

**THE ROLE OF CUSTOMARY COURTS IN THE DELIVERY OF JUSTICE IN
SOUTH SUDAN**

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DECLARATION

I Vicent Museke, hereby declare that, the dissertation entitled The Role of Customary Courts in the Delivery of Justice in South Sudan is my own work and that, all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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APPROVAL FOR SUBMISSION

This dissertation has been submitted for examination with my approval as supervisor.

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Ms. NF Dlamini-Ndwandwe

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LIST OF ABBREVIATIONS

| | |
|---------|--|
| CL: | Customary Law |
| CLC: | Customary Law Courts |
| CPA: | Comprehensive Peace Agreement |
| CPCA: | Criminal Procedure Code Act |
| GONU: | Government of National Unity |
| GOS: | Government of Sudan |
| GOSS: | Government of South Sudan |
| ICSS: | Interim Constitution of South Sudan |
| JOSS: | Judiciary of South Sudan |
| LGA: | Local Government Act, 2009 |
| MOLACD: | Ministry of Legal Affairs and Constitutional Development |
| ROSS: | Republic of South Sudan |
| SPLA: | Sudan People's Liberation Army |
| SPLM: | Sudan People's Liberation Movement |
| TA: | Traditional Authority |
| TCSS: | Transitional Constitution of South Sudan, 2011. |
| TCSS: | Transitional Constitution of South Sudan |
| UNDP: | United Nations Development Programme |

ABSTRACT

This study examines the role of customary courts in the delivery of justice in South Sudan. In doing so, it analyses the legal background, the hierarchy and composition of the customary courts. The considerations behind the constitutional recognition of the customary law courts in the current constitutional dispensation and the jurisdiction of customary courts are limited to customary matters and only criminal cases with a customary interface. It is noted that the customary Judges do not only exercise judicial functions but also play executive and legislative functions which contravene the constitutional principle of separation of powers. Reconciliation and compensation are noted as the major principles applied in the customary law courts. The major concern is that most practices in the customary law courts violate fundamental human rights.

KEY TERMS

Customary law courts, traditional authority, legal dualism, statutory courts, customary law, human rights, jurisdiction, criminal cases, customary interface.

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CHAPTER ONE: GENERAL INTRODUCTION

1.1. BACKGROUND TO THE STUDY:

This chapter forms the introductory part for the whole dissertation. The chapter provides a brief overview of South Sudan as a Country and it highlights access to justice as one of the major challenges in South Sudan. An analysis is made on the concept of legal pluralism since the Country has a dual system of justice, the customary and the formal justice system. In the same regard, South Sudan has been under civil wars for decades which greatly impacted on the customary justice system. Therefore, the effects of war on the customary justice system are discussed as well. The concept of legal pluralism and the effects of war on the customary justice system have been addressed in order to try and relate the study to the various concepts and theories related to its main focus which is, 'The Role of Customary Courts in the Delivery of Justice in South Sudan.' The objectives of the study have been set forth including the significance, justification and methodology for conducting this study. Additionally, the sequence of chapters outlining the general layout of the study is included as well.

1.1.1. Brief Overview of South Sudan

On 14th July 2011, South Sudan became the 193rd Member State of the United Nations. This marks the latest chapter in the troubled history that features two centuries of external domination and internal armed conflict.¹ For over two decades, South Sudan was confronted with civil wars.² Poor leadership and bad governance, characterized by successive discriminative policies and economic marginalization of Southerners, resulted into widespread violation of human rights and total breakdown of the rule of law institutions.³ Many leading South Sudanese consider the many years of civil war as a struggle to defend the customs,

¹ Jan Arno Hessbruegge J.A., 2012 "Customary Law and Authority in a State under construction: The case of South Sudan" *African Journal of Legal Studies* 5, 295-311 P 295

² Maplestone Chris M.C. (2008), *Comparative analysis of South Sudanese Customary Law and Victoria Law*, Springvale Monash Legal Services Inc. Australia P 11

³ United Nations Development Programme South Sudan, Access to Justice and Rule of Law Programme Document, 2010.

languages, religions, and communal property of the South Sudanese against practices of arabisation, Islamization, resource extraction and land alienation emanating from successive governments in Khartoum.⁴ In 1990 for instance, the government introduced mandatory 'zakat' (alms-in tax) and in 1991, it issued a new Penal Code based on Sharia Law.⁵ As an enforcement strategy, the Khartoum government introduced a public order law which was said to be inspired by Islam with a special Police force and court setup to enforce it.⁶ These legal procedures were accompanied by certain policy measures apparently carried out with the aim of enhancing religious commitment or ensuring that religious morality was upheld.⁷ Examples of these measures included; building of mosques and prayer places in all government buildings and any other buildings used by the public.⁸ This found resistance in the South which was deeply rooted, though without scripture in the system of rituals and traditional beliefs.⁹ The resistance resulted into full scale civil war which affected all government institutions as well as the way of peoples' lives including the customary justice system.

The Comprehensive Peace Agreement (CPA) of 2005 between the then Government of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A), ended the decades-long civil war in Sudan, created the semiautonomous government of Southern Sudan (GoSS) and the government of National Unity (GoNU). After six years of an interim period as a semiautonomous state,¹⁰ South Sudan held a referendum on full self-determination on January 9, 2011 and the eventual declaration of independence on July 9, 2011 and the birth of the Republic of South Sudan (RoSS).

⁴ United States Institute of Peace, 2010, a study of 'Local Justice in Southern Sudan', United States Institute of Peace, Washington DC, USA.
available online at www.usip.org (accessed on October 12, 2010). This was a Joint Study by United States Institute of Peace and Rift Valley Institute on how justice is administered in the local courts in South Sudan.

⁵ Abdel Salam A.S, 2011, *Islamism and The State* in *The Sudan Hand Book*, James Currey an Imprint of Boydell & Brewer Ltd, NY, USA, 94-107 at 105.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Wendy James W.J. 201, *Religious Practices & Belief*, in *The Sudan Hand Book*, James Currey an Imprint of Boydell & Brewer Ltd, NY, USA (2011) pp. 43-53 at 49.

¹⁰ Machakos Protocol, 2002, Para 2.2, the protocol forms part of many other protocols that constituted the Comprehensive Peace Agreement, 2005.

As a new nation, South Sudan is facing several challenges among which access to justice by all is a core and critical issue.¹¹ The State lacks capacity to deliver justice in light of the swift adoption of the common law system and is plagued by glaring capacity gaps. Because the State does not have the capacity or legitimacy to fill the gap in social ordering and conflict resolution, it relies heavily on the customary justice system to dispense justice.¹² Outside the urban centers, the statutory courts and other government institutions hardly exist as a force of order in the lives of most citizens.¹³ Instead, the State relies on traditional authorities since they are close to the people and can assist in the performance of both executive and judicial functions.¹⁴ The traditional authorities regulate their local affairs by enforcing the unwritten rules and practices that are accepted to drive binding rules traced to the customs and practices of the people.¹⁵

In South Sudan, dispute resolution is a function played by different actors across the Country.¹⁶ The family and community elders are nearly always the first and preferred source of dispute resolution and those that cannot be resolved by elders are referred to the Customary Law Courts.¹⁷ However, successive governments have sought to institutionalize certain official avenues of dispute resolution.¹⁸ Often couched in terms of empowering traditional authority or protecting local custom, this has really been an attempt to increase government control over

¹¹ Pimentel David, P.D. 2010 "Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan" *Hague Journal on the Rule of Law*, 2, issue 01, 1-28.

¹² Leila Chirayath, Caroline Sage and Michael Woolcock, 2005, 'Customary Law and Policy Reform: Engaging with the Plurality of justice systems', background paper for World Development Report 2006, UNDP, New York, USA, p. 6.

¹³ Jan Arno Hessbruegge J.A., 2012 'Customary Law and Authority in a State under construction: The case of South Sudan' *African Journal of Legal Studies* 5, p 295-311 at p 296

¹⁴ Markus V. Hoehne; 2008, '*Traditional Authorities and Local Government in South Sudan*', Max Plack Institute for Social Anthropology, Halle/Saale, Germany, p. 3.

¹⁵ Allot Anthony. A.A. 1970, *New Essays in African Law*, Butterworth's, London p. 145.

Allot defines Native Customary Law to mean a rule or a body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established native usage and which is appropriate and applicable to any particular cause, action, suit, matter, dispute, issue or question and includes also any native customary law recorded.

¹⁶ Cherry Leonardi C.L. 2011, *Traditional Authority , Local Government & Justice*, in *The Sudan Hand Book*, James Currey an imprint of Bodysell & Brewer Ltd, NY, US, 108-121 at p. 109.

¹⁷ Ibid

¹⁸ Ibid.

local society and the resulting institution of native or traditional administration are seen by the government as a channel for regulating, monitoring and maintaining social equilibrium in the local communities.¹⁹ It is interesting to note that rarely can any government policy or programme succeed without the help of traditional authorities. John Wuol Makec asserts that, the non-existence of the agencies and facilities that are necessary for the efficient operation of the criminal law have given precedence to the development of the customary justice system in South Sudan.²⁰ Wuol Makec's point on the non-existence of the agencies and facilities for the modern justice systems reflects the reality on the ground as far as rural areas are concerned. However, in the urban areas where the state rule of law institution, law enforcement agencies exist, still the customary justice system is more popular even among the officials in such institution. A State Prosecuting Attorney or police investigator, for instance, can gladly refer a well investigated criminal case to the customary court rather than the statutory courts. This is not because it is a criminal case with a customary interface, but simply because the complainant or the suspect has requested that they need the case to be adjudicated upon in a customary law court. To this end, it becomes more of an issue of perception and being deeply rooted into the customary justice system than the non-existence of the law enforcement agencies and the institution for the modern justice system.

1.1.2. Emerging Legal Pluralism in South Sudan:

South Sudan has a dual system of Justice: the formal courts and the customary law courts.²¹ Both systems are applied concurrently, though in a parallel manner, in both rural and urban

¹⁹ Ibid. Also see John Wuol Makec, *The Customary Law of the Dinka People of Sudan in comparison with aspects of western and Islamic Laws*; Afro world Publishing Co London England 1988 at p. 36. John argues that the objective of customary law and the customary justice system is the maintenance of peace or equilibrium and the restoration of status quo through the payment of damages.

²⁰ Wuol Makec John . W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London, p. 36.

²¹ Pimentel David, P.D. 2010 "Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan" *Hague Journal on the Rule of Law*, 2, issue 01, 1-28. At p 10

Also see Griffiths John .G.J. (1986) 'What is Legal pluralism?' *Journal of Legal Pluralism and Unofficial Law*, 24: 1-55 at p. 4. John urges that the term 'legal pluralism' is itself an item for debate. He defines it as a legal system that recognizes different legal orders throughout society and with bases in ethnic and tribal traditions.

centres. Mahmood Mamdan notes that the bifurcated systems of justice have colonial origins.²² They were developed – one for colonial rule and access to land and natural resources and the other for the colonized.²³ Historically, there has been only limited, prescribed interaction between the two systems of justice.²⁴ However, under the current constitutional dispensation there is more interaction and both systems are recognized by the Transitional Constitution of South Sudan, 2011. The statutory courts are established under Article 122 of the Transitional Constitution of South Sudan, 2011²⁵ and Section 6 (1) of the Judiciary Act, 2008. Section 6 (1) of the Judiciary Act provides as that, Judicial power in Southern Sudan is vested in an independent organ to be known as the Judiciary of South Sudan.²⁶ Meanwhile, the Customary Law Courts are established under Section 97 (1) of the Local Government Act, 2009. The Section provides as follows, ‘There shall be established Customary Law Courts as follows; ‘C’ Courts, ‘B’ Courts, ‘A’ Courts or Executive Chief’s Courts and Town Bench Courts.’²⁷

Although statutory laws and formal courts have been in use throughout South Sudan from the days of Anglo-Egyptian colonization, the customary justice system has been the primary source of social order and stability within South Sudan.²⁸ It, therefore, follows that the customary justice system has been the cement that has held together communities and tribes and a bridge between the many and varied tribal groups that make up the population of South Sudan.²⁹ Customary law certainly varies among the different communities in South Sudan but the

²² Mahmood Mamdan, *Citizen and Subject: Contemporary Africa and the Legacy of late Colonialism*, Princeton University press, 1996, p. 16.

²³ Ibid.

²⁴ Haki network, 2011 ‘Engaging Customary Justice Systems: White paper’ available online at www.hakinetwork.org (accessed on 20/1/13).

²⁵ Article 122 (1) and (2) of the Transitional Constitution of South, 2011 states as follows; ‘(1) Judicial power is derived from the people and shall be exercised by the courts in accordance with the customs, values, norms and aspirations of the people and in conformity with this Constitution and the law, (2) Judicial powers shall be vested in an independent institution to be known as the Judiciary.’

²⁶ Section 6 (1) of the Judiciary Act, 2008, Laws of South Sudan.

²⁷ Section 97 (1) of the Local Government Act, 2009, Laws of South Sudan.

²⁸ Aleu Akechak Jok, .A.A. and others 2004, *report on the Study of Customary Law in Contemporary Southern Sudan* (World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs, p. 6.

²⁹ Ibid.

Customary Law Courts function in similar ways.³⁰ This partially explains why overwhelmingly, dispute resolution is handled within local communities by tribal authorities under the customary justice system.³¹ Prior to 1980, the judiciary of Sudan consisted of two separate divisions: the Civil Division headed by the Chief Justice and the Sharia Division headed by the Chief qadi. The civil courts considered all criminal and most civil cases. The sharia courts, comprising religious Judges trained in Islamic law, adjudicated for Muslims matters of personal status, such as inheritance, marriage, divorce, and family relations. The 1980 executive order consolidating civil and sharia courts created a single High Court of Appeal to replace both the former Supreme Court and the Office of Chief Qadi. Initially, Judges were required to apply civil and sharia law as if they were a single code of law. Since 1983, however, the High Court of Appeal, as well as all lower courts, were required to apply Islamic law exclusively. Following the overthrow of Nimeiri in 1985, the courts suspended the application of the harsher *hudud* punishments in criminal cases. Each province or district had its own appeal, major, and Magistrates' courts. Serious crimes were tried by major courts convened by specific order of the provincial Judge and consisted of a bench of three magistrates. Magistrates were of first, second, or third class and had corresponding gradations of criminal jurisdictions. Local Magistrates generally advised the police on whether to prepare for a prosecution, determined whether a case should go to trial (and on what charges and at what level), and often acted in practice as legal advisers to defendants³²

Even when Sharia courts³³ were in place, 90%³⁴ of the legal disputes in South Sudan were resolved by Customary Law Courts.³⁵ Nationally, dispute resolution through the customary

³⁰ Pimentel David, P.D. 2010, "Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan" *Hague Journal on the Rule of Law*, 2, issue 01, 1-28.

³¹ Jan Arno Hessbruegge J.A., 2012 "Customary Law and Authority in a State under construction: The case of South Sudan" *African Journal of Legal Studies* 5, p 295-311. at p. 296.

³² See <http://countrystudies.us/sudan/> (accessed on 5/9/2012).

³³ Ibid

³⁴ Small Arms Survey, 2012, Report on 'Women's security and law in South Sudan: Sudan Human security Baseline Assessment', Geneva Switzerland P. 2.
available online at <http://www.smallarmssurveysudan.org> (accessed on 20/8/2013).

justice system stands at over 60%.³⁶ This is attributed to their accessibility and flexibility in the procedures and the sanctions that, adopts a restorative approach and emphasizes reconciliation, compensation, restoration and rehabilitation.³⁷ This approach is in line with Section 98 (3) (c) & (d) of the Local Government Act, 2009. This Section provides that; 'In deciding cases, the Customary Law Courts shall *inter alia* apply the following principles; (c) adequate compensation shall be awarded to victims of wrongs; (d) voluntary mediation and reconciliation, agreements between parties shall be recognized and enforced.'³⁸

While everyone has a right to have access to the formal State justice guaranteed under Article 20 of the Transitional Constitution of South Sudan, 2011,³⁹ in Countries like South Sudan where access to justice is most needed, it is most lacking. In practice, this right is often denied for a number of reasons.⁴⁰ The formal justice system for instance, is too expensive; too far away and too difficult to understand as most of the proceedings are subjected to considerable delays at all stages. This is mainly as a result of the sheer number of cases being processed through a limited number of formal courts and court officials.⁴¹ Litigants, who prefer to use the formal courts, are often lost within legal processes, whose procedures and remedies are incomprehensible and complicated from the perspective of most citizens. Most of the judicial officials are neither trained nor have experience in the common system and this complicates the system further as most of them have sharia law background. It also follows that, the justice administered by the formal courts is retributive as it involves prison sentences which are often

³⁵ Aleu Akechak Jok, Robert A. Leitch, and Carrie Vandewint, 2004, *report on 'the Study of Customary Law in Contemporary Southern Sudan'* (World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs, at p. 6, available online at <http://www.gurtong.org/customaryl原因.asp>.

³⁶ Access to Justice Perception survey in South Sudan 2013; Report by United Nations Development Programme, Juba South Sudan,

³⁷ Penal Law International 2000, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice system*, Astron Printers, London, pp. 3-4.

³⁸ Section 98 (3) (c) and (d) of the Local Government Act, 2009, Laws of South Sudan.

³⁹ Article 20 of the Transitional Constitution of South Sudan, 2011 provides that; 'The right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to courts of law to redress grievance whether against government or any individual or organization.'

⁴⁰ United Nations Development Programme 2011, Global Programme Annual Report, Strengthening the Rule of Law: In crisis-affected and fragile situations P. 33.

⁴¹ Ibid.

out of step with the expectations of the people in comparison with the traditional justice system based on the traditional African model and viewed as restorative.⁴² Similarly, proceedings in the formal courts are carried out in English or Arabic which the people do not understand coupled with the scarcity of qualified interpreters.⁴³ Even where the interpreters are available, the translations are incorrect or far away from the issue in contention. One observer in a Magistrates Court noted as follows;

*‘When translations are required, the proceedings are usually long and turgid. Quite often the translations are hopelessly inaccurate, and invariably they do not capture the nuances of the speaker’s mother tongue.’*⁴⁴

It is those shortcomings of the formal justice system that give credence to the customary justice system.⁴⁵ However, one of the persistent challenges of post-colonial African States including South Sudan is to understand the nature of their legal pluralism.⁴⁶ It goes without saying that the major challenge of legal pluralism is the competition-conflict for existence between the customary laws and its dispute settlement institutions and the formal justice system.⁴⁷ This has ushered in a state of plural legal orders, where a specific dispute or subject matter may be governed by multiple norms, laws or forums that co-exist within a particular jurisdiction.⁴⁸

Where formal courts and customary law courts operate alongside each other, the population engages in ‘forum shopping’ depending on the reputation of the court to hand down a just

⁴² Penal Law International 2000, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice system*, Astron Printers, London, p. 6.

⁴³ Article 6 (3) of the Transitional Constitution of South Sudan, 2011 states as follows, ‘English shall be the official working language in the Republic of South Sudan, as well as the language of instruction at all levels of education’.

⁴⁴ Penal Law International 2000, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice system*, Astron Printers, London, p. 6.

⁴⁵ Ibid.

⁴⁶ E.S.Nwaucha, E.N. 2010 “The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana” *Tulane European & Civil Law Forum* 25, 37-62, p. 37.

⁴⁷ Tsehai Wada Wourji. T.W, 2012 “Coexistence between the Formal and Informal Justice systems in Ethiopia: Challenges and prospects”, *African Journal of Legal Studies* 5, 269-293, p. 269.

⁴⁸ Ibid, p. 273.

decision and also a relative cost as both the formal and customary law courts charge fees.⁴⁹ The usual expected outcome of this ill-defined legal pluralism is that, enforcement and execution of court orders become a big challenge especially where the same case was adjudicated in more than one court, that is to say, in the customary court and the statutory court.

In South Sudan, the Customary Law Courts have legal recognition but their jurisdiction is, by and large, limited to personal, family and criminal matters mostly of less serious crimes or of customary nature.⁵⁰ Section 98 (1) of the Local Government Act, 2009 provides as follows; ‘The Customary Law Courts shall have judicial competence to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities’.⁵¹ (2) ‘A Customary Law Court shall not have competence to adjudicate on criminal cases except those criminal cases with a customary interface referred to it by a competent Statutory Court’.⁵² Even within this limited jurisdiction, the norms and values enshrined in the customary justice system are said to be sometimes inconsistent with the constitution and international human rights standards for which the formal State has a duty to respect, promote and defend.⁵³

A comparative view of the two systems amply shows that one’s strength is the other’s short comings.⁵⁴ It also helps to note that though there are major differences between the two systems, this should not be seen as suggesting that they are entirely dissimilar for they share many common features such as exercising judicial powers in accordance with the customs,

⁴⁹ Jan Arno Hessbruegge J.A., 2012 “Customary Law and Authority in a State under construction: The case of South Sudan” *African Journal of Legal Studies* 5, p 295-311, p. 304.

⁵⁰ Tsehai Wada Wourji. T.W, 2012 “Coexistence between the Formal and Informal Justice systems in Ethiopia: Challenges and prospects”, *African Journal of Legal Studies* 5, 269-293,p. 269.

⁵¹ Section 98 (1) of the Local Government Act, 2009, Laws of South Sudan.

⁵² Section 98 (2) of the Local Government Act, 2009, Laws of South Sudan.

⁵³ Tsehai Wada Wourji. T.W, 2012 “Coexistence between the Formal and Informal Justice systems in Ethiopia: Challenges and prospects”, *African Journal of Legal Studies* 5, 269-293, p. 273.

⁵⁴ Ibid p. 274.

values, norms and aspirations of the people.⁵⁵ As a result of these shared features, the differences are a question of degree rather than substance.⁵⁶

The formal justice system recognizes the interdependence of cultural norms, traditions, value systems and social responses to problem solving.⁵⁷ Thus the customary laws have been incorporated in the codes.⁵⁸ Article 5 of the Transitional Constitution of South Sudan, 2011 states, that; ‘The sources of legislation in South Sudan shall be: (a) this Constitution; (b) written law; (c) customs and traditions of the people; (d) the will of the people; and (e) any other relevant source.’⁵⁹

Section 206 of the Penal Code Act, 2008 creates the offence of murder and is to the effect that;

*‘Whoever causes the death of another person (a) with the intention of causing death; or (b) knowing that death would be the probable and not only a likely consequence of the act or 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 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.’*⁶⁰

Section 6 of the Civil Procedure Act, 2007 concerning the rules applicable to suits based on personal Law stipulates that; ‘Where a suit or other proceedings in a Civil Court raises a

⁵⁵ Article 122 (1) of the Transitional Constitution of South Sudan, 2011.

⁵⁶ Penal Law International, Access to Justice in Sub-Saharan Africa, the Role of Traditional and Informal Justice System, Astron Printers, London, 2000, p. 121.

⁵⁷ Victor L. Streib; Expanding a Traditional Criminal Justice Curriculum into an Innovative Social Control curriculum: Journal of criminal Justice, Vol. 5, PP.165-169 (1977) Pergamon Press, printed in USA.

⁵⁸ Streib Victor. S. V. 1977 “Expanding a Traditional Criminal Justice Curriculum into an Innovative Social Control curriculum”, Journal of criminal Justice, Vol. 5, Pergamon Press USA.

⁵⁹ Article 5 of the Transitional Constitution of South Sudan, 2011.

⁶⁰ Section 206 of the Penal Code Act, 2008, Laws of South Sudan.

question regarding succession, inheritance, legacies, gifts, marriage, divorce, or family relations, the rule for decision of such question shall be;

*" (a) Any custom applicable to the parties concerned; provided that, it is not contrary to justice, equity or good conscience and has not been by this, or any other enactment, altered or abolished or has not been declared void by the decision of a competent Court."*⁶¹

In a similar wording, Section 7 (2) of the Civil Procedure Act, 2007 states as follows;

*'In cases not provided for by any other law, the Court shall act according to South Sudan judicial precedents, customs and principles of justice, equity and good conscience.'*⁶²

In this context, the customary law courts are often quite flexible in terms of the basis of the law that they apply, the Chiefs' or customary courts apply an ad hoc mixture of customary principles and compensation, and statutory (or even international) legal codes and penalties.⁶³ However, this flexibility ought to be confined to the customary values without the ad hoc mixture or blending of statutory laws as this breeds a state of undefined procedures and rules in the customary courts. Cherry Leonardi asserts that; the customary justice system has never been fixed and rigid; each court decision is a product of its immediate context and lengthy process of negotiation and the resulting dynamism is particularly apparent in urban courts, where returnees and younger generation gradually push for change as they argue their case in the public arenas of the Courts.⁶⁴ Even if they are dominated by elder men, the system is clearly weighted against women and youth, but this does not preclude the latter sometimes finding

⁶¹ Section 6 (a) of the Civil Procedure Act, 2007, Laws of South Sudan.

⁶² Section 7 (2) of the Civil Procedure Act, 2007, Laws of South Sudan.

⁶³ Cherry Leonardi . C.L. 2011, *Traditional Authority, Local Government & Justice*, in *The Sudan Handbook*: James Currey an imprint of Boydell & Brewer Ltd, NY, USA (2011), p. 118.

⁶⁴ Ibid.

ways to use the courts to their own advantage.⁶⁵ There is tremendous social and cultural change in South Sudan and this is sometimes reflected in the courts.⁶⁶

Despite the distinct hierarchy in the two judicial systems, the courts work together in a complementary though confusing and often inconsistent manner.⁶⁷ Statutory courts, which form the top tiers of the hierarchy are supposed to provide an avenue for appeals from customary law courts.⁶⁸ For instance, Section 99 (2) of the Local Government Act, 2009 provides that, 'The decision of the 'C' court which is the highest customary law court in the county shall be appealed against to the County Court Judge of First Grade.'⁶⁹ Presided over by Judges with formal training, the statutory courts apply predominantly statutory laws but also customary laws, partly in the context of appeals from customary law courts.⁷⁰

Referrals from customary law courts to statutory courts are made inconsistently and without clear regulatory guidelines, with individual Chiefs adjudicating in the manner they feel is appropriate as there is no law to prescribe the rule of procedure.⁷¹ The point of concern is that, the dual of customary-formal divide has weakened the justice systems as a whole. Parallel, unconnected systems generate confusing and often debilitating conflicts of laws and jurisdictional gaps and/or redundancies.⁷² However, given the poor state of statutory courts, the cost and distance involved, the customary law courts remain the best choice for dispute resolution for an ordinary South Sudanese

⁶⁵ Ibid, p. 119.

⁶⁶ Ibid.

⁶⁷ Small Arms Survey, 2012, study on 'Women's security and law in South Sudan: Sudan Human security Baseline Assessment', Geneva Switzerland), p. 2. available online at <http://www.smallarmssurveysudan.org> (accessed on 20/9/2013).

⁶⁸ Ibid

⁶⁹ Section 99 (3) of the Local Government Act, 2009, Laws of South Sudan.

⁷⁰ Supra

⁷¹ Ibid.

⁷² Ibid.

1.1.3. Effects of War on the Customary Justice System:

Justice Aleu Akechak Jok, asserts that the civil war had a far-reaching and probably irreversible impact upon South Sudanese society and its customs, which in turn affected the customary law and the way it is applied.⁷³ Kuyang Logo adds that, the effects of external forces for change such as 'globalization', international human rights and the return of many South Sudanese from other countries with developed western systems of justice pose very big questions on the administration and quality of the customary justice system.⁷⁴ During the war, the traditional leaders (Customary Judges/Chiefs) lost their authority and power to the military and civil administrators in total marginalization, Chiefs were also punished for crimes committed by their subjects.⁷⁵ Frequently, the punishment had the aim of humiliating the Chiefs in front of their communities.⁷⁶ It is worth noting that even in the after mass of the war, this kind of intimidation and humiliation continues with the executive arresting and incarcerating Chiefs for some wrongs committed by the members of their communities.

Markus V. Hoehne, notes that the other factors undermining chiefly authority are that the war-induced displacement and the communities were dispersed. This reduced the contact between the Chiefs and the followers.⁷⁷ Frequently, new Chiefs were installed by the people in the Internally Displaced People's Camps (IDP). The Government as well as the guerillas installed new Chiefs in the respect of territories controlled by them.⁷⁸ According to Manfred Hinz, the Sudanese Peoples Liberation Movement (SPLM) was taken over by the Liberation Councilors

⁷³ Justice Aleu Akechak Jok, Robert A. Leitch, and Carrie Vande wint, March 2004. Report on the Study of Customary Law in Contemporary Southern Sudan. <http://www.cmi.no/sudan/resources.cfm> web visited on November 22, 2011. The Study was done for World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs.

⁷⁴ Kuyang Harriet Logo, Legal Pluralism in South Sudan, Paper presented at a conference on Customary Law and Legal Pluralism in Post-Conflict and Fragile Societies; United States Institute of Peace, George Washington University, Eliot School of International Affairs USA (17-18, 2009).

⁷⁵ Markus V. Hoehne; Traditional Authority and Local Government in South Sudan (consultancy report), Max Planck Institute for Social Anthropology, Halle/saale, Germany (2008) p. 17.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

who performed administrative functions of the traditional leaders.⁷⁹ The military administrators established parallel customary courts to judge customary cases for personal gains and threatened the Chiefs so that they would not perform their judicial functions.⁸⁰ These interferences and developments led to conflict of loyalty after the return of the people and their Chiefs to their old clan territory.⁸¹ Second and related to that, the proliferation of Chiefs and their courts, in particular, undermined their authority. The ease with which the Chiefs were appointed and dismissed by the soldiers or guerillas made a mockery of their office. Some Chiefs became 'SPLA Chiefs'. After the war, the question is who is the 'real' Chief- the one who was deposed or fled, or the one who had cooperated with the SPLA.⁸²

Amidst all the challenges, the customary law courts continue to settle the disputes and the government has given considerable prominence to customary law, traditional authority in their rhetoric and legislation.⁸³ The Transitional Constitution of South Sudan, 2011 made clear the commitment to customs and traditions as a central source of law, as well as to the role for traditional authorities, which principally means Chiefs and customary law in the local government system.⁸⁴ However, what remains to be seen is whether the customary law courts can be restored to their former glory and regain public confidence in the way they administer justice. However, this is far from being achieved if the current state of the entire judicial system is not overhauled with serious legal and institutional reforms.

⁷⁹ Manfred O. Hinz, 2010, Report on 'a strategy to strengthen Southern Sudanese customary law as a source of law in an autonomous legal system', The United Nations Development Programme (UNDP) South Sudan and the Ministry of Legal Affairs for the Republic of South Sudan p. 56.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Markus V Hoehne M.H. 2008 'Study of Traditional Authority and Local Government in Southern Sudan' *Max Planck Institute for Social Anthropology* Halle/Saale, Germany. p. 17.

⁸³ United States Institute of Peace, 2010 'Local Justice in Southern Sudan', United States Institute of Peace, Washington DC, United USA, p 11. available online at www.usip.org (accessed on October 12, 2010)

⁸⁴ Article 5, 166 and 167 of the Transitional Constitution of the Republic of South Sudan South Sudan, 2011, Article 5 lists custom and tradition as the second source of legislation. Article 166 recognizes the institution, status and the role of traditional authorities (Chiefs) and Article 167 requires all the state governments legislation and Constitutions to provide for the role traditional authority as an institution of local government.

1.2. STATEMENT OF THE PROBLEM:

The delivery of justice in South Sudan has been of concern since the Anglo-Egyptian rule.⁸⁵ The fusion of customary and statutory law remains to date a discussion and their parallel existence and application has plunged the current legal system and access to justice initiatives into a confusing state of legal order. This state of affairs has negatively impacted on access to justice needs and the continued application of customary law alongside the newly adopted common law system with no clear procedures is at best rudimentary. The modern judicial process exists but with very limited capacity to dispense justice due to lack of trained manpower and infrastructure leaving most of the conflicts/disputes being resolved or adjudicated upon in the customary law courts.⁸⁶ In the circumstances that the customary justice system remains the biggest forum for dispute resolution, the system is faced with enormous challenges including; proliferations of customary law courts without following the right legal procedures in establishing the customary courts, undefined rules and procedures, adopting procedures and practices that violate fundamental human rights, lack of supervision and management of the courts, political interference by appointing and removing Chiefs without following the due process of law.

Given the undefined plurality of the legal system in South Sudan, in some instances, the customary courts apply penal or statutory laws in their dispute resolution thus introducing the concept of retributive justice in a customary justice system whose core motive is restorative form of justice. In this regard, both the state and customary courts engage in 'norm shopping' borrowing from various statutes (including ones no longer officially in force) and customary

⁸⁵ Anglo-Egyptian rule was the joint British and Egyptian government that ruled Sudan from 1899 to 1955. It was established by the Anglo-Egyptian Condominium Agreements of January 19 and July 10, 1899 and with some later modifications, lasted until the formation of the sovereign, independent Republic of Sudan on January 1, 1956. The Anglo-Egyptian Agreement of 1953 had outlined the steps to be taken for Sudanese self-rule and self-determination. www.britannica.com topic history of Sudan date visited February 14, 2012.

The Condominium agreements established an office of governor-general, to be appointed, on British recommendation, by the khedive of Egypt and vested with supreme civil and military command. In theory, Egypt shared a governing role, but in practice the structure of the Condominium ensured full British control over Sudan. The governors and inspectors were customarily British officers, though technically serving in the Egyptian Army, and key figures in the government and civil service always remained graduates of British universities and military schools.

⁸⁶ United Nations Development Programme South Sudan: Access to Justice Project document, 2010, Page 5 Para 3.

percepts to justify their decisions. This competition is not only between the customary courts and the formal courts but amongst the customary justice institutions or the courts themselves. This practice in the customary courts is traced to the fact that during the war, many Chiefs lost their authority either to the government or the rebels and new Chiefs were appointed depending on who was in control and the new Chiefs had to strictly apply the rules as dictated or given by the appointing authority. Even after the war, such Chiefs are still part of the customary justice system and this has contributed to the conflict among the Chiefs themselves about who is the right Chief and what law and procedures to follow in the administration of justice. The major concern with this state of affairs is that in the long run, the rule of law will not be built without legal certainty about the applicable law, clear division of authority and line of appeal.⁸⁷

All over south Sudan, there is proliferation of customary law courts and it is not clear who is responsible for the establishment and supervision or the general management and administration of the customary justice system. In this regard since these courts have not been established in accordance with current constitutional dispensation, it, therefore, follows that even the jurisdictional lines between the different hierarchies of the customary courts let alone between the formal and the customary systems are rarely drawn as well. The result is an unstructured, *de facto* form of legal pluralism.⁸⁸ It is a fact that the African customary justice system does not distinguish between criminal and civil wrongs but in the current constitutional dispensation the jurisdiction of the customary courts has been limited to civil and family matters and they ought to confine to it. However, in practical terms the customary court does not bother to analyze or express whether the case before it, is criminal or civil in nature.⁸⁹ To this end, it becomes obvious that customary law courts always pass penal sentences which

⁸⁷ Jan Arno Hessbruegge J.A., 2012 "Customary Law and Authority in a State under construction: The case of South Sudan" *African Journal of Legal Studies* 5, 295-311, p. 305.

⁸⁸ United Nations Development Programme South Sudan: Access to Justice Project document, 2010, Page 5 Para 3.

⁸⁹ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London, P. 22.

appear on the surface to be civil remedies.⁹⁰ As a result, it is hard to grasp the precise jurisdiction or competence of the customary law courts resulting into unwarranted disputes and accusations between the formal justice institutions and the customary justice system institutions and its officials. The limited government capacity has ensured very little regulation of the customary courts raising concern as to the form and quality of justice they are actually providing.⁹¹

The universality of human rights with its values and norms is a concept that is supposed to be embraced by all institutions whether formal or informal as it is domesticated in most national Constitutions. However, in the customary justice system in South Sudan, individual rights guaranteed by the Constitution are alienated and sacrificed by the court application of moral, cultural and religious beliefs disguised as customs and traditions at community level. Customary laws based on cultural norms and traditions are often, but not always, in conflict with statutory laws and international human rights standards.

Some writers and observers have noted that some customary law courts give girls for compensation, an act which is inhuman as it reduces a human being to the status of property.⁹² It has been urged quite convincingly that in the customary justice system, the concept of supernatural plays an important role.⁹³ Samson Wassara urges that the customary law courts can pass judgment on a person based on immaterial evidence such as magic or sorcery, which is an unfair trial in itself and can all be summed up as flagrant violations of human rights.⁹⁴ The practices of conservative traditional authorities (customary Judges) overlook, in many

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Samson S wassara. S.S. 2007 "Study on Traditional Mechanisms of Conflict Resolution in South Sudan" *Berghof Foundation for peace Support, Berlin*. P. 10
available online at www.berghof-peacesupport.org (accessed on March 20, 2012).

⁹³ Oba A Abdulmumini, O.A. 2008 "Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts" *Journal of African Law*, 52, (1). 139-158, p 139.

⁹⁴ Samson S wassara. S.S. 2007 "Study on Traditional Mechanisms of Conflict Resolution in South Sudan" *Berghof Foundation for peace Support, Berlin*. P. 10

instances, the values of fundamental rights enshrined in the Transitional Constitution of South Sudan and in particular the right to fair trial.

The prevalence of illegal fire-arms in the hands of civilians has escalated tribal conflicts and cattle raiding and greatly undermined the role of customary law courts which are charged with the duty of settling such disputes. Poor handling of cases and allegations of corruption in the customary courts have also increased the rate of revenge killings. In cattle owning communities for instance in the Dinka and Nuer communities, seizure of cattle as ransom or the basis for settling disputes over restitution as a way of enforcing orders of a customary law court rekindles more violence.⁹⁵

The infusion of executive and judicial powers by the traditional authorities greatly affects the functionality of the customary Justice system in its bid to mete out justice to the alleged criminals forcing people into taking the law in their hands. This creates a situation where even the slightest disputes including domestic quarrels being settled through a shoot-out due to undermining of the customary system by citizens.⁹⁶ The infusion of powers compromises the quality of justice in that, it not only portrays the Chief (Judge) as partial as he/she tries to balance the demands of justice and his/her duties as an executive arm of government but it also erodes people's confidence in the system as a whole.

1.3. THE AIMS AND OBJECTIVES OF THE STUDY:

1.3.1. General Aim:

To assess the role and effectiveness of the customary justice system of conflict/dispute resolution in South Sudan.

1.3.2. Specific Objectives:

- 1) To describe and evaluate the nature of the customary justice system in South Sudan.

⁹⁵ Ibid

⁹⁶ United States Institute of Peace, Study on Local Justice in South Sudan, Washington DC, USA (2010).

- 2) To assess the status of the customary law courts in the current constitutional dispensation.
- 3) To discuss the concept of human rights in the customary justice system.
- 4) To analyze the delivery of justice
- 5) To establish the emerging challenges and make necessary recommendation

1.4. Hypotheses:

- (a) The customary law courts in South Sudan operate under undefined rules and procedures thus affecting the delivery of justice.
- (b) Some of the procedures/practices in the customary law courts violate the fundamental human rights guaranteed by the Bill of Rights in the Constitution of South Sudan.

1.4.1. Research Questions:

1. How do you describe the role of customary law courts in dispute resolution?
2. Do customary law courts have clear rules and procedure that guide them in the delivery of justice?
3. How effective is the customary justice system in the delivery of justice to the community?

1.5. METHODOLOGY:

1.5.1. Literature Review:

This study greatly relied on a variety of the available academic and legal literature on the subject including text books, journals, reports, articles and legislation on the role of customary law courts and the entire subject of customary law in South Sudan. These materials were obtained from the Ministry of Justice library, Judiciary of South Sudan and United Nations Development Programme Governance and Rule of Law Unit, Law libraries in Uganda and the electronic search engines were greatly relied on in obtaining articles. Some few decided cases in both the statutory and customary courts were reviewed. Reviewing of court registers (where they exist) in the customary law courts was done and this helped to widen the

understanding of the type of disputes resolved by the customary law courts. This choice of methodology offered both qualitative and quantitative value to the study.

On a more theoretical note, I wish to express that my views on the role of customary law courts in the delivery of justice is to a high degree, influenced by my work with the traditional authorities (customary Judges/Chiefs) and customary law in South Sudan. For four years, I closely worked with the customary Judges as a Rule of Law Officer with UNDP South Sudan, Access to Justice and Rule of Law Project.

1.5.2. Observation and Interview:

Attending and observation of court proceedings was largely employed and relied on in this study. This gave empirical evidence of the processes and procedures adopted by the customary law courts as well as giving a clear insight in the principles of customary law used in dispute resolution. It also helped in understanding the adaptation or the non-adaptation of human rights approaches in the court proceedings. Interviews with the customary Judges, litigants, Judges of the Statutory Courts, government officials and elders as well as discussions with groups and individuals especially the leadership of traditional authorities. The choice of interviews ensured that well informed opinions from people who are gifted in customary law and well acquitted with the delivery of justice in the customary courts are obtained. This was used as a tool to validate the available literature on the subject. The interviews with the statutory Judges created understanding differences and linkages in the formal and customary system of justice.

1.5.3. Limitations:

Limited materials on the role of customary justice systems. Most of the available text books (literature) focus more on the customary law with very little information on the customary law courts. This was solved by relying more on published journals and articles on the subject. Interviews and discussions were held only in Lakes State, one of the ten States of the Republic of South Sudan. Information from other states was obtained through literature review.

Insecurity in the area was a big limitation to the study as there were tribal fights due to cattle raiding/wrestling. There were also many militia groups and bandits in South Sudan hence making most of the areas inaccessible without proper security arrangements. Misconception of the project by some respondents was another obstacle. Some of the customary Judges were very suspicious and had misconceptions about the purpose of the study as a government policy to take away their powers.

1.5.4. Scope of the Study:

The study is composed of four chapters. Besides the introductory chapter which constitutes chapter one, it contains three other chapters. Chapter two gives an analysis of the historical legal background of the customary law courts in South Sudan since the colonial period, the current status of the customary law courts including its present legal recognition, hierarchy, jurisdiction and the guiding principles in the customary law courts. The chapter also analyzes the role of Traditional Authority as an Institution of Local Government charged with the responsibility of administering customary law in the customary law courts as well as the challenges facing customary law courts and traditional authorities in the administration of justice.

Chapter three deals with the concept of Human Rights in the Customary Law Courts; it makes an analysis of the presence or absence of human rights in the customary law courts and the effect it has on access to justice and delivery of justice. Emphasis is put on the legal requirement for the customary law courts to observe, uphold and give effect to the Bill of Rights as contained in the Transitional Constitution of South Sudan, 2011. This analysis is done by looking at the current national and international legal framework in relation to the various norms, practices and traditions in the customary law courts whether they give effect to the Bill of Rights enshrined in the Transitional Constitution of South Sudan, 2011. The Issues of gender mainstreaming, women and children rights in the customary justice system are considered as well. Finally, Chapter Four presents the Summary, Conclusions and Recommendations. The

recommendations are made specifically on how the system can be reformed within without abdicating the core values of the traditional system of justice.

1.6. Chapter Conclusion

South Sudan has a dual system of Justice: the formal courts and the customary law courts, both systems operate in a parallel manner with very little linkages in terms of cases processing or dispute resolution with the customary law courts being the most accessible by the local population. The next chapter presents the current perspectives about the customary law courts, their structure and jurisdiction as well as the role of traditional authorities in South Sudan.

CHAPTER TWO:

THE CUSTOMARY LAW COURTS AND TRADITIONAL AUTHORITY IN SOUTH SUDAN: HISTORICAL AND CURRENT PERSPECTIVES

2.1. Introduction:

The study of traditional and informal justice is marked by panoply of terms such as traditional, customary, indigenous, informal, non-state, local, community, popular, participatory, often conflated in both discourse and practice. In some instances, they essentially seek to capture the same social phenomenon, while in others, their meanings are quite different.⁹⁷ In this section customary, traditional and informal justice systems are used interchangeably to mean the system of laws and community institutions that reflect the cultural norms, practices and traditions and have a long history providing local dispute resolution. To this end, the institution of traditional authority (Customary Chiefs) is therefore constitutionally established and mandated with the function of administering customary.⁹⁸ In the wordings of Section 112 (1) (b) of the Local Government Act, 2009, Traditional Authority refers to the institution charged with the responsibility of administering customary law in the Customary Law Courts.⁹⁹

This Chapter presents the historical legal background of the customary law courts in South Sudan since the colonial period, their current status including the present legal recognition, justification for the current constitutional recognition, hierarchy and composition of the various customary law courts as well as the principles that guide the customary law courts in the adjudication of disputes. In addition, the Chapter analyzes the role of Traditional Authority as

⁹⁷Peace Building Initiative; A study on the Traditional and Informal Justice Systems; available online at website-<http://www.peacebuildinginitiative.org/index.cfm?pagelId=1695> (accessed on 20/8/2013).

⁹⁸ Article 174, of the Transitional Constitution of South Sudan, 2011 provides that, '(1) The institution, status and role of traditional authority according to customary law, are recognized under this Constitution; (2) Traditional authority shall function in accordance with this Constitution and the law; (3) The courts shall apply customary law subject to this Constitution and the law.

⁹⁹ Section 112 (1) (a) & (b) Local Government Act, 2009, Laws of South Sudan, stipulates that the Traditional Authority shall be an institution of Traditional system of governance at the State and Local Government levels: which shall (a) be semi-autonomous authorities at the State and local Government levels (b) administer customary law and justice in the customary law courts in accordance with the provisions of this Act and any other law applicable.

an institution of Local Government charged with the responsibility of administering customary law in the customary law courts. A critique on the infusion of legislative, executive and judicial functions in the institution of traditional authorities as well as other challenges facing the customary law courts and the customary justice system are discussed in general.

2.2. Historical Background of the Customary Law Courts in South Sudan:

2.2.1. Precolonial Period

There is very limited literature on the state of customary law courts in South Sudan in the precolonial period. However, before the arrival of the British or other European colonisers the indigenous legal institutions were everywhere found in Africa.¹⁰⁰ Allott argues that, these institutions were for the most part customary in origin and type¹⁰¹. For instance in South Sudan the tribal rulers popularly known as traditional authorities were the ones charged with the dispensation of justice¹⁰² in their various communities and their authority was based on the community's acceptance of the application of the various customs and practices of a given community. In the early twentieth century, the British colonial empire asserted its control over Sudan through the system of indirect rule and the local justice systems incorporated new structures including the customary law courts through the principle of native administration.¹⁰³ To this end routine administration could be done through local authorities, using customary structures and law, and in so far as these could be co-opted by government.

¹⁰⁰ Allot Anthony. A.A. 1970, *New Essays in African Law*, Butterworths, London p.10

¹⁰¹ *ibid*

¹⁰² T.W. Bennett, May/2008, "Customary Law in South Africa (part 11)- The Courts", *Journal of the Diplomacy and Law*, Oxford, Volume 43, P 66-79. P. 66

¹⁰³ Deng K David. D.D. 2013 *"Study on challenges of accountability: an assessment of dispute resolution processes in rural South Sudan"* report by South Sudan Law Society p.11

2.2.2. Colonial Era

According to T.W. Bennett, while writing about the history of courts, the colonial court system did not work with African litigants in mind.¹⁰⁴ He argues that they were all excluded from the formal courts by high fees and alien laws. As a result, Africans had no forum for settling civil disputes and a simple solution was to co-opt the services of the traditional rulers who had been dispensing justice long before colonialism.¹⁰⁵

Manfred O. Hinz, in the report on Customary Law Strategy for South Sudan, asserts that the Chiefs' Courts Ordinance of 1931 is the first legal document for tracing the legal origin and probably hierarchy of the customary law courts in South Sudan.¹⁰⁶ This was very much the product of the British colonial policy of indirect rule and the intention of the Ordinance was to establish indigenous tribunals for the adjudication of a wide range of disputes to which the natives were parties under the supervision of the colonial administration.¹⁰⁷ John Wuol Makec adds that this was the first time the State got involved in the organization of the customary justice system in South Sudan.¹⁰⁸

The Chiefs' Courts Ordinance, 1931 conveyed both administrative and judicial powers. The Courts were not only used to settle disputes but also to punish disobedience towards the government.¹⁰⁹ Section 4 (1) of the Chiefs' Court Ordinance, 1931 established the customary courts as follows;

T.W. Bennett, 2008, "Customary Law in South Africa (part 11)- The Courts", *Journal of the Diplomacy and Law*, Oxford, Volume 43, 66-79. p. 65.

¹⁰⁵ *ibid*

¹⁰⁶ Manfred O. Hinz . M.H. 2009, Report on 'the Strategy to strengthen Southern Sudanese Customary Law as a source of Law in an autonomous legal system', United Nations Development Programme South Sudan and the Ministry of Justice for the Republic of South Sudan, P. 31.

¹⁰⁷ *Ibid*

¹⁰⁸ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London, p. 222.

¹⁰⁹ Leonardi Cherry L. C. & Musa Abdul Jalil, M.J. (2011), *Traditional Authority, Local Government & Justice in The Sudan Hand Book*, James Currey an Imprint of Boydell & Brewer Ltd, NY USA, 108- 121, p. 111.

*‘There shall be the following classes of Chiefs’ Courts; (a) a Chief sitting alone, (b) a Chief sitting with members; (C) a Special Court as provided in Section 8 of the Ordinance’.*¹¹⁰

The Chiefs’ Courts Ordinance, 1931, was applicable to the then Southern Sudan’s three provinces of Bahr el Ghazal, Equatoria and Upper Nile; and the Native Courts Ordinance, 1932, was applicable to the remaining six provinces of Northern Sudan.¹¹¹

The jurisdiction and the powers of the Chiefs’ Courts were defined by the Chief Justice in the warrant of establishment.¹¹² Section 5 of the Chiefs’ Courts Ordinance, 1931 provided that;

(a) ‘Chiefs’ Courts of the classes specified in the (a) and (b) of section 4 (1) shall be established by a warrant under the hand of the Chief Justice at such places or within such areas as it thinks fit.

(b) The warrant shall define the power of the court and the limits of its jurisdiction.’

Section 6 of the Ordinance provided as follows; ‘Every Chiefs’ Court shall have full jurisdiction and power to the extent set out in the Ordinance or in its warrant of establishment and in its regulations in all civil cases in which each of the parties is a native and in all criminal cases in which the accused person is a native provided that;

(a) In civil cases in which one or more of the parties and;

(b) In criminal cases in which the accused person is a government official or is a native not domiciled or ordinarily resident in the Upper Nile Province or in the Equatoria Province or in the Bahr el Ghazal Province, the court shall have no jurisdiction only in case (a) with

¹¹⁰ Section 4 of the Chiefs’ Court Ordinance, 1931, Laws of Sudan.

¹¹¹ Deng Biong Mijak. D.B.2009. ‘Customary justice and legal pluralism in post conflict and fragile societies’, paper presented at the customary law workshop hosted by United States institute of peace, George Washington University, World Bank, The George Washington University, Elliott School of International Affairs on November 17-18, 2009, P. 15, available online at www.usip.org, (accessed on 11/9/2012).

¹¹² Wuolake John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London, p. 224.

*the consent of such a party or parties, and in case (b) with the consent of the District Commissioner.'*¹¹³

The Chiefs Courts Ordinance, 1931 was a novel development in that, it did not only formally recognize and establish the customary courts but it also formally recognized the Chiefs' legal authority to exercise customary jurisdiction in their traditional tribal areas.¹¹⁴ Francis Mading Deng notes that, the customary justice system in South Sudan centers primarily on the figure of the Chief and to this end, the Chiefs' powers had to be recognized as well.¹¹⁵ Section 7 (a) of the Chiefs' Court Ordinance, 1931 provided therefore, that 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.¹¹⁶ The customary courts were allowed to administer the provisions of any other law, the administration of which was authorized by their warrant of establishment or the regulations accompanying such warrants.¹¹⁷ For instance, Section 7 (b) of the Chiefs' Court Ordinance, 1931 provided that the Chiefs' court shall administer the provisions of any Ordinance which the courts may be authorized to administer in its warrants or regulation.¹¹⁸

During the colonial and early post-colonial time, the strict segregation between 'native' and 'non-native' in the administration of justice was a governing principle which was reflected in the plurality of the existing laws and their isolated application.¹¹⁹ This was not only applied in

¹¹³ Section 6 of the Chiefs' Court Ordinance, 1931 as reproduced, by John Wuol Makec: *The Customary Law of the Dinka People of Sudan, In comparison with aspects of Western and Islamic Laws*, Afroworld Publishing Co. London, England, 1988 at p. 224.

¹¹⁴ Aleu Akechak Jok, Robert A Leitch, and Carrie Vande wint, 2004 "The Study of Customary Law in Contemporary Southern Sudan" World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs. P.14. available at <http://www.cmi.no/sudan/resources.cfm> web visited on November 22, 2011.

¹¹⁵ Mading Deng M.D, (2004) 3rd edition, *Tradition and Modernization: A Challenge of law among the Dinka of the Sudan*, Kush Inc. Washington D.C., p. 86.

¹¹⁶ Section 7 (a) of the Chiefs' Courts Ordinance, 1931 as quoted by Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London at p. 19.

¹¹⁷ Section 7 of the Chiefs' Courts Ordinance, 1931, laws of Sudan.

¹¹⁸ Ibid.

¹¹⁹ Olive C Ruppel. O.R. and katharina Ruppel- Schlichting K.R.S., 2011 "legal and judicial pluralism in Namibia and Beyond: a modern approach to African legal Architecture" *Journal of Legal Pluralism No. 64*, 33-63 at p. 36.

Sudan but even other African Countries for instance, the new Order-in-Council for Uganda, 1902, Article 20 provided that in all cases, civil and criminal to which natives are parties, every court shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order-in-Council, or any regulation or rule made under any Order-in-Council or Ordinance.¹²⁰ Similar provisions were made in Somaliland protectorate under Article 12 of the Somaliland Order-in-Council, 1929, in Northern Rhodesia under Article 36 of the Northern Rhodesia Order-in-Council, 1924, in Kenya under Article 7 of the Kenya Colony Order-in-Council, 1921.¹²¹

2.2.3. Post-Colonial Period

In the post-colonial period, the Sudanese Central government legislators re-affirmed the legal status of the customary law courts in Southern Sudan.¹²² The People's Local Courts Act 1977 repealed the Chiefs' Courts Ordinance, 1931 but replaced it with an almost identical mandate without altering in any great detail the recognition of the jurisdiction of the customary courts.¹²³ Section 2(1) (a) of the Act provides that; 'Any Court established under any of the aforesaid Ordinances shall continue to decide cases until the warrants of establishment of the new Courts are issued in accordance with the provisions of this Act.'¹²⁴

Just as was the case under the Chiefs' Courts Ordinance 1931, the People's Local Courts Act, 1977 made separate provisions for North and South Sudan, with respect to the establishment of the local courts, their jurisdiction and powers, and the hierarchy of appeals, although with

¹²⁰ Article 20 of the New Order-in-Council for Uganda, 1902, Archives, Law Development Center Library, Kampala-Uganda.

¹²¹ Allot Anthony. A.A. 1970, *New Essays in African Law*, Butterworths, London p. 130.

¹²² Aleu Akechak Jok, Robert A Leitch, and Carrie Vande wint, 2004 "The Study of Customary Law in Contemporary Southern Sudan" World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs.p15 available at <http://www.cmi.no/sudan/resources.cfm> web visited on November 22, 2011.

Wuol Makec. W.M. 'The Essentials for the Re of Customary Law in the Southern Sudan'. The Sudanese Judgment and Precedents Encyclopedia, Sudan Judiciary, Khartoum at p. 3.

¹²³ The evolution of Customary Law in South Sudan, 2012, an article by the United Nations Development Programme in South Sudan, available online at <http://www.undp.org/content/dam/southsudan/library/Documents/2011-AWPs/DG/UNDP-SS-customary-law-08-12>. accessed on 12/5/2013.

¹²⁴ Section 2 of the People's Local Courts Act, 1977, Laws of Sudan.

relatively minor differences.¹²⁵ The People's Local Act stipulated in Section 11 (1) that the composition of a People's Local Court is to consist of a president, vice president, and sufficient number of members to be selected by the Chief Justice. According to section 11 (2) of the People's Local Courts Act, 1977, the members of the Court are selected pursuant to recommendation of the resident Magistrate, in consultation with various local officials before it would be submitted to the Chief Justice.¹²⁶ Nonetheless, most of the Judges, particularly at the higher levels, such as president and vice president, are hereditary leaders whose legitimacy in the eyes of their people is vested on that background, with government authority behind them being more of reinforcement rather than a foundation of their moral authority.¹²⁷

Although before the current constitutional framework, customary law courts or the customary justice system had been recognised on fairly generous terms, the common law was still taken to be the basic law of the land and customary law was very much a subordinate element and so the customary law courts.¹²⁸ Constitutional change prompted talk of 'Africanising' the legal system.¹²⁹ In the run-up to the Comprehensive Peace Agreement, 2005 (CPA) concluded between the Government of Sudan and the Sudanese Peoples' Liberation Movement/Army (SPLM/A), the Southern Sudan Chief Justice at the time, Ambrose Thiik, summed up a widespread sentiment on the customary justice system when he stated that, 'Customary law embodies much of what we have fought for these past twenty years. It is self-evident that, customary law will underpin our society, its legal institutions and laws in the future.'¹³⁰

During the peace negotiations, the customary justice system was singled out for special treatment. Paragraph 3.2.3 of the Machakos Protocol, 2002 that forms part of the

¹²⁵ Mading Deng. M.D. 2006 'Customary Law in the Cross fire of Sudan war of Identities', a study conducted for United State Institute of peace, p. 22.

¹²⁶ Article 11 (2) of the People's Local Courts Act, 1977, Laws of Sudan.

¹²⁷ Mading Deng. M.D. 2006 , opcit

¹²⁸ T. W. Bennet; 2011, 'Legal Pluralism and the family in South Africa: Lessons from Customary Law Reform', *Emory International Law Review*.25, 1030- 1059 p. 1034.

¹²⁹ Ibid, p. 1035.

¹³⁰ Jan Arno Hessbruegge J.A., 2012 "Customary Law and Authority in a State under construction: The case of South Sudan" *African Journal of Legal Studies* 5, 295-311, p 301.

comprehensive peace agreement, provides that; 'Nationally enacted legislation applicable to the Southern States and/or the Southern Region shall have as source of its legislation popular consensus, the values and customs of the people of Sudan including their traditions and religious beliefs having regard to Sudan's diversity.'¹³¹ This has been preserved in the various legislations currently in South Sudan and by way ensuring that the customary justice system is at an equal footing with the statutory justice system. To this end, the Transitional Constitution of South Sudan, 2011 recognizes custom as a source of law. Article 5 provides that; 'The sources of legislation in South Sudan shall be: (a) this Constitution; (b) written law; (c) custom and traditions of the people; (d) will of the people; and (e) any other source.'

T.W. Bennett urges that because of the recognition of customary law at an equal basis with statutory law as a source of legislation, a special system of courts sympathetic to the cultural or religious affiliations of the litigants, is a vital component in any policy of legal pluralism because it can give full and proper expression to their beliefs and practices.¹³² Bennett's argument seems to be in line with Article 122 (1) of the Transitional Constitution of South Sudan 2011. This Article provides as follows, 'Judicial power is derived from the people and shall be exercised by the courts in accordance with the customs, values, norms and aspirations of the people in conformity with the constitution and the law.'¹³³ As much as this constitutional provision applies to both the formal courts and the customary law courts, it however makes a very big case for current state of the customary law courts. To that end, it is therefore logical to argue that the current legal status of the customary law courts in South Sudan has its roots in the colonial days except that the courts are now seen more from a constitutional perspective rather than in the common law lens.

Agreed text on the preamble, principles and the Transition Process between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan people's Liberation Army, 2002 (Machakos Protocol) para 3.2.3, available online at http://www1.chr.up.ac.za/chr_old/indigenous/documents/Sudan/Legislation/Machakos%20Protocol%202002.pdf (accessed August 31,2013) the Machakos Porotocol, 2002 form part of the many protocol signed to form the Comprehensive Peace Agreement under 2005.

¹³² T. W. Bennet; 2011, 'Legal Pluralism and the family in South Africa: Lessons from Customary Law Reform', *Emory International Law Review*.25, 1030- 1059, p. 1052.

¹³³ Article 122 (1) of the Transitional Constitution of South Sudan, 2011.

2.3. Customary Law Courts under the Current Legal Framework:

The Transitional Constitution of South Sudan, 2011 recognizes the customary law courts, the institution and role of traditional authority under Article 167. Article 167 provides that; '(1) The institution, Status and role of Traditional Authority according to customary law, are recognized under this Constitution; (2) Traditional Authority shall function in accordance with this Constitution and the State Constitutions and the law; (3) The courts shall apply customary law subject to this Constitution and the law.'¹³⁴

The Local Government Act, 2009 in no uncertain terms legally recognizes and formally establishes the Customary Law Courts. Section 97 (1) thereof provides that; 'There shall be established Customary Law Courts as follows;

- (a) *'C' Courts;*
- (b) *'B' Courts or Regional Courts;*
- (c) *'A' Courts or Executive Chief's Courts; and*
- (d) *Town Bench Courts.'*¹³⁵

2.3.1. General Competence of the Customary Law Courts:

Under the current constitutional framework, the general jurisdictions of the Customary Law Courts are to adjudicate on customary disputes. Section 98 (1) of the Local Governments Act, 2009 provides that, 'The Customary Law Courts shall have judicial competence to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities'.¹³⁶ Article 167 (3) of the Transitional Constitution, 2011 provides that the courts shall apply customary law subject to this Constitution and the law.¹³⁷

¹³⁴ Article 167 of the Transitional Constitution of South Sudan, 2011. The Traditional Authority according to Section 5 of the Local Government Act, 2009, Laws of South Sudan means the traditional community body with definite traditional administrative jurisdiction within which customary powers are exercised by the traditional leaders on behalf of the community.

¹³⁵ Section 97 (1) (a), (b), (c) and (d) of the Local Government Act, 2009, Laws of South Sudan.

¹³⁶ Section 98 (1) of the Local Government Act, 2009, Laws of South Sudan.

¹³⁷ Article 167 (3) of the Transitional Constitution of South Sudan, 2011.

The courts being referred to are, the customary law courts as the formal courts are provided for under Articles 122-134.¹³⁸ However, this is not in any way to suggest that the formal courts can not apply customary law. Section 7 (2) of the Civil Procedure Act, 2007 provides that, 'in cases not provided for by any law, the court shall act according to South Sudan judicial precedents, customs and principles of justice, equity and good conscience'.¹³⁹ In the formal courts, customary law has made inroads not only in civil or family matters but also in criminal cases as well. Section 6 (2) of the Penal Code Act, 2008 provides that, 'In the application of this Act, Courts may consider the existing customary laws and practices prevailing in the specific areas.'¹⁴⁰

In murder cases which are punishable by death for instance, the application of customary law of blood compensation can mitigate the sentence to not more than ten years in prison. Section 206 (b) of the Penal Code Act, 2008 provides that, 'Whoever causes the death of another person knowing that the death would be the probable and not only the likely consequence 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 relatives of the deceased opt for customary blood compensation, the court may award in lieu of death sentence with imprisonment for a term not exceeding ten years.'¹⁴¹

In further regard to the jurisdiction of the customary courts, T.W. Wourji, points out that even with the legal recognition of the customary justice system, their jurisdictions are by and large

¹³⁸ Articles 122 to 134 of the Transitional Constitution of South Sudan, 2011 establish the formal courts and provide for their functions and hierarchy.

¹³⁹ Section 7 (2) of the Civil Procedure Act, 2007, laws of South Sudan.

¹⁴⁰ Section 6 (2) of the Penal Code Act, 2008, laws of South Sudan.

¹⁴¹ Section 206 (b) of the Penal Code Act, 2008, Laws of South Sudan. Also see: Section 266 of the Penal Code Act, 2008. It provides that, 'Whoever, has consensual sexual intercourse with a man or woman who is and whom he or she has reason to believe to be a spouse of another person, commits the offence of adultery, and shall be addressed in accordance with the customs and traditions 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.'

limited to personal, family and criminal matters-mostly of less serious crimes.¹⁴² Section 98 (2) of the Local Government Act, 2009 puts a limitation on the competence of the Customary Law Courts in criminal matters. The Section provides that, '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 Court.'¹⁴³

The difference between this Section and Section 6 (b) of the Chiefs' Court Ordinance, 1931, lies in the fact that the Chiefs' Court had full jurisdiction in all criminal cases in which the accused person was a native. The Section provided that; 'In criminal cases in which the accused person is a government official or is a native not domiciled or ordinarily resident in the Upper Nile Province or in the Equatoria Province or in the Bahr el Ghazal Province, the court shall have no jurisdiction only in case (a) with the consent of such a party or parties, and in case (b) with the consent of the District Commissioner.'¹⁴⁴ Secondly, under the current legal framework as seen from Section 98 (1) of the Local Government Act, 2009, a person does not need to be a 'native' of the area but as long as the matter is customary, the court shall have jurisdiction. Lastly, the current legislation does not create classes of people over whom the customary law courts can have jurisdiction instead; the jurisdiction is determined by the nature of the case. In the same context, there is no requirement for the consent of the parties for their cases to be adjudicated in the customary law courts in certain cases, as it was the case under section 6 of the Chiefs' Courts Ordinance, 1931.¹⁴⁵

The issue of jurisdiction of the Customary Law Courts is one of the major challenges in the South Sudan legal system.¹⁴⁶ Section 98 (2) of the Local Government Act, 2009 for instance,

¹⁴² Tsehai Wada Wourji. T.W, 2012 "Coexistence between the Formal and Informal Justice systems in Ethiopia: Challenges and prospects", *African Journal of Legal Studies* 5, 269-293. p. 273.

¹⁴³ Section 98 (2) of the Local Government Act, 2009, Laws of South Sudan.

¹⁴⁴ Section 6 of the Chiefs' Court Ordinance, 1931 Laws of Sudan.

¹⁴⁵ Section 6 of the Chiefs' Courts Ordinance, 1931, Laws of Sudan.

¹⁴⁶ Report on the workshop to harmonize Customary Law and Statutory Law systems held in Juba (13-15,2012): Ministry of Justice and Judiciary of South Sudan.

provides that, '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 Court.'¹⁴⁷ However, the Law does not classify or define the various criminal cases with a customary interface nor does it define customary interface. John Woul Makec, the leading South Sudanese writer on Customary Law, points out that in South Sudan, a customary law court does not bother to analyze or express whether the case before it is a criminal case or civil case, nor does it expressly state that its decision constitutes either a penalty of civil award of damages. If one goes deeper into the law, it becomes obvious that customary courts always pass penal sentences which appear on the surface of it to be civil remedies.¹⁴⁸ T. Olawale Elias urges that in African law, no distinction is ever therein between the civil and criminal wrongs as commonly conceived in European Law.¹⁴⁹ He continues that, the usual evidence cited in support is that offences like murder, rape and theft which are clearly criminal offences are generally treated by many African societies as matters of private redress by the wronged party or group rather than by the State as the custodian of public safety and welfare.¹⁵⁰

As a way of illustration, in the case of Ben Makoi Wade Kuc Vs. the Government of South Sudan, Supreme Court Criminal Review No. 6 of 2011,¹⁵¹ the applicant was tried, convicted and sentenced to 10 years in prison by the High court in Rumbek for rape under section 247 (1) of the Penal Code Act, 2008.¹⁵² This Section provides that; '(1) Whoever, has sexual intercourse or carnal intercourse with another person, against his or her will or without his or her consent, commits the offence of rape, and upon conviction, shall be sentenced to imprisonment for a term not exceeding fourteen years and may also be liable to a fine; (2) A consent given by a

¹⁴⁷ Section 98 (2) of the Local Government Act, 2009, Laws of South Sudan.

¹⁴⁸ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London, p. 37.

¹⁴⁹ Olawale Elias O.E. 1956, *the Nature of African Customary Law*, Manchester University Press, United kingdom., p. 110.

¹⁵⁰ Ibid.

¹⁵¹ Ben Makoi Wade Kuc Vs. The Government of South Sudan, Supreme Court Criminal Review No. 6 of 2011 (unreported).

¹⁵² Section 247 (1) & (2) of the Penal Code Act, 2008, Laws of South Sudan.

man or woman below the age of eighteen years shall not be deemed to be consent within the meaning of subsection (1), above.’

In this case, both the applicant and the girl admitted to having had sexual intercourse and the medical evidence showed that the girl was sixteen years of age and was pregnant. The applicant applied for review of his case in the Supreme Court against the decision of the High Court. In a decision of two to one in favour of the applicant, the Supreme Court held that; ‘The application of Section 247 of the Penal Code Act, 2008 to this case was wrong. First, the ingredients of rape under Section 247, such as consent and the age of the girl do not apply in a case that can be settled according to the Dinka Customary Law Act of 1984. More so for the age of a girl, there is no way for a Dinka man to know the ages of girls.’¹⁵³ Justice Aleu Akechak (at page 5) went on to say that, ‘Cases like the one before us do not fit into statutory laws especially the penal laws. Pregnancy cases are best resolved through customary laws because the question of age if tackled by applying the penal laws and the charge of rape in particular cannot be understood by the Dinka people.’¹⁵⁴ The Court ordered that the sentence of imprisonment for fourteen years and fine of 2000 South Sudan pound imposed under Section 247 of the Penal Code Act be quashed and the accused (applicant) to pay ‘arouk’ for the child (if any) and damages according to Dinka Customary Law of 1984.¹⁵⁵

In this context, it is apparently a contradiction to say that a penal law is a law of civil wrong.¹⁵⁶ Ben Makoi’s case helps to illustrate the magnitude of the problem facing not only the customary law courts, but also the statutory courts in deciding whether the matter is criminal or customary in nature. Olawale Elias asserts that under the customary justice system, the distinction between criminal and civil matters is not very definite; the same act might be

¹⁵³ Ben Makoi Wade Kuc Vs. The Government of South Sudan, Supreme Court of South Sudan, Criminal Review No. 6 of 2011 (unreported) Judgment of Justice Ayak-der Kom Awan at p. 2.

¹⁵⁴ Ibid, p. 4.

¹⁵⁵ Ibid.

¹⁵⁶ Olawale Elias O.E. 1956, *the Nature of African Customary Law*, Manchester University Press, United kingdom., p. 112.

regarded as either.¹⁵⁷ if the supreme Court decided that rape did not constitute a criminal offence and it was supposed to be addressed under customary law, how much more difficult will it be for a customary court/Judge deeply rooted in custom and tradition with no formal training in the modern state justice system, to discern whether the case before his/her court is customary or criminal in nature.

With regard to the current legal framework and the establishment of Customary Law Courts, the law introduced a new concept of women rights which was never contained in any previous legal documents on the operation of customary law courts. Section 97 (2) of the Local Government Act, 2009 provides that, 'Local Governments Authority shall ensure adequate representation of women in the customary law courts'.¹⁵⁸ This demonstrates that institutions established on the basis of communal and cultural norms can exist and function on the basis of equality and other rights which are hallmarks of a liberal Constitution.¹⁵⁹ It also makes the current legislation unique in that, it introduces the concept of gender mainstreaming and transformation in the customary justice system which was not the case in all previous legislation on the Customary Law Courts or Chiefs' Courts.

In explaining and justifying this trend, Abdullah A, a leading author on cultural transformation and human rights points out that, the objective of this transformation is to promote an empirically sound yet visionary and dynamic understanding of the relationship between culture and human rights with a view of formulating practical strategies for the greater protection of human rights, within the customary justice system.¹⁶⁰ It can be argued that Abdullah's views are in line with Article 16 (4) (a) of the Transitional Constitution of South Sudan, 2011 which provides for affirmative action to redress imbalances created by history, customs and

¹⁵⁷ Ibid.

¹⁵⁸ Section 97 (2) of the Local Government Act, 2009, Laws of South Sudan.

¹⁵⁹ E.S. Nwaucha, E.N. 2009 'Distinction Without Difference: Constitutional Protection of Customary Law and Cultural, Linguistic and religious Communities- a comment on *Shilubana and Others v. Nwamitwa*' *Journal of Legal Pluralism* 50, 67-85, p. 68.

¹⁶⁰ An-Na'im Abdulahi. A.A. 2002, *Cultural Transformation and Human Right in Africa*, Zed Books Ltd, London, p. 2.

traditions.¹⁶¹ This gives the current legislation a positive trend in addressing issues that affect the administration of justices in the customary law courts.

2.4. Constitutional Recognition of Customary Law Courts:

The question that comes to mind is why a modern state would constitutionally recognize a customary justice system whose values, practices and norms sometimes violate the basic human rights guaranteed by the statutory laws of the country. Alternatively one would question the rationale for the constitutional appropriateness of maintaining a dual legal system in a modern State.

Professor Bennett, a leading customary law scholar, has asserted that from a constitutional view point, the recognition and application of customary law as well as the customary justice system, rests on the right to culture.¹⁶² The South Sudan Bill of Rights contains a cultural rights provision. Article 33 of the Transitional Constitution of South Sudan, 2011 recognizes the right of persons belonging to a cultural, religious or linguistic community to enjoy their cultural practices and this is categorized as a collective right. In support of this view, Article 33 of the Transitional Constitution of South Sudan provides as follows: 'Ethnic and cultural communities shall have a right to freely enjoy and develop their particular cultures. Members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the context of their respective cultures and customs in accordance with this Constitution and the law'.¹⁶³ This provision is generally accepted as supporting the recognition and incorporation of customary justice system into the Constitution as it affords all South Sudanese the right to participate and enjoy a cultural right of their choice.

¹⁶¹ Article 16 1 (a) of the Transitional Constitution of South Sudan, 2011.

¹⁶² T W Bennet. 2011, 'Legal Pluralism and the family in South Africa: Lessons from Customary Law Reform' *Emory International Law Review*, 25 (2), 1029. p. 1035.

¹⁶³ Article 33 of the Transitional Constitution of South Sudan, 2011.

Sanele Sibanda, points out that the recognition was based on the need to incorporate on an equal basis a legal system rooted in African cultural traditions.¹⁶⁴ Article 122 (1) of the Transitional Constitution of South Sudan, 2011 provides thus: 'Judicial power is derived from the people and shall be exercised by the courts in accordance with the customs, values norms and aspirations of the people and in conformity with this Constitution and the law'.¹⁶⁵ In order to achieve this, the State needed to constitutionally recognize a system that is well suited in achieving the objectives of the law. Dias, in his book, 'Jurisprudena'¹⁶⁶ explains that, when a large section of the populace is in a habit of doing a thing over a very much longer period, it may become necessary for the courts to take notice¹⁶⁷ and also be necessary for the law to recognize it and this could have been the case with the customary law courts or customary justice system in South Sudan.

Sanele Sibanda further argues that there was already a functioning customary legal system that could become part of the state's justice and administrative infrastructure.¹⁶⁸ This, coupled with the fact that, the State does not have functioning formal justice systems in the rural areas, necessitated the recognition of the customary courts.¹⁶⁹ In addition, this justification displays a profound appreciation for the cultural significance of the customary justice system. Moreover almost 90% of the population of South Sudan access justice in the customary law courts.¹⁷⁰ As

¹⁶⁴ Sanele Sibanda; When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation, a paper delivered as a keynote address at the American University Washington School of Law on February 15, 2010 at the conference entitled, 'Custom, Law and Tradition: Alternative Legal Systems and their Impact on Human Rights.'

¹⁶⁵ Article 122 (1) of the Transitional Constitution of South Sudan, 2011.

¹⁶⁶ R.W.M. Dias, 1964, *Jurisprudena*, 2nd edn, Butterworth, London, p. 142

¹⁶⁷ *ibid.*

¹⁶⁸ *Sanele Sibanda*, 2010 "When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation". Paper delivered as a keynote address at the American University Washington School of Law on February 15, 2010 at the conference entitled "Custom, Law and Tradition: Alternative Legal Systems and their Impact on Human Rights."

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¹⁶⁹ Leila Chirayath, Caroline Sage and Michael Woolcock, 2005, 'Customary Law and Policy Reform: Engaging with the Plurality of justice systems', background paper for World Development Report 2006, UNDP, New York, USA, p. 6.

¹⁷⁰ Deng Biong Mijak, D.M. 2012 "Customary justice and legal pluralism in post conflict and fragile societies" paper presented at the customary law workshop hosted by United States institute of peace, George Washington University, World Bank, The George Washington University, Elliott School of International Affairs on November 17-18, 2009.

Available online at www.usip.org, (accessed on 11/9/2012)

Sanele Sibanda points out, supporters of the customary justice system's incorporation into the Constitution perceived its potential to contribute to the mainstreaming of African culture and values into South Sudan's legal system.¹⁷¹ Former Chief Justice of South Sudan Ambrose Thiik summed up this point in the following phrase;

*'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 years. It is self-evident that customary law will underpin our society, its legal institutions and laws in the future.'*¹⁷²

Thirdly, in South Sudan the customary law courts/justice systems are the Centre of dispute resolution and the means to guide the regulation of deteriorating relationships between the individuals and communities.¹⁷³ Woul Makec reinforces this when he argues that African law is positive and not negative. It does not create offences nor make criminals, but it directs how individuals and communities should behave towards each other. In essence, the whole objective of the customary justice system is to maintain an equilibrium and the penalties of African law/legal system are directed, not against specific infractions, but to the restoration of this equilibrium.¹⁷⁴ John Wuol Makec's argument is in line with the principles that are applied by the customary law courts in deciding cases. Section 98 (3) (c) & (d) Local Government Act 2009, provides that in deciding cases, customary law courts shall, inter alia apply the following principles, (a) adequate compensation shall be awarded to victims of wrongs and (b) voluntary

¹⁷¹ Sanele Sibanda, 2010 'When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation'. Paper delivered as a keynote address at the American University Washington School of Law on February 15, 2010 at the conference entitled "Custom, Law and Tradition: Alternative Legal Systems and their Impact on Human Rights.

¹⁷² Justice Ambrose Thiik, Statement can be available online at www.gurtong.org (accessed September 12, 2012). Also see: Manfred Hinz, Customary law Strategy for South Sudan, 2010.

¹⁷³ Unpublished Report on the first customary law work plan workshop held at Nairobi on December 14th-16th, 2004. Available online at www.gurtong.org, The workshop was conducted by the Sudanese Peoples Liberation Movement (SPLM) it is now the Ruling party in South Sudan, by the time of the report they were still rebels but in negotiation by then Government of Sudan, those negotiations lead to the signing of the Comprehensive Peace agreement (CPA) which granted the South Semi Autonomous State for a transitional period of five year and the eventually a referendum on self determination which saw the birth of the Republic of South Sudan (ROSS) on July 9, 2011).

¹⁷⁴ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London. page 36.

mediation and reconciliation agreements between the parties shall be recognized and enforced.¹⁷⁵ As way of restating Wuol makec's point the purpose of section 98 (3) of the Local Government Act 2009, is to maintain the social equilibrium in society and this could easily be achieved through constitutional recognition of the customary law courts as statutory courts are largely adversarial in their proceedings and hence not reflecting the customary values of the society.

The forth justification for the current constitutional recognition of the customary law courts is because the customary justice system in South Sudan is most understood by the people. More so, its importance came from its role and development of customary law in the societies long before the colonialist arrived in the area and before the modern state emerged.¹⁷⁶ This long history holds a deep attachment for the retention of customary justice system and considering the role played during war by the customary chiefs who also double as customary Judges and keeping in mind that one of the major factors that brought South Sudanese to together during the war was the desire to protect their cultural identity, values and justice system thus the need for the court system that will reflect those values. Also in fragile States like South Sudan, the government has to give legitimacy to the traditional peacemaking and conflict resolution institutions. In general, grass roots peace initiatives can only succeed where there is a successful combination of local legitimacy and effective government backing and follow through.¹⁷⁷ This has been done in other African countries for instance, in Rwanda after the genocide, traditional courts were resorted to in order not only achieve accountability for the crimes committed, but also to ensure traditional courts with successful peacemaking techniques are relied on to foster peace initiatives.

¹⁷⁵ Section 98 (3) (c) & (d) of the Local Government Act, 2009, Laws of South Sudan.

¹⁷⁶ Unpublished Report on the first customary law work plan workshop held at Nairobi on December 14th-16th, 2004., Local Government Board Juba South Sudan. Available online at www.gurtong.org, The workshop was conducted by the Sudanese Peoples Liberation Movement (SPLM) it is now the Ruling party in South Sudan.

¹⁷⁷ Cherry Leonardi. C.L. 2011. *Traditional Authority, Local Government & Justice*, in *The Sudan Hand Book*, James Currey an Imprint of Boydell & Brewer Ltd, NY, USA p. 119.

The level of development of the Country as well offers a strong reason for need to maintain the customary justice system. Dammer and Albanese in their very analytical book on, 'Comparative Criminal Justice Systems' argue that Saudi Arabia is said to have a low crime rate simply because most of the cases are resolved in informal ways. Their reasoning is that, Saudi Arabia is not a highly developed country in some way and is certainly not highly urbanized, despite its great wealth per capita, a sizable portion of the population continues to nomadic Bedouins, who are unlikely to resort to formal legal system to settle their disputes and resolve their crime problems.¹⁷⁸

Dammer and Albanese's analogy is about crime rate analysis, however, the concept of development and nomadic life style fully applies to South Sudan with regard to the customary justice system, several communities are cattle keepers and others are so deep in remote areas with no formal courts and this could have been at the heart of the political leaders and the legislators in recognizing the customary justice system in the current constitutional order in South Sudan. It can therefore be evidently concluded that the recognition of the customary law courts in the new constitutional dispensation in South Sudan was not only to do with the appreciation of a court with African values, but it was also due to the limited capacity of the formal courts to adjudicate on cases as well as for political reasons due to the influence and respect that people have for the customary Judges.

2.5. Hierarchy and Composition of the Customary Law Courts in South Sudan:

The Transitional Constitution of South Sudan, 2011 and the Judiciary Act, 2008 place the customary law courts at the lower level of the judicial structure or hierarchy and simply refer to them as other Courts. Article 123 of the Constitution provides that; 'The judiciary shall be structured as follow: (a) The Supreme Court; (b) Courts of Appeal; (c) High Courts; (d) County Courts; and (e) Other Courts or tribunals as deemed necessary to be established in accordance

¹⁷⁸ Harry R. Dammer. H.D. and Jay S. Albanes. J.A.2011, 'Comparative Criminal Justice Systems', Wadsworth Cengage Learning United States of America, Fifth edition, P. 31.

with the provisions of this Constitution and the law.’¹⁷⁹ Section 7 of the Judiciary Act, 2008 is just a replica of Article 123; hence the judicial hierarchy is the same.¹⁸⁰

The Local Government Act, 2009 is the law that lays down the clear hierarchy of the customary law courts. Section 97 (1) establishes four types of customary law courts in a hierarchal manner as follows;

- (a) ‘C’ Courts;
- (b) ‘B’ Courts or Regional Courts;
- (c) ‘A’ Courts or Executive Chiefs Courts; and
- (d) Town Bench Courts.¹⁸¹

The law prescribes the jurisdictions and the composition of each of the Courts and this is considered in turn. These courts are administered by Chiefs including the paramount Chief, who is the head of Chiefs in a County. A County is a territory in which the administrative jurisdiction of local government council is established.¹⁸² The other Chiefs include the Head Chief, the Executive Chief and Sub Chief. The Head Chief is the head of his community. The Executive Chief is the administrator of the members of his community, while the Sub Chief/ head man is the deputy to the Executive Chief and is the head of the section in the community.

2.5.1. The ‘C’ Courts:

Section 99 (1) of the Local Government Act, 2009 provides that, ‘There shall be established in each County a ‘C’ Court which shall be the highest customary law court of the County.’¹⁸³ This Court consists of the Paramount Chief as the Chairperson and the Head Chiefs of the ‘B’ or Regional Courts.¹⁸⁴ The Paramount Chief as the Head of Chiefs in a County is responsible for the

¹⁷⁹ Article 123 of the Transitional Constitution of South Sudan, 2011.

¹⁸⁰ Section 7 of the Judiciary Act, 2008, Laws of South Sudan.

¹⁸¹ Section 97 (1) of the Local Government Act, 2009, Laws of South Sudan.

¹⁸² Section 5 of the Local Government Act, 2009, Laws of South Sudan.

¹⁸³ Section 99 (1) of the Local Government Act 2009, Laws of South Sudan.

¹⁸⁴ Section 99 (4) (a) & (b) of the Local Government Act, 2009, Laws of South Sudan.

administration of the customary law courts in the County.¹⁸⁵ Section 99 (7) provides that, 'The 'C' Court shall have the competence of deciding on: (a) appeals against the decisions of the 'B' Courts; (b) cross cultural civil suits; and (c) criminal cases of a customary nature referred to it by a competent Statutory court.'¹⁸⁶

The law does not define or give a list of criminal cases of customary nature; however, some of the criminal cases of a customary nature include offences like adultery. Section 266 of the Penal Code Act, 2008 is to the effect that, whoever has consensual sexual intercourse with a man or woman who is and whom he or she has reason to believe to be the spouse of another person, commits the offence of adultery and shall be addressed in accordance with the customs and traditions 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 with both.¹⁸⁷ In the case of Akok Deng Aiem, Criminal Appeal No. 198 of 2011, the Court of Appeal for Greater Bahr El Ghazal Circuit, the court observed that, 'The cardinal intention of the legislature of South Sudan, in using the phrase lieu, wanted to say that priority must be given to the application of the existing customary law and tradition prevailing in a specific area unless the aggrieved party has no customary law.'¹⁸⁸ The favourable courts to solve such cases are customary courts as provided for in the law.¹⁸⁹

The appeals against the decisions of the 'C' Courts lie with the County Court Judge of First Grade¹⁹⁰ the County Court Judge of First Grade is not among the customary courts but is part of the formal courts as provided under Article 123 of The Transitional Constitution of South Sudan,

¹⁸⁵ Section 99 (4) of the Local Government Act, 2009, Laws of South Sudan.

¹⁸⁶ Section 99 (7) (a), (b) & (c) of the Local Government Act, 2009 Laws of South Sudan.

¹⁸⁷ Section 266 of the Penal Code Act, 2008, Laws of South Sudan.

¹⁸⁸ Akok Deng Aiem, Criminal Appeal No. 198 of 2011, the Court of Appeal for Greater Bahr El Ghazal Circuit, South Sudan.

¹⁸⁹ Section 99 (7) (c) of the Local Government Act, 2009 provides that the 'C' Court shall have the competence to decide on criminal cases of a customary nature (emphasis mine).

¹⁹⁰ Section 99 (3) of the Local Government Act, 2009, Laws of South Sudan.

2011 and Sections 7 and 18 of the Judiciary Act, 2008.¹⁹¹ However, this creates a link between the customary justice system and the formal courts and re-emphasize a fact that they often serve to complement and reinforce in the adjudication of justice.¹⁹²

As already noted, the competence of the 'C' Court is to decide on appeals against the decisions of 'B' Courts; cross cultural civil suits; and criminal cases of customary nature referred to it by a competent Statutory Court.¹⁹³ It therefore follows that the 'C' Court is not only an appellant court but also possess original jurisdiction. This Court also sits as a court of first instance only in cases of cross cultural civil suits and criminal cases of a customary nature. Cross cultural civil suits involves cases where the parties belong to different ethnic groups or where the defendant and the plaintiff are not under the jurisdictions of the same Chief.¹⁹⁴ In criminal cases it must arise out of a customary dispute for instance an assault as a result of an argument over bride price between in-laws or relatives.

In terms of accountability, the customary courts are established on the basis of administrative units, the Paramount chief as the Chairperson of the 'C' Court is accountable to the executive arm of government at the county level.¹⁹⁵ Section 99 (5) of the Local Government Act, 2009 provides that, 'The Chairperson of the 'C' Court shall be answerable to the County Commissioner for the performance of the Court.'¹⁹⁶ Section 5 of the Local Government Act, 2009 defines a County Commissioner as a person elected by the people of a County as the head of the local government in the County.¹⁹⁷

¹⁹¹ Article 123 of the Transitional Constitution of South Sudan, 2011 provides that, 'The judiciary shall be structured as follows (a) the supreme Court (b) Courts of Appeal; (c) High Court; (d) County Court; and (e) Other courts or tribunals in accordance with the provisions of this Constitution and the law.'

¹⁹² Leila Chirayath. L.C. and others 2005, 'Customary Law and Policy Reform: Engaging with the Plurality of justice', background paper prepared for World Development Report 2006: Equity and Development, the World Bank, Washington DC (2005) p. 2.

¹⁹³ Section 99 (7) (a),(b) & (c) of the Local Government Act, 2009, Laws of South Sudan.

¹⁹⁴ Mading F. Deng. M.D. 2004, *Tradition and Modernization: A Challenge for Law among the Dinka of the Sudan* 3rd edition, Kush Inc. Washington D.C, p. 88.

¹⁹⁵ Section 99 (5) of the Local Government Act, 2009.

¹⁹⁶ Section 99 (5) of the Local Government Act, 2009, Laws of South Sudan.

¹⁹⁷ Section 5 of the Local Government Act, 2009, Laws of South Sudan.

2.5.2. The “B” Courts or Regional Courts:

The ‘B’ Court is the second highest customary court in the hierarchy of customary courts. section 100 (1) of The Local Government Act, 2009 provides that ‘There shall be established in each County, ‘B’ Courts or Regional Courts, as the case may be, which shall be customary Courts.’¹⁹⁸ The Court is composed of the Head Chief as the Chairperson of the court with the Chiefs as members.¹⁹⁹ The Head Chief as the Chairperson of the ‘B’ court is responsible for the administration of the customary law courts of the ‘Payam’.²⁰⁰ According to Section 5 of Local Government Act, a ‘Payam’ means the second tier of the local government which is a coordinative unit of a County and which exercises delegated powers from the County Executive Council.²⁰¹ In terms of accountability, Section 100 (6) provides that, ‘The Chairperson of the ‘B’ or regional Courts shall be answerable to the Paramount Chief for the performance of the Court’.²⁰²

This Court has both original and appellant jurisdiction. It acts as court of first instance in; (a) major customary disputes; and (b) minor public order cases.²⁰³ The other cases in which the ‘B’ or Regional Court has jurisdiction or competence to decide include;²⁰⁴

(a) Major customary civil suits of marriage;

(b) Divorce, adultery and elopement;

(c) Inheritance;

(d) Child rights and care;

(e) Women rights; and

(f) Customary land disputes.

¹⁹⁸ Section 100 (1) of the Local Government Act, 2009, Laws of South Sudan.

¹⁹⁹ Section 100 (5) of the Local Government, 2009, Laws of South Sudan.

²⁰⁰ Section 100 (7) of the Local Government Act, 2009 Laws of South Sudan.

²⁰¹ Section 5 of the Local Government Act, 2009 Laws of South Sudan (Section 5 is the interpretation section to the Act).

²⁰² Section 100 (6) of the Local Government Act, 2009, Laws of South Sudan.

²⁰³ Section 100 (2) of the Local Government Act, 2009, Laws of South Sudan.

²⁰⁴ Section 100 (4) of the Local Government Act, 2009, Laws of South Sudan.

The appellate jurisdiction of this Court is in respect of appeals against decisions of the ‘A’ or Executive Chiefs Court.²⁰⁵

The concern about the jurisdiction of the ‘B’ Court is in relation to minor public order cases as provided under Section 102 (2) (b) of the Local Government Act.²⁰⁶ Cases against public order should have been left to the statutory courts. The reasoning is that these cases are well stipulated under the Penal Code Act, 2009. Sections 79-86 list public order cases to include; Public Violence, Participating in Gathering with Intent to Promote Public Violence, Breaches of the Peace or Bigotry, Obstructing or Endangering Free Movement of Persons or Traffic, Possession of Articles for Criminal Use, Disorderly Conduct in Public Place, Causing Offence to Persons of a Particular Race, Religion, etc, Possession of Offensive Weapons at Public Gatherings, Disrupting a Public Gathering.²⁰⁷

By the customary court entertaining matters of public order, it does not only create confusion on its jurisdiction, but also on the law to apply whether statutory or customary law as some customary courts resort to applying statutes instead of customary law. Article 167 (3) of the Transitional Constitution of South Sudan, 2011 is to the effect that the Courts shall apply customary law subject to this Constitution.²⁰⁸ This provision extends only to customary matters and not to criminal cases. Confusion often arises when the customary courts apply customary law in resolving criminal matters and vice versa.

2.5.3. The ‘A’ or Chief Courts:

The ‘A’ court is established under Section 101 (1) of the Local Government Act, 2009. It provides that, ‘There shall be established in each ‘Boma’, ‘A’ or Chief Courts which shall be

²⁰⁵ Section 100 (3) of the Local Government Act, 2009, Laws of South Sudan.

²⁰⁶ Section 100 (2) (b) of the Local Government Act, 2009, Laws of South Sudan.

²⁰⁷ Chapter V11, sections 79-86 of the Penal Code Act, 2009, Laws of South Sudan.

²⁰⁸ Article 2167 (3) of the Transitional Constitution of South Sudan, 2011, if strict interpretation is given, the courts under this particular article that are supposed to apply customary law are customary law courts because statutory courts are provided for under articles 122-134.

the customary courts of first instance.²⁰⁹ A 'Boma' is the basic administrative unit of a County and it exercises delegated powers within a County.²¹⁰ The 'A' Court is a Court of first instance and composed of the Chief as the Chairperson of the Court and the Sub-Chiefs as members.²¹¹ The Chairperson of the Court is responsible for the administration of the Court and is accountable to the Head Chief for the performance of the Court.²¹² Appeals against 'A' Court decisions lie with the 'B' or Regional Court. According to Section 101 (2) of the Local Government Act, 2009, the competence or jurisdiction of the 'A' Court is to handle the following matters;²¹³

- (a) Family disputes;*
- (b) Traditional feuds;*
- (c) Marriage suits; and*
- (d) Local administrative cases.*

2.5.4. Town Bench Courts:

According to the Local Government Act, 2009, the Town Bench Courts are to be established in the areas of Town Councils, one at the level of the town and equivalent to "B" or Regional Courts and one equivalent to "A" Courts in the areas under the town's Quarter Councils.²¹⁴ Appeals against Town Bench Courts lie with the County Court Judge of First Grade. The jurisdictions of Town Bench Courts are to decide on;

- (a) Administrative cases;*
- (b) Customary civil suits;*
- (c) Rates, excise and other service provision related disputes; and*
- (d) Public order cases.*

Apart from the Town Bench court being established under the Local Government Act, it is purely not a customary court as such given the nature of its jurisdiction. The lacuna in the law is

²⁰⁹ Section 101 (1) of the Local Government Act, 2009, Laws of South Sudan.

²¹⁰ Section 5 of the Local Government Act, 2009, Laws of South Sudan.

²¹¹ Section 101 (3) of the Local Government Act, 2009, Laws of South Sudan.

²¹² Section 101 (3) & (4) of the Local Government Act, 2009, Laws of South Sudan.

²¹³ Section 101 (2) of the Local Government Act, 2009, Laws of South Sudan.

²¹⁴ Section 102 (1), (2) of the Local Government Act, 2009, Laws of South Sudan.

that the composition and administration of this court is not defined. However, in this court there are sometimes Chiefs and retired civil servants as lay Judges.

2.6. Guiding Principles in the Customary Law Courts:

John Wuol Makec, asserts that a justice system cannot effectively be achieved if there are no principles or rules to guide the court.²¹⁵ Equally true is the fact that a system of law, whose objective is undoubtedly the administration of justice must embody some form of guiding principles or procedures, however rudimentary it may be.²¹⁶ Perhaps, the strongest influence for the law recognizing these principles is the desire to achieve positive outcome for certain types of cases in the customary law Courts.²¹⁷ O.O. Elechi points out that African indigenous or customary justice system employs restorative and transformative principles in conflict resolution.²¹⁸ He adds that this justice system is process-oriented rather than rule based.²¹⁹ Armstrong adds that, its emphasis is on the processes of achieving peaceful resolutions of disputes rather than adherence to the rules as the basis of determining disputes.²²⁰

Section 98 (3) of the Local Government Act, 2009 provides that;

‘In deciding cases, the customary Law Courts shall, inter alia apply the following principles;’²²¹

(a) Justice shall be done to all, irrespective of social, economic and political status, race, nationality, gender, age, religion, creed or belief;

(b) Justice shall neither be delayed nor denied;

(c) Adequate compensation shall be awarded to the victims of wrongs;

²¹⁵ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London. Page 216.

²¹⁶ Ibid Page 217.

²¹⁷ Dematteo David. D.D. and others, 2013 ‘Community-based alternative for justice-involved individuals with severe mental illness: Diversion, Problem–Solving courts, and reentry’, *Journal of Criminal Justice* 41, 64-71 p. 64.

²¹⁸ Oke Elechi, O.E. 2004, ‘Human Rights and the African Indigenous Justice system’, a paper presented at the 8th international Conference of the international Society for the Reform of Criminal Law, (August 8-12, 2004) Montreal, Quebec, Canada, P. 18.

²¹⁹ Ibid.

²²⁰ Ibid

²²¹ Section 98 (3) (a), (b), (c), (d) & (e) of the Local Government Act, 2009, Laws of South Sudan.

(d) Voluntary mediation and reconciliation, agreements between parties shall be recognized and enforced;

(e) Substantive justice shall be administered without any due regard to technicalities.'

The customary justice principles as embedded in the law are applied by the customary law courts in order to create a reconciliation which brings the two belligerent sides together through intercession of chiefs/elders, leading to acceptance of responsibility and an indication of repentances.²²² Nsereko argues that this legal process focuses mainly on the victim rather than the offender and the goal of justice is to vindicate the victim and protect his/her right.²²³ The imposition of punishment on the offender was designed to bring about the healing of the victim rather than to punish the offender just for punishment sake.²²⁴ Accordingly, among the principles provided for under section 98 (3) of the Local Government Act, 2009²²⁵ compensation, mediation and conciliation are the most used and often adopted by the customary law courts in resolving disputes in South Sudan.

2.6.1. Compensation:

Section 98 (3) (c) of the Local Government Act, 2009 provides that, 'adequate compensation shall be awarded to the victims of wrongs'.²²⁶ Compensation refers to a monetary or material payment to compensate for a loss or damage.²²⁷ Nsereko argues that in a customary justice system, when there is any conflict rather than punish the offender for punishment sake, the offender is made to pay compensation to the victim and compensation goes beyond restitution. It also represents a form of apology and atonement by the offender to the victim and the

²²² International Institute for Democracy and Electoral Assistance; 2008, 'Traditional Justice and Reconciliation after a violent Conflict: Learning from African Experiences', Stronmsborg, Stockholm, Sweden p. 107.

²²³ Nsereko N, 1992, 'Victims of Crime and their Rights. In Criminology in Africa' in Tibamanya Mwene Mushanga (edn.) Rome: United Nations Interregional crime and Justice Research Institute (UNICRI) 1992.

²²⁴ Ibid.

²²⁵ Section 98 (3), (c) & (d) of the Local Government Act, 2009, Laws of South Sudan.

²²⁶ Section 98 (3) (c) of the Local Government Act, 2009, Laws of South Sudan.

²²⁷ Oxford Dictionary of Law, page 109.

community.²²⁸ The customary law courts adopt compensation in a wide range of cases such as murder, adultery, theft and damage to property. The form and mode of compensation varies depending on the tribe.²²⁹ The cattle keeping tribes always pay compensation in terms of cows and this therefore follows that, the customary courts in the various areas awards compensation in terms of the resources available to that particular community.²³⁰ Section 71 of the Re-Statement of Bahr El-Gazal Region Customary Law (Amendment) Act, 1984 for instance, provides that, 'A person who causes the death of another is bound with his relatives on the paternal side to pay 'apuk' (compensation) of 30 cows to the relatives of the deceased.'²³¹

As seen from section 71 of the Re-Statement of Bahr El-Gazal Region customary Law (Amendment) Act, 1984, the principle of compensation as applied entails the concept of collective responsibility by the accused person's family, clan or community.²³² This does not mean that all of those who are eligible or obliged to contribute will be charged in court.²³³ The suspect or tortfeasor is tried alone; the responsibility of the other people comes into play when the suspect (tortfeasor) is found guilty of the offence and ordered to pay compensation.²³⁴

This is so because the legal rights and duties are primarily attached to a group rather than to individuals.²³⁵ The individual plays a relatively subordinate role. Very often, the members of the group, as individuals are only users of collective rights belonging to the family, clan, tribe or ethnic group as a whole.²³⁶ It therefore follows that a law breaking individual thus transforms

²²⁸ Nsereko N; 1992. 'Victims of Crime and their Rights. In Criminology in Africa' in Tibamanya Mwene Mushanga (edn.) Rome: United Nations Interregional crime and Justice Research Institute (UNICRI) 1992.

²²⁹ Samson S. wassara; Traditional Mechanisms of Conflict Resolution in South Sudan (Berghof Foundation for peace Support, Berlin, 2007, p. 9.

²³⁰ Ibid.

²³¹ section 71 of the Re-Statement of Bahr El-Gazal Region Customary Law (Amendment) Act, 1984.

²³² Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London. p. 200.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Penal Law Reform International 2000, *Access to justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice systems*, Astron Printers, London, 2000, p. 23.

²³⁶ Ibid.

his/her group into a law breaking group, for in his/her dealings with others, he/she never stands alone. In the same vein, a disputing individual transforms his/her group in a disputing group and it follows that if he/she is wronged, he/she may depend upon his/her group for vengeance, for in some vicarious manner, they too have been wronged.²³⁷ This therefore means that a legal subject is construed very differently in the common-law and the customary justice system. As an atom in the common law system and as a person inextricably linked to family, clan or group²³⁸ thus the justification for compensation award affecting the entire group.

The arrangements to pay compensation are not part of the court proceedings but can be made outside court. According to John Wuol Makec, in most of the cases, the Chief whose kinsman has been convicted for the death of another person will deliberate with his people on the amount of contribution by each person or family towards the compensation.²³⁹ John Woul Makec adds that the objective of compensation as applied by the courts, is the restoration of the social equilibrium disturbed since African customary law is largely positive and not negative. This makes it less concerned with punishment but rather the restoration of the social equilibrium or peace in the community as one of the core principal objectives of the customary law courts.²⁴⁰ Oko Elechi adds that the customary justice system, supports the offenders by persuading them to understand and accept responsibility for their actions. Accountability may result in some discomfort to the offender, but not harsh as to degenerate into further antagonism and animosity.²⁴¹ Obligations must be achievable hence processes recognize and respond to community bases of crime and above all efforts are made to disprove the wrong

²³⁷ Ibid p. 23.

²³⁸ Ibid.

²³⁹ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London. p. 199.

²⁴⁰ Ibid

²⁴¹ Oko Elechi. O.E. 2004, 'Human Rights and the African Indigenous Justice system'. a paper presented at the 8th international Conference of the international Society for the Reform of Criminal Law (August 8-12, 2004) Montreal, Quebec, Canada, P. 19.

doing, rather than the wrong-doer.²⁴² Elechi continues that underlying this approach, is the belief that all human beings are important and are not expandable.²⁴³

In a comparative manner, the principle of compensation is not only limited to customary law court, but is also applied in the formal courts in all civil cases and in all criminal matters. Section 21 (1) of the Penal Code Act, 2008 provides that; ‘A Court which convicts any person, whether or not the said Court passed any sentence as set forth in section 8, may order the offender to pay compensation to any person injured by his or her offence, if such a compensation is in the opinion of the Court recoverable in a civil suit.’²⁴⁴

Section 206 (b) of the Penal Code Act, 2008 provides that, ‘If a person causes the death of another person commits the offence of murder and upon conviction can be sentenced to death or imprisonment for life and may also be liable to a fine provided that the, 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.’²⁴⁵

This principle has been interpreted by the Courts in South Sudan for instance in the case of Buong Akec Chol and Others Vs. New Sudan.²⁴⁶ In this case, the appellants were involved in a tribal or sectional fight leading to death of two people. The High Court convicted them on murder and were sentenced to death. They appealed to the Court of Appeal against the sentence on the ground that they ought to have been sentenced to pay the customary blood compensation. The issue was whether the death penalty is precluded by customary law local practice? Jok, J.A at page 128 held that;

“As for the sentence handed down on the four accused by the High Court, I am of a different opinion perhaps because of my way of interpretation of the proviso of section

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Section 21 (1) of the Penal Code Act, 2008, Laws of South Sudan.

²⁴⁵ Section 206 (b) of the Penal Code Act, 2008, Laws of South Sudan.

²⁴⁶ Buong Akec Chol and Others Vs. New Sudan, Criminal Appeal No. 95 of 2001, Court of Appeal at Rumbek, The South Sudan Law Reports, 2004, The South Sudan Law Society, pp. 122-124.

*158 of the Penal Code (now 206 (b)) which states in the last paragraph that, 'provided that if the practice of paying compensation is observed in the area the 'dia' or compensation shall be paid', the County of the appellants is such an area where the practice of paying 'dia' or compensation is observed. This should be the sentencing policy in my opinion as long as Section 158 of the Penal Code of 1994 is there, this section can only change after the amendment of the Penal Code. I therefore rule that the above three prisoners to jointly pay compensate to the relatives of the deceased by paying a total of 31 heads of cattle.'*²⁴⁷

Justice Jok's position was followed in the case of Agok Marial Dier Vs. New Sudan, Court of Appeal Criminal Appeal No. 01 of 2002. In the leading judgment of Thik, C.J at page 138, the court held that;

*'The Courts practice under Judicial Circular 18 of the Old Sudan was that the express wishes of the relatives of the deceased in respect of 'dia' or customary compensation settlement have always been upheld by confirming ultimate court of the land. There is no reason why the Court of Appeal in New Sudan cannot follow this time-honoured practice; it being the ultimate confirming court in the New Sudan'.*²⁴⁸

He continued that, *'For this reason, I do hereby alter the death sentence passed against the prisoner Agok Marial Dier and substitute the same with penal servitude for 8 years, with effect from the date of arrest. The prisoner should pay thirty-one heads of cattle in compensation to the relatives of the deceased'.*²⁴⁹

Similar trends have been followed in the Supreme Court in the case of Dakabai and Others Vs. The Government of South Sudan, Criminal Appeal No. 20 of 2011. In this case, the appellant was charged with murder under section 206 of the Penal Code Act, 2008, tried by a Special Court, convicted and sentenced to pay compensation of 51 heads of cattle to the relatives of

²⁴⁷ Ibid, Justice Jok's judgment at pages 128-129.

²⁴⁸ Agok Marial Dier Vs. New Sudan, Court of Appeal criminal Appeal No. 01 of 2002, The South Sudan Law Reports, 2004, pp. 134-140 at p. 138.

²⁴⁹ Ibid.

the deceased, a fine of 3,000 SDG (Sudanese pounds) and an additional 10 heads of cattle for using a deadly weapon (a rifle).The conviction and sentence were upheld by the Court of Appeal of Greater Bahr El Ghazal Court of Appeal. He appealed to the Supreme Court against the decision of the Court of Appeal. The Supreme Court upheld the decision of the lower courts. Justice Aleu A. jok at page 9 held that, the appeal be dismissed and confirm the findings (conviction), penalties and the orders of compensation passed against the appellant as decided by the Special Court and confirmed by the Court of Appeal.²⁵⁰

However the application of the customary law principle of compensation as much as it is intended to restore peace and harmony in the community.²⁵¹ There are divergent views proposing for it to be scraped from the criminal laws. As the, then Chief Justice Thiik's observations in the case of John Mathiang Bol and Others Vs. New Sudan, Court of Appeal Criminal Case No. 20 of 2001, observed at page 112;

"I wish to state my earnest hope that the current law review process of our laws would correct what I regard as serious flaw under the provisions of Section 158 (now 206) of the Penal Code. There is a tenable interpretation of the proviso resulting in the many convicted murderers walking away in liberty for doing no more than to hold out that they are ready and willing to pay the customary compensation to the relatives of the victims. At the end of the day, they walk in freedom amidst the relatives of the deceased victims even after they have absolutely failed to pay the promised 'dia' or compensation settlement. In the end, another innocent life, a distant relative of the absconding murderer is needlessly killed in revenge thereof.²⁵² He held that, 'I find no reason to interfere with the death penalty passed against this appellant as upheld by my learned colleague, the deputy Chief justice. I am not persuaded to the interpretation of the proviso to Section 158

²⁵⁰ Dakabai and Others Vs. The Government of South Sudan, Supreme Court Criminal Appeal No. 20 of 2011 (unreported).

²⁵¹ Wuol Makec John .W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London.p. 199.

²⁵² John Mathiang Bol and Others Vs. New Sudan, Court of Appeal, Criminal Case No. 20 of 2001, The South Sudan Law Reports 2004, pp. 105-140-117 at p. 112.

*(now 206) of the Penal Code, as maintained by my colleague, Justice Aleu, that death sentence is ruled out by the said proviso’.*²⁵³

Dr. Samson Wassara one of the leading writers on South Sudan customary justice system re-echoes the views of Justice Thiik when he argues that, the seizure of cattle for example in Dinka and Nuer communities as ransom for compensation on the basis for settling disputes over restitution rekindles more violence in cattle owning communities.²⁵⁴ Wassara further notes that in some communities, customary compensation involves taking of girls for compensation, an act that is considered inhuman as it reduces a human being to the status of property.²⁵⁵

2.6.2. Mediation and Conciliation:

According to section 98 (3) (d) of the Local Government Act, 2009, in resolving disputes, the Customary Law Courts are supposed to apply the principle of voluntary mediation, conciliation and to recognize and enforce the agreements between the parties.²⁵⁶ Section 4 of the Land Act, 2009 defines mediation as a process for resolving disputes where two or more parties to a dispute meet and attempt to settle a matter with assistance of a mediator.²⁵⁷ In their book, ‘Conflict Resolution: An Introductory Text (2005)’, authors Ellis and Anderson defines mediation as a process in which one or more third parties facilitate healing, story-telling, negotiations, communication and problem-solving between parties-in-conflict who make decisions on outcomes.²⁵⁸

According to the Penal Law Reform International, mediation is at the core of the customary justice system. Whereas under the formal courts, a victim is effectively relegated to a status of

²⁵³ John Mathiang Bol and Others Vs. New Sudan, Court of Appeal Criminal Case No. 20 of 2001, The South Sudan Law Reports 2004, pp. 105-140, at p. 114.

²⁵⁴ Samson S wassara. S.S. 2007 “Study on Traditional Mechanisms of Conflict Resolution in South Sudan” *Berghof Foundation for peace Support*, Berlin, p. 10.

available online at www.berghof-peacesupport.org (accessed on March 20, 2012).

²⁵⁵ Ibid.

²⁵⁶ Section 98 (3) (d) of the Local Government Act, 2009, Laws of South Sudan.

²⁵⁷ Section 4 of the Local Government Act, 2009, Laws of South Sudan.

²⁵⁸ www.metros.ca date visited on November 18, 2012

a witness in criminal cases, under the customary justice system, a victim is central to the decision making process.²⁵⁹ In the customary law courts, a dispute cannot be settled unless the victim as well as the offender agrees with the final decision.²⁶⁰ John Wuol Makec explains that, the primary objective of mediation as applied by the customary law courts is to ensure that peace and harmony is restored between the contesting parties through compromise and reparation for the wrong committed, hence the court procedure being greatly influenced by the process of conciliation.²⁶¹

Wuol Makec adds that, the aim of conciliation is to prevent or avoid enmity or ill-feelings which a judicial decision might produce between the parties.²⁶² Harmony will not be restored unless the parties are satisfied that justice has been done.²⁶³ The complainant will accordingly want to see that the legal rules, including those which specify the appropriate recompense for a given wrong are applied by the court. However, the party at fault must be brought to see how his/her behavior has fallen short of the standard set for a particular role as involved in the dispute and must come to accept that the decision of the court is a fair one.²⁶⁴ On his/her side he wants an assurance that once he/she has admitted his/her error and made recompense for it he/she will be re-integrated into the community.²⁶⁵

Wul Makec argues that, in order to emphasize the importance of mediation and conciliation even when the matter is before court, the elders who take part in the court proceedings may

²⁵⁹ Penal Law Reform International, 2000. *Access to justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice systems*, Astron Printers, London, p. 23.

²⁶⁰ Ibid

²⁶¹ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London. p. 220.

²⁶² Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London. p. 199.

²⁶³ Penal Law Reform International, 2000. *Access to justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice systems*, Astron Printers, London.p. 24.

²⁶⁴ Ibid .

²⁶⁵ Allot Anthony. A.A. 1970, *New Essays in African Law*, Butterworths, London, p. 145.

still insist and endeavor to persuade the court to refer the matter for settlement outside court, or they may urge the court to persuade the parties to make some compromise.²⁶⁶

In support of the above point, Section 98 (3) (d) of the Local Government Act, 2009 allows the Court on its own to initiate a settlement of the dispute outside the court.²⁶⁷ The enmity and ill feelings are avoided because self-determination is the heart of the Customary Justice System. The parties are authors of their own fate. The parties themselves create the terms of settlement or agreement.²⁶⁸ They are more likely to conform to them than if the terms of agreements were created by others and they were ordered to comply with them. The Chiefs make a final decision but based on the parties' wishes which creates a win-win situation.²⁶⁹ This pretty creates the difference between the customary courts' approach to dispute resolution and the formal courts that largely employ an adversarial approach.

The concept and use of mediation in dispute resolution is well known and applied all over the world for instance, in Japan the use of the criminal justice system to settle disputes is very minimal in comparison to other countries especially with a developed economy and legal structure like the United States of America.²⁷⁰ In Japan, dispute settlement emphasizes compromise; mediation and consensus as the norm.²⁷¹ Further, informal procedures used by police, neighbors, or families are preferred to formal court process for dealing with offenders.²⁷² John Wuol Makec points out that mediation and conciliation processes in the customary law courts in South Sudan can be equated to the formal court with a system of

²⁶⁶ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London . p. 199.

²⁶⁷ Section 98 (3) (d) of the Local Government Act, 2009, laws of South Sudan.

²⁶⁸ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London. p. 199.

²⁶⁹ Ibid.

²⁷⁰ Harry R. Dammer, and Jay S. Albanese, 2011, 5th edition, *Comparative Criminal Justice Systems*, Wadsworth Cengage Learning USA P. 89.

²⁷¹ Ibid.

²⁷² Ibid.

arbitration or Alternative Dispute Resolution (A.D.R).²⁷³ He urges that the customary law courts or communities of South Sudan practice advanced A.D.R.²⁷⁴ The 'A.D.R' is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. Customary Law Courts adopt a persuasive role in order to induce an agreement, compromise or settlement and this role is so common in cases involving family relations.²⁷⁵ The job of the court is less to find facts, state the rules of law, and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community.²⁷⁶

2.6.3. Restitution:

Restitution is another principle applied by the customary law courts in deciding cases or in conflict resolution. The principle is always applied in cases of fraudulent loss of property. Restitution is the return of property to the owner or person entitled to possession. If one person has unjustifiably received either property or money, he has the obligation to restore it to the rightful owner in order that he should not be unjustly enriched or retain unjustified advantage.²⁷⁷ According to the customs of the people of South Sudan, the true owner of property is not deprived of his title when possession of such property has been transferred through theft, robbery, breach of trust, deceit or fraud and any other wrongful means.²⁷⁸

The true owner is entitled to trace any property that has been transferred to any person in the already stated ways and if the property has been damaged, destroyed, perished or got injured the true owner has to be restituted or is entitled to recover damages against the person who

²⁷³ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London, p. 220.

²⁷⁴ Ibid.

²⁷⁵ Cherry Leonardi. C.L. & Musa Abdul Jalil M.A. 2011, *Traditional Authority, Local Government & Justice in The Sudan Hand Book*, James Currey, New York ,USA, 108-144 p. 118.

²⁷⁶ Allot Anthony. A.A. 1970, *New Essays in African Law*, Butterworths, London, p. 145.

²⁷⁷ Oxford Dictionary of Law, sixth edition, page 464.

²⁷⁸ Section 56 of the Re-Statement of the Bahrel-gazal region Customary Law (amendment) Act, 1984. Bharel-Ghazal region Act No.1 of 1984.

made a wrongful transfer or acquired possession from him.²⁷⁹ Just like other principles applied by the customary law courts in conflict resolution, the main objective of restitution is to ensure that there is no unjustified enrichment to the detriment or expense of others.²⁸⁰

In some communities such as the Dinka for instance, if you steal one cow you are supposed to pay back two. This is not only intended to restore the owner to his previous position as if nothing had happened but it also works as a deterrent measure against others who may want to engage in the same anti-social or anti community behaviors. Restitution cuts across the various tribes in South Sudan and it takes different forms based on the different communities and the resources available but the principle remains the same. In concluding this section on the guiding principles on dispute resolution in the customary law courts, it has to be born in mind that their applicability is more of a cultural obligation than a legal requirement.

In conclusion therefore, it is worth noting that as much as the law clearly establishes the principles that have to be followed by the customary law courts in the adjudication of cases, these principles are quite often abused by the courts as it may violate peoples' rights due to the form that it takes for instance, the use of girl child for compensation or collective responsibility to compensate of one member of the family or clan.

2.7. The Role of Traditional Authorities in Administering Justice:

Cherry Lenoardi, notes that the term 'Traditional Authority' is a problematic term because it is often taken to indicate an age-old and untouched custom.²⁸¹ He continues that it is important to realize that traditional leaders across South Sudan in fact reflect a far more modern uneasy accommodation between the government and society.²⁸² Section 5 of the Local Government

²⁷⁹ Sections 56, 57 and 58 of the Re-Statement of the Bahrel-gazal region Customary Law (amendment) Act 1984. Bharel-Ghazal region Act No.1 of 1984.

²⁸⁰ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London, p. 199.

²⁸¹ Cherry Leonardi. C.L. & Musa Abdul Jalil M.A. 2011, *Traditional Authority, Local Government & Justice in The Sudan Hand Book*, James Currey, New York ,USA, 108-144 at p. 110.

²⁸² Ibid.

Act 2009, defines Traditional Authority to mean the traditional community body with definite traditional administrative jurisdiction within which the customary powers are exercised by the traditional leaders on behalf of the community.²⁸³

Before discussing the role of traditional authorities under the current constitutional framework, it is imperative to explain historical aspects of the institution. In his highly regarded and equally provocative book, 'Citizen and Subject', Mamdani focuses on the role, function and structure of native authorities and customary law within the colonial state. He calls the state form of colonial powers established for dealing with the native question a 'decentralized despotism'. He argues that the colonial state was bifurcated on one hand, a centrally organized policy with rights and liberties, ruled directly by the appointed or elected governor. More so, most invariably for the white settlers; on the other hand, a decentralized native inhabited by indigenous Africans or natives with few or no rights and liberties, ruled indirectly via Chiefs appointed and maintained by the colonial administration.²⁸⁴ To achieve this, there was need to establish institutional and political control over traditional authorities by developing a system of indirect rule.²⁸⁵

In a similar tone to Mamdani, Bennett asserts that, the British officers sought to overcome the limitation of their resources through alliances with traditional rulers.²⁸⁶ They also encountered a bewildering multiplicity of local authority and by their own admission had to construct new kinds of leadership altogether and the nature of their authority would be changed by the demands of mediating with the colonial government.²⁸⁷ According to Motala, this was necessary because in most traditional African societies the law existed outside the framework

²⁸³ Section 5 of the Local Government Act, 2009, Laws of South Sudan.

²⁸⁴ Mamdan Mahmood M.M. 1996, *Citizen and Subject: Contemporary Africa and the Legacy of late Colonialism*, Princeton University press p. 16.

²⁸⁵ Ibid.

²⁸⁶ T.W. Bennett, 2008 "Customary Law in South Africa (Part 1)", *Journal of the Diplomacy and Law*, Oxford, Volume 43, P 30 – 64 p. 65.

²⁸⁷ Cherry Leonardi. C.L. & Musa Abdul Jalil M.A. 2011, *Traditional Authority, Local Government & Justice in The Sudan Hand Book*, James Currey, New York ,USA, 108-144 at p. 110.

of a state in the modern sense. Obedience to the law was maintained through custom and religion as well as established patterns of sanction and the pre-colonial African societies had a high level of organization in which political, economic and social control was maintained.²⁸⁸

Bennett argues that as the influence of the traditional rulers and their threat to British authority waned, the use of their services began to appear more attractive.²⁸⁹ Leonardi explains that much of the variation in the legitimacy and effectiveness of the traditional authority in South Sudan today arises from the contingency of its origin and the variable success of individual leaders in maintaining authority within their community, while at the same time working with government.²⁹⁰

The Transitional Constitution of South Sudan, 2011 recognizes the institution and role of Traditional Authority. Article 167 thereof provides that;²⁹¹

- (1) *'The Institution, status and role of Traditional Authority, according to customary law are recognized under this Constitution;*
- (2) *Traditional Authority shall function in accordance with this Constitution, the State Constitutions and the law;*
- (3) *The courts shall apply customary law subject to this Constitution and the law.'*

Article 168 (1) is to the effect that legislation of the state shall provide for the role of Traditional Authority as an institution at local government level on matters affecting the local

²⁸⁸ Motale Ziyad. M.Z. 1989 "Human Rights in Africa: a Cultural, Ideological and Legal Examination" *Hastings International and Comparative Law Review* 12, 373-410 (as quoted by Elechi 2004, P. 14).

²⁸⁹ T.W. Bennett, 2008 "Customary Law in South Africa (Part 1)", *Journal of the Diplomacy and Law*, Oxford, Volume 43, P 30 – 64 p. 65.

Ryle John. R.J. 2011, *Peoples and Cultures of the Two Sudans* in *The Sudan Hand Book*, James Currey an Imprint of Boydell & Brewer Ltd, NY, USA , 31-42 at p. 3.

²⁹⁰ Cherry Leonardi. C.L. & Musa Abdul Jalil M.A. 2011, *Traditional Authority, Local Government & Justice* in *The Sudan Hand Book*, James Currey, New York ,USA, 108-144 at p. 111.

²⁹¹ Article 167 (1) (2) & (3) of the Transitional Constitution of South Sudan, 2011.

community.²⁹² In line with this Constitutional provision, the Local Government Act, 2009 Section 112 (1) thereof provides that;

‘The Traditional Authority shall be an institution of traditional system of governance at the State and local government levels which shall:²⁹³

- (a) Have semi-autonomous authorities at the State and local government levels;*
- (b) Administer customary law and justice in the customary law courts in accordance with the provisions of this Act and any other applicable law; and*
- (c) Exercise deconcentrated powers in the performance of executive functions at the local government levels within their respective jurisdictions.’*

This current legislation confers upon Traditional Authorities (chiefs) both judicial, executive (administrative) and legislative powers or functions. The Traditional Authorities are not only used to settle disputes and perform executive functions,²⁹⁴ but also the Chiefs play a key role in tax collection particularly social service tax and customary courts fees and fines.²⁹⁵ Social service tax is called head tax in some other places usually paid by every male of 18 years and above. The Chiefs also help in conducting assessment of who is eligible to pay the tax. Section 121 (1) of Local Government Act, 2009 provides for the function for the council of Traditional Authority, in this context the functions of the Council are the very roles that each individual traditional authority leader performs.

It provides that;

‘(1) the functions and duties of the South Sudan Council of Traditional Authority leaders shall be but not limited to;

- (a) Provide a forum for dialogue with all levels of government on matters of custom and traditions of the people of South Sudan;*

²⁹² Article 168 (1) of the Transitional Constitution of South Sudan, 2011.

²⁹³ Section 112 (1) of the Local Government Act, 2009, Laws of South Sudan.

²⁹⁴ Cherry Leonardi. C.L. & Musa Abdul Jalil M.A. 2011, *Traditional Authority, Local Government & Justice in The Sudan Hand Book*, James Currey, New York ,USA, 108-144 p. 108.

²⁹⁵ Section 74 (a) (ii) and (b) (vi) of the Local Government Act, 2009.

- (b) Intervene to resolve inter-tribal disputes by applying customary and traditional conflict resolution mechanisms;*
- (c) Foster peace building and resolution of conflicts through mediation and other conciliatory mechanisms;*
- (d) Advise all levels of government on matters of traditions and customs of the people of South Sudan.'*

In regard to the judicial role, as provided under Section 112 (1) (b) of the Local Government Act, 2009, it is the role of Traditional Authority to administer customary law and justice in the customary law courts.²⁹⁶ In so doing, they preside over all the disputes as Chiefs in their respective communities and as members of the customary law council which is the highest customary law authority in the County.²⁹⁷ In exercising this competence, the traditional authorities are supposed to administer justice to all irrespective of social, economic and political status, race, nationality, gender, age, religion, creed or belief.²⁹⁸

Kofi Annan, the then UN secretary-general, officially acknowledged this role in his August 2004 report on, 'The Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies', 'Due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them continue their often vital role and to do so in conformity with both international standards and local tradition' (United Nations 2004: 12).²⁹⁹ Traditional Authorities are key players especially in land disputes. Section 92 of the Land Act, 2009 provides that;³⁰⁰

- (1) "Where a dispute related to land occurs, the parties may agree to use a mediation to resolve the dispute.*

²⁹⁶ Section 122 (1) (b) of the Local Government Act, 2009, Laws of South Sudan.

²⁹⁷ Section 93 of the Local Government Act, 2009, Laws of South Sudan.

²⁹⁸ Section 98 (3) (a), (b) (c) & (d) of the Local Government Act, 2009, Laws of South Sudan.

²⁹⁹ International ideas, a study on Traditional justice and Reconciliation after a Violent conflict, learning from African experience. 2008, page 3 www.idea.int web visited on 20/10/2012.

³⁰⁰ Section 92 (1) & (2) of the Land Act, 2009, Laws of South Sudan.

(2) The mediator shall be designated upon request by the parties from amongst members of the County Land Authority, the 'Payam' Land Council or Traditional Authority depending on the area where the conflict occurs."

John Woul Makec, points out that unlike under the adversarial system in the formal courts where the Judge is required to behave as a referee or umpire by not taking part in the judicial contest.³⁰¹ The procedure under the customary law courts makes the Judge (Chief) an investigator of facts during the trial. Wuol Makec further notes that, by the traditional authority playing the role of investigator cannot be construed as amounting to partiality; it is the duty of the court to elicit the best evidence from the litigants in order that he/she may pass the correct judgment. This investigatory role is justified on the ground that there are no lawyers in the customary law courts to assist the litigants as well as the Court³⁰². The Local Government Act also mandates the Traditional Authority as members of the customary law council responsible for the selection, recruitment and training of the customary law courts staff and maintenance of professional standards in the accordance with the applicable rules and regulation.³⁰³

In the context of executive powers, Traditional Authority provides leadership and governance at the community level. Section 112 (1) of the Local Government Act, 2009 provides that, 'The Traditional Authority shall be Semi- autonomous authorities at the State and local government levels and exercise deconcentrated powers in the performance of executive functions at the local government levels within their jurisdictions.'³⁰⁴ In South Sudan, very little work can be done at the community level without the involvement of the traditional authorities. In some places, the local communities have never known any other government structures beyond that of the Chief. The Traditional Authorities co-operate with the government in execution of public

³⁰¹ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London. P. 218.

³⁰² *ibid*

³⁰³ Section 93 (2) of the Local Government Act, 2009, Laws of South Sudan.

³⁰⁴ Section 211 (1) (a) & (b) of the Local Government Act, 2009, Laws of South Sudan.

policies and development projects benefiting the communities and this falls within their administrative and governance role.

Traditional Authorities are key players in the promotion of peace in the communities, while there are several interethnic conflicts in Southern Sudan. Nonetheless, the bottom line is that traditional approaches led by traditional leaders have played and are able to play a substantial role in solving interethnic conflicts. Indeed, the history of Southern Sudan demonstrates that traditional negotiations resulted in the restoration of peace. It has nevertheless to be seen whether the new dimension of interethnic fights, which are said to be caused by interests to destabilize, can be managed by traditional means.³⁰⁵ It also remains to be seen if the Traditional Authority can stem a conflict whose cause could be external to both sides in the conflict.

As an executive arm of government, Traditional Authorities play a major role of upholding, promoting, protecting and preserving the culture, language, traditions of the communities. The communities in South Sudan put all their trust in matters of tradition and culture in the Chiefs who are seen as the custodians of morals and culture. This is part of the criteria for one to be selected or elected as a Chief; he/she must be a person of high moral integrity and commands a lot of respect in the society.

2.7. Challenges Facing the Customary Law Courts and Traditional Authorities in South Sudan:

Despite the enormous work that the customary law courts and the Traditional Authorities are doing in adjudicating over disputes and filling a gap that the formal courts and other government structures have left, the customary justice system faces very threatening challenges. For instance, the fusion of judicial, executive and legislative powers in traditional

³⁰⁵ Mafred O. Hinz. M.H.2009, 'Report on the strategy to strengthen South Sudan Customary Law as a source of law in an autonomous legal system'. South Sudan Ministry of Justice library and the UNDP South Sudan Rule of Law/governance unit. p. 78.

authority is a source of complaint.³⁰⁶ This is based on the concept of modern democratic principles of separation of power on the one hand and the granting of various executive/administrative and judicial functions to the traditional authorities on the other hand.³⁰⁷ This poses the question of how the democratic principle shall be implemented when all the powers of the three arms of government are vested in one institution the traditional authority and being executed by the same individuals.³⁰⁸

The traditional authorities are by law mandated to execute all those functions. The Local Government Act, 2009 Section 19 (2) provides that, 'The traditional leaders shall represent their people in the County Legislative Council as determined by this Act and regulations there under'.³⁰⁹ Section 122 (1) (b) and (C) provides that, 'The traditional authorities shall be institutions of the traditional system of governance at the State and local government Level which shall, 'administer customary law and justice in the customary law courts in accordance with the applicable law; and exercise deconcentrated powers in the performance of executive functions at the local government level within their respective jurisdictions'.³¹⁰

The doctrine of separation of powers means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction.³¹¹ Montesquieu recognized the basic pillars of State authority to include the executive, legislature

³⁰⁶ Cherry Leonardi. C.L. & Musa Abdul Jalil M.A. 2011, *Traditional Authority, Local Government & Justice in The Sudan Hand Book*, James Currey, New York ,USA, 108-144 p. 112.

³⁰⁷ Markus V. Hoehne.M.H. 2008. ' Study of Traditional Authority and Local Government in Southern Sudan', Max Planck Institute for Social Anthropology Halle/Saale, Germany. p. 2.

³⁰⁸ Article 51 of the Transitional Constitution of South Sudan, 2011 provides that, 'The National Government shall have the following organs: (a) The Legislature (b) the Executive; and (c) the Judiciary.'

³⁰⁹ Section 19 (2) of the Local Government Act, 2009, Laws of South Sudan.

³¹⁰ Section 122 (1) (b) & (C) of the Local Government Act, 2009, Laws of South Sudan.

³¹¹ Judge Phineneas M. Mojapelo 2012, 'The Doctrine of Separation of powers: A South African perspective', Paper presented at the Middle Temple South Africa Conference, September 2012, p. 1.

available online at <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf> (accessed on 21/9/2013).

and judicial functions; and he added that these functions ought to vest in three distinct organs with, in each instance, different office bearers. He supported his argument by saying;³¹²

*'All would be in vain if the same person, or same body of officials, be it the nobility or the people, were to exercise these three powers: that of making laws, that of executing the public resolution, and that of judging crimes or disputes of individuals.'*³¹³

Judge Phineas M. Mojapelo argues that Montesquieu's idea eventually developed into a norm consisting of four basic principles; (a) the principle of trias politica, which simply requires a formal distinction to be made between the legislative, executive and judicial components of the state authority. (b) The principle of separation of personnel, which requires that the power of legislation, administration and adjudication be vested in three distinct organs of state authority and that each one of those organs be staffed with different officials and employees, that is to say, a person serving in the one organ of state authority is disqualified from serving in any of the others. (c) The principle of separation of functions which demands that every organ of state authority be entrusted with its appropriate function only, that is to say, the legislature ought to legislate, the executive to confine its activities to administering the affairs of the state and the judiciary to restrict itself to the function of adjudication. (d) The principle of checks and balances, which requires that each organ of the state is entrusted with special powers designed to keep a check on the exercise of functions by others in order that the equilibrium in the distribution of powers may be upheld.³¹⁴

By the executive, legislative and judicial powers all being infused in the institution of traditional authorities, it defeats the objective of the doctrine of separation of powers that is intended to prevent abuse of power within the different spheres of government.³¹⁵ Sir William Blackstone echoed these sentiments thus;³¹⁶

³¹² Ibid, p. 2.

³¹³ Ibid.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Blackstone William B.W. 1775, *Commentaries on the laws of England in Four Books 7th edn*, Vol. 1 at p. 146.

'in all tyrannical governments, the supreme magistracy, or the right both of making and enforcing the laws, is vested in one and the same man or one and the same body of men; and can whenever these two powers are united together, there can be no public liberty. The magistracy may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed in quality of the dispenser of justice, with all power which he as legislature thinks proper to give himself. But where the legislature and executive authority are in distinct hands, the former will take care not to entrust the later with so large a power, as may tend to subversion of its own independence, and therewith of the liberty of the subject.'

He continues thus;

'In this distinct and separate existence of the judicial power, in a particular body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservatives of the public liberty, which cannot subsist long in the state, unless the administration of common justice be in some degree separated from both the legislative and also from executive power. Where it is joined, the life, liberty and property of subject would be in the hands of arbitrary Judges whose decisions would be then regulated only in their own opinions and not by any fundamental principle of law'.

Markus V. Hoehne points out that, It has to be concluded that the infusion of functions and the role of traditional authorities undermines the emergence of modern state structures at the local level. He urges that this is the case if one accepts the high standards of modern democracy in general and democratic decentralization in particular.³¹⁷

The Customary Law Courts are operating independent of the formal courts. It is not clear whether they form part of the judiciary or they are totally a different judicial body. The only linkage in the law is that the appeals against the decisions of the 'C' Court which is the highest

³¹⁷ Markus V. Hoehne. M.H. 2008, *Traditional Authority and Local Government in Southern Sudan*, Max Planck Institute for Social Anthropology Halle/Saale, Germany, p. 30.

Customary Law Court lie with the County Judge of First Grade.³¹⁸ Ordinarily, it would be the judiciary with the mandate on the establishment and administration of the customary law courts and ensuring that all their proceedings confirm to the laws. This gap in the administration and clarity in the laws has led to proliferation of customary law courts all over the country which in turn puts in question the quality of justice in the customary law courts.³¹⁹ If the judiciary is the only body in which the judicial powers are vested³²⁰ and the customary law courts being responsible for adjudicating for most of the cases, then the judiciary should be duty bound to supervise the technical function of the customary law courts while the local government for the administrative function of the courts, like collecting the fees and fines according to well established procedures.³²¹

In the same context with regard to accountability, it has to be stated that there is limited accountability regarding exercise of traditional authority. Traditional leaders mostly hold their position for life time. Even if they perform poorly, they rarely can be effectively sanctioned. In theory, at least they can also hold their position without being responsive to many of their subjects as they do not have to face periodical democratic elections.³²² Section 117 (5) of the Local Government Act, 2009 provides that; 'All the selected Chiefs whose Chieftainship constitutes the institution of governance shall assume office according to their customs and practices save that, such customs and practices shall be in conformity with the provisions of this Act and any other applicable law'.³²³ Leonardi, states that the critics claim instead that the system of traditional authority provides only privileges and abuse, that is undemocratic,

³¹⁸ Section 99 (2) of the Local Government Act, 2009, Laws of South Sudan.

³¹⁹ Report on the workshop to harmonize customary law and statutory systems (November 13-15) Ministry of Justice, Republic of South Sudan.

³²⁰ Article 122 (2) of the Transitional Constitution of South Sudan, 2011.

³²¹ Report on the workshop to harmonize customary law and statutory systems (November 13-15) Ministry of Justice, Republic of South Sudan.

³²² Markus V. Hoehne. M.H. 2008, *Traditional Authority and Local Government in Southern Sudan*, Max Planck Institute for Social Anthropology Halle/Saale, Germany. p. 8.

³²³ Section 117 (5) of the Local Government Act, 2009, Laws of South Sudan.

exclusionary and regressive, and/or that it has been corrupted beyond redemption by the political manipulation in recent years.³²⁴

Leonardi adds that, the variance in opinion is shaped by individual positions, age and stance. On the whole, the younger, urbanized and educated South Sudanese are more likely to criticize the failings of traditional authority with wide spread association with heredity and gerontocracy.³²⁵ But there is also immense variance across South Sudan among the traditional authorities themselves. Some have succeeded, perhaps over generations in retaining their respect and even affection of their people, largely through maintaining the delicate balance by which they keep government satisfied whilst still appearing to defend the interests of the local communities. The means by which they achieve this sometimes may be by confrontation with government as long as they convince their people that they are acting in their interest. Leonardi emphasizes that the apparent political malleability can therefore be a tactical strategy by the traditional authority to maintain good community relations with governments. On the other hand, many enjoy limited popular support because they are seen to have placed government or their own interests above the good of the community or chiefdom.³²⁶ However, in reality most traditional authorities are well acquainted with the needs of the local people among whom they live. More so, if compared with weakness or absence of government structures in many rural areas, traditional authority still perform better than the state institutions.³²⁷

Despite the prevalence of the customary law courts and traditional authorities all over South Sudan, the system has been almost completely neglected by the government and remains undeveloped even at the time when it is proved that the traditional authorities are the ones adjudicating upon the majority of the cases. They have no offices or court rooms, they function under trees, with no clerks to help in recording cases, only the court presidents are paid by the

³²⁴ Cherry Leonardi C.L. & Musa Abdul Jalil M.J. 2011; *Traditional Authority, Local Government & Justice*, in *The Sudan Hand Book*, James Currey an Imprint of Boydell & Brewer Ltd, NY, USA, p. 116.

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Markus V. Hoehne. M.H. 2008, *Traditional Authority and Local Government in Southern Sudan*, Max Planck Institute for Social Anthropology Halle/Saale, Germany, p. 8.

local government but other court members are not paid. This in a way has escalated corruption among the customary law courts and greatly compromises the work of traditional authorities both in their judicial and executive functions thus compromising the quality of justice in the customary law courts.³²⁸

2.9. Chapter Conclusion:

As seen from the historical background of the customary law courts during the colonial time, the structure of the courts and their competence has virtually reminded the same with very minor changes. However, the striking point in the new constitutional arrangement is the recognition of customary law courts and the institution of traditional authority in the transitional constitution of South Sudan 2011, thus, according the same constitutional recognition to the customary law courts like the statutory courts. By and large, the customary law courts and the entire customary justice system is now gauged by the constitutional standards and not like in the past when it was viewed in the lenses of common law which was improper as it subordinated the customary justice system with its institutions to the common law. The major concern with the current arrangement of the customary law courts is to clearly stipulate their proper jurisdiction as the law is not very clear specifically on criminal matters, it is hard to ascertain a criminal matter with a customary interface as the law does not define it. It would also be of great value if the doctrine of separation of powers is upheld so that if a chief is a judge, he does not again form part of the executive and legislature at the local government level to avoid conflict of interest. This in turn will improve on the quality of justice in the customary law courts.

In terms of the customary law courts following the modern constitutional norms such as human rights values and standards the transitional constitution 2011, requires all institutions and individuals to uphold the bill of rights enshrined in the constitution and the customary law courts are not an exception to the human rights notion as required by the constitution.

³²⁸ Report on the workshop to harmonize customary law and statutory systems (November 13-15) Ministry of Justice, Republic of South Sudan.

CHAPTER THREE:

HUMAN RIGHTS AND CUSTOMARY LAW COURTS.

3.1. Introduction:

The discussion of human rights in the customary law courts is noteworthy because human rights standards offer the possibility of fairness in three dimensions of justice which include structural, procedural and normative dimensions.³²⁹ The structural dimension of justice consists of participation and accountability. In this regard, particular attention must be paid to the rights of groups not strongly represented in the customary courts which include women, minorities and children. Procedural justice consists of guidelines for adjudication processes that ensure that the parties to a dispute are treated equally and that their case is decided by a person with no interest in the case. Finally, normative justice consists of substantive rules that protect the rights of vulnerable groups such as women and children.³³⁰ It is these three concepts that will be evaluated in terms of the principles, procedures and punishments/remedies available in the customary courts in order to ascertain the presence or absence of human rights and its effect on the justice processes in the customary law courts. This chapter therefore, examines the concept of human rights in the customary justice system in general and the human rights issues in the customary law courts in specific terms. An analysis is specifically made on the current constitutional provisions relating to human rights and how these rights are dealt with in the proceedings of the customary law courts. Emphasis is put on the legal requirement for the customary law courts to observe, uphold and give effect to the Bill of Rights as contained in the Transitional Constitution of South Sudan, 2011.³³¹

³²⁹ U.N.D.P, U.N Women, U.N.I.C.E.F, 2012, Study on 'informal Justice System: Chartering a way for human based engagement', page 11.

³³⁰ Ibid.

³³¹ Article 9 (2) of the Transitional Constitution of South Sudan, 2011, provides that, 'The rights and freedoms of individuals and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of Government and by all persons'.

Section 112 (2) of the Local government Act, 2009, Laws of South Sudan provides that, 'In the exercise of the delegated and/or deconcentrated powers, the Traditional Authorities shall observe, respect and adhere to the Act of Rights as enshrined in the Comprehensive Peace Agreement, the National, Southern Sudan and State Constitutions'.

Section 98 (3) of the Local Government Act, 2009³³² lays down the principles that guide the customary law courts in deciding cases, most of which rotate around the concepts of mediation, compensation and restitution. It is the application of these principles that differ from one ethnic group to another.³³³ It is also the application of the principles in the various communities' customary law courts that cause the violation and infringement of peoples' rights than settling of cases, for instance, taking a girl for compensation is an inhuman act which reduces a human being to the status of property. The issue of passing judgment on a person based on uncontested immaterial evidence such as magic or sorcery is in itself unfair trial.³³⁴ The sentencing of people to corporal punishment not prescribed by the law violates freedom from torture and inhuman and degrading treatment.³³⁵

To that end, the discussion is done in relation to the various norms, practices and traditions in the customary law courts in order to determine whether such practices or procedures give effect to the Bill of Rights as required by the Transitional Constitution of South Sudan, 2011. In so doing, emphasis is put on the right to equality before the law in relation to discrimination based on gender and sex, right to fair trial, protection against inhuman and degrading treatment and harmful practices against women such as use of girls for compensation in blood feuds or settling of murder cases and sentencing of people to non-judicial corporal punishment. The major argument herein is that in a constitutional democracy with modern human rights values, everything must be measured upon the standard morals and ethics set by the Constitution as the supreme law of the land³³⁶ and the customary law courts cannot be an

³³² Section 98 (3) of the Local Government Act, 2009, laws of South Sudan, provides that, 'In deciding cases, the Customary Law Courts shall, *inter alia* apply the following principles;

- (a) Justice shall be done to all, irrespective of social, economic and political status, race, nationality, gender, age, religion, creed or belief;
- (b) Justice shall neither be delayed nor denied;
- (c) Adequate compensation shall be awarded to victims of wrongs;
- (d) Voluntary mediation and reconciliation agreements between parties shall be recognized and enforced; and
- (e) Substantive justice shall be administered without due regard to technicalities'.

³³³ Samson S wassara. S.S. 2007 "Study on Traditional Mechanisms of Conflict Resolution in South Sudan" *Berghof Foundation for peace Support, Berlin*, p. 11.

³³⁴ Ibid.

³³⁵ Article 18 of the Transitional constitution of South Sudan, 2011, provides that, 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

³³⁶ Article 3 of the Transitional Constitution 2011, provides that;

exception. It is also noted that most of the practices in the customary law courts that are inconsistent with human rights norms are not based on any legal provision as there is currently no law that prescribes the procedures, punishments or sentences that can be imposed by the customary law courts. Thus the question is whether such practices can still be tenable in constitutional democracy. This section also volunteers proposals on how the customary justice system can be improved in order to reflect the human rights values in the adjudication of cases by the customary law courts.

3.2. Concept of Human Rights in Customary Justice:

The constitutional recognition of the customary justice system in South Sudan's legal system can be looked at as a scheme to restructure the justice system based on African tradition to mirror the modern international concepts of human rights.³³⁷ Bennett notes that these aims are closely associated with the realization of the right of a so-called 'rights cultures', a code of norms derived in part from the international human rights movement.³³⁸ Human rights are both a cultural and value laden concept, which symbolizes rights which a person is entitled to for no other reason than his or her humanity. The concept of human rights gained international status in 1948 when the General Assembly of the United Nations proclaimed a general Charter on human rights, the Declaration on Human Rights and Fundamental Freedoms.³³⁹ Later, two

(1) 'This Constitution derives its authority from the will of the people and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of government throughout the Country.

(2) The authority of government at all levels shall derive from this Constitution and the law.

(3) The states' constitutions and all laws shall conform to this Constitution'.

³³⁷Part of the Preamble to the Transitional Constitution of South Sudan, 2011, states that, 'Determined to lay the foundation for a united, peaceful and prosperous society based on justice, equality, respect for human rights and the rule of law'.

Section 11 (2) of the Local Government Act, 2009 Laws of South Sudan, provides that, 'Every ethnic and cultural community within a local government territory shall have the right to freely enjoy and develop its cultures and practice its own customs and traditions while recognising and respecting the rights of others'.

³³⁸ T.W. Bennett, 1991, "The Compatibility of African Customary Law and Human Rights", *AcTA JURIDICA*, 18, 18-35 at page 22.

³³⁹ Universal Declaration of Human Rights, 1948, the preamble states that, 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures,

detailed treaties were negotiated; the Convention on Economic, Social and Cultural Rights and the Convention on Civil and Political Rights both entered into force in 1976. The core objective of the Charter on human rights and its associated conventions is to act as a common standard of achievement for all people.³⁴⁰ Moskowitz describes this thus;

*‘Because there is but a single definition of man, so there can be, but a single measure of man, its dimensions are fixed drives of human spirit, with all the elemental pleasures and pains of flesh, the human spirit, with all its institutions, feelings, fantasies and impulses, which seek the good, the true and the beautiful; and the power of human mind, which is the basis of man’s claim to dignity and worth, to freedom and justice’.*³⁴¹

Questions often arise as to whether justice processes and procedures under the customary law courts or indigenous/traditional justice systems meet international human rights standards. Underlying this thinking is the belief that pre-colonial Africa had no concept of human rights, and so could not practice human rights. As such, human rights are only achievable through liberal regimes since they are products of western culture.³⁴² This would therefore follow that African post-colonial states and institutions modeled after western states are in a better position to protect the rights of victims of crimes, offenders and the community. This thinking therefore, presupposes that the concept of human rights is strange to the African customary justice system that is deep rooted and has its origin in the norms, values, traditions and practices of the African people.

Bennett, one of the leading writers on the African customary law, asserts that Africa has an indigenous doctrine of human rights that was misunderstood or overlooked by European

national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction’.

³⁴⁰ Elechi O Oko. E.O. 2004. “Human Rights and the African Indigenous Justice System”. Paper presented at the 18th International Conference on the society for reform of criminal Law, university of Wisconsin (August 8-12, 2004). page 5.

³⁴¹ Ibid.

³⁴² Ibid available at www.isrcl.org (accessed on September 20, 2010).

colonists, who were too patronizing to believe that the continent could produce such a code.³⁴³ He continues that, because decision making was consensual and because society was not profit-oriented (wealth was distributed on the basis of need), African societies had generated an ethical system that served the goal of human dignity as effectively as any western code.³⁴⁴ This is true in certain respects, for instance, the notion of due process of law permeated indigenous law, deprivation of personal liberty or property was rare, security of persons was assured and the customary legal process was characterized not by unpredictable and harsh encroachments upon the individual by the sovereign, but by meticulous procedures for decision making.³⁴⁵ In this regard, the African conception of human rights was an essential aspect of African humanism sustained by religious doctrines and principles of accountability to the ancestral spirits. However, Howard (as quoted by T. W Bennett) is of the view that;

*“The so-called ‘African concept of human rights’ is therefore actually a concept of human dignity. The individual feels respect and worthiness as a result of his or her fulfillment of the socially approved role. Any rights that might be held are dependent on one’s status or contingent on one’s behaviour. Such a society may well provide the individual with a great deal of security and protection. He adds that one may even argue that people may well value such dignity more than their freedom to act as individuals.”³⁴⁶ In relatively homogeneous static and small scale societies, this tendency is likely to be stronger than the tendency towards individualism”.*³⁴⁷

In other words, there is confusion between the means (human rights) and the end (human dignity) they are supposed to serve. Howard’s argument holds water in that the customary justice system and customary law solely relies on the right to culture and this is more of a group right than an individual right. For instance, Article 33 of the Transitional Constitution of South Sudan, 2011 (T.C.S.S) provides that,

³⁴³ T.W. Bennett, 1991, “The Compatibility of African Customary Law and Human Rights”, *ACTA JURIDICA*, 18, 18-35 at p. 30.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Ibid

*‘Ethnic and cultural communities shall have a right to freely enjoy and develop their particular cultures. Members of such communities shall have the right to practice their beliefs, use their languages, observe their religion and raise their children within the context of their respective cultures and customs in accordance with this Constitution and the law’.*³⁴⁸

In addition, Article 38 (1) (d), (e) and (f) of the T.C.S.S, 2011 requires all levels of Government to recognize cultural diversity and encourage such diverse cultures to harmoniously flourish and find expression. This can be done through education and the media, protecting cultural heritage, monuments and places of national, historic or religious importance from destruction, desecration, unlawful removal or illegal export, and protecting, preserving and promoting the cultures of the people which enhance their human dignity and are consistent with the fundamental objectives and principles set out in the Constitution.³⁴⁹ The rights protected by Articles 33 and 38 of the Transitional Constitution of South Sudan, 2011 are significant both for the individual and communities they constitute. E.S Nwauche points out that the protection of diversity is not affected through giving legal personality to a group as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the State not to deny them the right to collectively profess and practice their religion, language and culture.³⁵⁰

The right to culture is an internationally recognized right as most of the human rights instruments mention the protection of cultural rights.³⁵¹ For instance, Article 22 (1) of the African Charter on Human and Peoples’ Rights, 1986 provides that,

³⁴⁸ Article 33 of the Transitional Constitution of South Sudan, 2011.

³⁴⁹ Article 38 (1) (d, e and f) of the Transitional Constitution of South Sudan, 2011.

³⁵⁰ E.S.Nwaucha, E.N. 2010 “The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana” *Tulane European & Civil Law Forum* 25, 37-62, p. 70.

³⁵¹ T.W. Bennett, 1991, “The Compatibility of African Customary Law and Human Rights”, *ACTA JURIDICA*, 18, 18-35 at page 22.

*‘All peoples shall have a right to their economic, social and cultural development with regard to their freedom and identity and in equal enjoyment of the common heritage of mankind’.*³⁵²

The Charter seeks to embody both the traditional, ‘first generation’ rights found in the 1948 Universal Declaration of Human Rights and the ‘second generation’ rights to culture contained in the 1966 International Convention on Economic and Social Rights. Article 15 of the Covenant recognizes the right of everyone to participate in cultural life.³⁵³

South Sudan is yet to ratify all the core international human rights instruments including the International Convention on Civil and Political Rights (I.C.C.P.R), the International Convention on Social Economic and Cultural Rights (I.C.S.E.C.R) with the exception of the Convention on Elimination of Discrimination against Women (C.E.D.A.W) which was ratified on 9th September 2014. South Sudan is also a party to the main regional human rights instrument, the African Charter on Human and Peoples’ Rights. However, the Transitional Constitution of the Republic of South Sudan, 2011 made far-reaching provisions in its Bill of Rights, which guaranteed civil, political, economic, social and cultural rights to citizens of the Republic including; right to life and human dignity, personal liberty, equality before the law, right to fair trial, freedom from slavery, servitude and forced labour, right to found a family, rights of women, rights of the child, freedom from torture, right to litigation, restriction on death penalty, privacy, religious rights, freedom of expression and media, freedom of assembly and association, right to participation and voting, right to own property, right to education, rights of persons with special needs and the elderly, public health care, right of access to information, rights of ethnic and cultural communities, and right to housing.³⁵⁴

The most remarkable point about the Bill of Rights in the T.C.S.S, 2011 is that it makes it a covenant between the people and the Government and the basis of social justice and equality.

³⁵² Article 22 of the African Charter on Human and Peoples Rights, 1986.

³⁵³ Article 15 of the International Convention on Economic, Social and Cultural Rights, 1966.

³⁵⁴ Article 10-34 of the Transitional constitution of South Sudan 2011.

In this regard, Article 9 of the T.C.S.S, 2011 states 3.*inter alia* that,³⁵⁵

- (1) 'The Bill of Rights is a covenant among the people of South Sudan and between them and their Government at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy.*
- (2) The rights and freedoms of individuals and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of Government and all persons.*
- (3) All rights and freedoms enshrined in international human rights treaties, conventions and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill.*
- (4) This Bill of Rights shall be upheld by the Supreme Court and other competent Courts and monitored by the Human Rights Commission'.*

The purposive interpretation of Article 9 of the T.C.S.S, 2011 would therefore, suggest that there can never be justice in any court proceedings if the Bill of Rights is not respected in the due process of the law. Article 14 of the T.C.S.S, 2011 is the equality provision and it provides that, 'All persons are equal before the law and are entitled to the equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status'.³⁵⁶ In the same vein, Section 112 (2) of the Local Government Act, 2009 provides that, 'In exercise of the delegated and/or decocentrated powers, the Traditional Authorities shall observe, respect and adhere to the Bill of Rights as enshrined in the Comprehensive Peace Agreement, the National Constitution of South Sudan and State Constitutions'.³⁵⁷ To that end, these legal provisions are intended to ensure that the concept of human rights is part and partial of the customary justice system given the thinking that African customary law is opposed to human rights norms. It therefore follows that, without

³⁵⁵ Article 9 of the Transitional Constitution of South Sudan, 2011.

³⁵⁶ Article 14 of the Transitional Constitution of South Sudan, 2011.

³⁵⁷ Section 112 (2) of the Local Government Act, 2009, Laws of South Sudan.

these safe guards or guarantees, the constitutional securing of human rights can have little meaning if a personal law (customary law) denies any individual the basic rights which find expression in the laws governing personal relationships.³⁵⁸ However, despite all these constitutional safe guards, there remain several human rights issues in the customary law courts that need to be addressed.

3.3. Human Rights Issues in the Customary Law Courts of South Sudan:

The human rights issues that typically arise with respect to the operation of the customary law courts are quite well known and numerous writings on the subject have cited them. Wojkowska (2006), for example, describes the following weaknesses in human rights protection in the customary law courts; lack of equality before the law, unfair trial as courts do not always give the accused the chance to be heard or adequately represented, decisions that are inconsistent with basic principles of human rights, for example, imposing cruel and inhuman forms of punishment such as flogging or banishment or that perpetuate the subordination of women such as the use of girls for compensation, holding individuals accountable to social collectivities and broader social interests.³⁵⁹

3.3.1. Equality before the Law:

The Bill of Rights in the T.C.C.S, 2011 is formed by and crafted in line with the Universal Declaration of Human Rights (U.D.H.R). At the heart of this Constitution lie the principles of equality and non-discrimination.³⁶⁰ To that end, South Sudan is governed by a Constitution that guarantees all citizens equal protection of the law. Article 14 of the T.C.C.S provides that, 'All persons are equal before the law and are entitled to the equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion,

³⁵⁸ T.W. Bennett, 1991, "The Compatibility of African Customary Law and Human Rights", *ACTA JURIDICA*, 18, 18-35 , p 23.

³⁵⁹ U.N.D.P, U.N Women, U.N.I.C.E.F, 2012, Study on 'Informal Justice System: Chartering a way for human based engagement' page 11.

³⁶⁰ Bonolo Ramadi Dinokopila, B.R. 2012, 'The constitutionality of judicial corporal punishment in Botswana', *University of Botswana law journal*, volume 15, p. 3.

birth, locality or social status’.³⁶¹ Section 98 (3) (a) of the Local Government Act, 2009³⁶² provides that, ‘In deciding cases, the Customary Law Courts shall, *inter alia* apply the following principles; justice shall be done to all, irrespective of social, economic and political status, race, nationality, gender, age, religion, creed or belief’.³⁶³ The foregoing legal provisions are quite not followed in the customary courts especially in matters of domestic violence when women report such cases against their husbands. In South Sudan, customary law allows a certain level of violence in the home and permits a man to ‘discipline’ his wife but not the other way round. Although such cases are rarely reported, when women apply to the customary courts if the violence exceeds a culturally construed as reasonable level, in dealing with the case, the customary law courts and the individual Chiefs often condone violence as a normal cultural practice. However, if a wife is found to be ‘behaving badly’ or not fulfilling her duties, such as failing to cook for her husband, insulting him, or drinking, she may end up being sentenced by the courts. The wives are sometimes punished more harshly than their offending husbands, for example, by receiving a larger number of lashings and this in itself deters many vulnerable women from reporting their cases to the customary law courts.³⁶⁴

This is not only discriminatory in nature because women are not accorded the same opportunity under the customary law to discipline their errant husbands, but it also entrances the cultural prejudices resulting in the widespread discrimination against women thus offending the constitutional concept of equality before the law as provided for under Article 14 of the T.C.C.S, 2011.³⁶⁵ With the same measure, it goes against the concept of the right to litigation guaranteed for all persons under the Transitional Constitution. Article 20 is to the

³⁶¹ Article 14 of the Transitional Constitution of South Sudan, 2011.

³⁶² Local Government Act, 2009, Laws of South Sudan.

³⁶³ Section 98 of the Local Government Act, 2009, Laws of South Sudan.

³⁶⁴ Small Arms Survey, 2012, ‘ Women’s security and law in South Sudan: Sudan Human security Baseline Assessment’ Geneva Switzerland, p.4 . available online at <http://www.smallarmssurveysudan.org>

³⁶⁵ Article 14 of the Transitional Constitution of South Sudan, 2011, provides that, ‘All persons are equal before the law and are entitled to the equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status’.

effect that no person shall be denied the right to resort to the courts of law to redress grievances whether against Government or any individual or organization.³⁶⁶ It is unlikely that a woman punished after reporting her abusive husband can again report another case. This coupled with ignorance and lack of legal aid awareness, creation to support access to justice for women, complicates matters more as many individuals do not even think that such discriminatory tendencies are in violation of the basic tenants of the Transitional Constitution of South Sudan, 2011.

The importance of the right to equality was emphasized in the famous South African case of *Fraser Vs. Children's Court, Pretoria North and others*, Mahomed, D.P had the following to say;

*"There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a ' . . . need to create a new order . . .' in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".*³⁶⁷

Mahomed, D.P's assertions are clearly in line with the preamble to the Transitional Constitution of South Sudan, 2011.³⁶⁸ The limitations are especially evident where the customary courts legitimise practices based on ethno-religious frameworks that tend to have particularly opposing consequences for women. That being the case, human rights standards should find their way into the traditional/customary justice system as part of a more peaceful, stable and accountable society.³⁶⁹ In order to achieve a stable accountable society with a customary justice system that respects and upholds the Bill of Rights, there is need to conduct a complete

³⁶⁶ Article 20 of the Transitional Constitution of South Sudan, 2011.

³⁶⁷ *Fraser Vs. Children's Court, Pretoria North and others*, 1997 (2) S.A 261 (CC); 1997 (2) BCLR 153 (CC) at paragraph 20.

³⁶⁸ Part of the Preamble to the Transitional Constitution of South Sudan states that, ' Recalling our long and heroic struggle for justice, freedom, equality and dignity in South Sudan; determined to lay the foundation for a united, peaceful and prosperous society based on justice, equality, respect for human rights and the rule of law'.

³⁶⁹ United Nations Development Programme, South Sudan, Manual for Training of Customary Judges, 2014.

overhaul of the present customary court practices and procedures. This on the face of it represents a social order that is seemingly acceptable but not based on the new constitutional dispensation which specifically requires the customary law courts and all individuals and institutions to promote the spirit, purpose and objects of the Bill of Rights.³⁷⁰

3.3.2. Right to Fair Trial:

Procedural justice consists of guidelines for adjudication processes that ensure that the parties to a dispute are treated equally, that their case is decided by a person with no interest in the case and who is obliged to render a decision solely on the basis of facts and objective rules rather than on personal preferences, and that anyone making an assertion or accusation must provide verifiable evidence to support it.³⁷¹ Under international human rights law, everyone has the right without discrimination to a ‘fair and public hearing’ in criminal and civil matters ‘by a competent, independent and impartial tribunal established by law’. Both the African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, based on the African Charter of Human and Peoples’ Rights, and the U.N Human Rights Committee’s *General Comment No. 32*, interpreting the International Covenant on Civil and Political Rights, emphasize that the Judges of customary courts must be both independent and impartial, and that proceedings before traditional courts must respect international minimum standards on the right to a fair trial and respect the equality of all persons without discrimination.³⁷² Principle Q (d) of the *Principles and Guidelines* also provides that States are to ensure and respect the independence and impartiality of such courts.³⁷³ Notwithstanding the fact that South Sudan has not yet ratified almost all the international and

³⁷⁰ Article 9 (2) of the Transitional Constitution of South Sudan, 2011, provides that, ‘The rights and freedoms of individuals and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of Government and by all persons’.

³⁷¹ U.N.D.P, U.N Women, U.N.I.C.E.F, 2012, Study on ‘Informal Justice System: Chartering a way for human based engagement’ page 11.

³⁷² International commission of Jurists (ICJ),2013, ‘South Sudan: an independent Judiciary in an Independent State’, ICJ, Geneva Switzerland, p. 25.

³⁷³ Ibid.

regional human rights instruments, it has similar provisions in the Transitional Constitution, 2011.

Article 19 of the Transitional Constitution of South Sudan, 2011 has very elaborative provisions on the right to a fair trial.³⁷⁴ Article 19 (3) of the T.C.S.S, 2011 specifically requires the courts including customary law courts to afford all parties involved in a dispute a fair trial. It provides that, 'In all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by a competent court of law in accordance with procedures prescribed by law'.³⁷⁵ The right to a fair trial is key to the integrity of legal proceedings.³⁷⁶

However, achieving this constitutional principle of fair trial in the customary law courts could be still far from reality especially in cases between men and women or between highly respected members of society and the disadvantaged groups like the poor. For instance, in cases involving women, the right to a fair trial is in most cases violated due to the composition of the court itself. The Chiefs who preside over customary courts are generally older men with deeply ingrained patriarchal views³⁷⁷ which are reflected in their decisions.³⁷⁸ To this end, such Chiefs are more easily swayed by men's interests and points of view and their judgments more often

³⁷⁴ 19 (1) An accused person is presumed to be innocent until his or her guilt is proved according to the law.

(2) Any person who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her.

(3) In all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by a competent court of law in accordance with procedures prescribed by law.

(4) A person arrested by the police as part of an investigation, may be held in detention, for a period not exceeding 24 hours and if not released on bond to be produced in court. The court has authority to either remand the accused in prison or to release him or her on bail.

(5) No person shall be charged with any act or omission which did not constitute an offence at the time of its commission.

(6) Every accused person shall be entitled to be tried in his or her presence in any criminal trial without undue delay; the law shall regulate trial in absentia.

(7) Any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice or to have legal aid assigned to him or her by the government where he or she cannot afford a lawyer to defend him or her in any serious offence.

³⁷⁵ Article 19 (3) of the Transitional Constitution of South Sudan, 2011.

³⁷⁶ Namakula Catherine. N.C. 2012, "Language rights in minimum guarantees of fair criminal trial", *The international journal of speech, language and the law* 19.1, 73-93 , p. 74.

³⁷⁷ Jan Arno Hessbruegge J.A., 2012 "Customary Law and Authority in a State under construction: The case of South Sudan" *African Journal of Legal Studies* 5, p 295-311. p. 308.

³⁷⁸ Small Arms Survey, 2012, 'Sudan Human Security Baseline Assessment' (HSBA) Geneva, Switzerland 2012, p. 4. <http://www.smallarmssurveysudan.org>.

than not are biased in favour of men.³⁷⁹ As a result, existing social hierarchies and inequalities are often reflected and reinforced in the dispute resolution system. Customary law courts' decisions generally reflect the thinking of a cross section of the population and their decisions.³⁸⁰ Holleman in his description of the trial in a *shona* court in Southern Africa puts this in perspective when he asserts that;

'The traditional hearing lapses into stages in which the court seems to disintegrate into a free-for all debating society without rules of precedence, speech or conduct. Everyone comes in and gives his opinion and the one who sits back, seemingly powerless, is the Chief himself... He is a good Chief when he knows how to listen patiently and watch faithfully... and the solution emerges as the common product of many minds. The Chief's decision is then as undramatic and uneventful as a full-stop after a long paragraph'.³⁸¹

In further regard to right to fair trial, Article 19 (3) of the T.C.S.S, 2011 is to the effect that in all civil and criminal proceedings, litigants should be entitled not only to a fair but also a public hearing.³⁸² As in many African countries, customary courts' proceedings in South Sudan are often held out in the open, for example, under large trees and community members are free to observe the proceedings. The issue here is not holding the proceeding in public for the sake of it but to ensure that justice is not only done but is also seen to be done. However, in the context of the customary courts in South Sudan, the notion of public hearing appears to have a negative impact on the decisions of the court especially in issues involving women. Normally, many more men than women attend the courts which can make them intimidating for a

³⁷⁹ Ibid.

³⁸⁰ U.N.D.P, U.N Women, U.N.I.C.E.F, Study on Informal Justice System: Chartering a way for human based engagement 2012, p. 22.

³⁸¹ Kayitare Frank. K.F. 2004, 'Respect of the right to a fair trial in indigenous African Criminal Justice Systems: The case of Rwanda and South Africa', LLM Dissertation submitted to the Faculty of Law of the University of Pretoria, p. 12.

Holleman, J.F. 1949, 'An anthropological approach to Bantu law: With specific reference to shona Law' 10 *Rhodes-Livingstone Journal*, 53.

³⁸² Article 19 (3) of the Transitional Constitution of South Sudan, 2011, provides that In all civil and criminal proceedings every person shall be entitled to a fair and public hearing by a competent court of law in accordance with procedures prescribed by law.

woman. Since public participation in the court proceedings is largely accepted, the Chiefs take crowd support and opinion into consideration, thus a largely male crowd can influence matters in favour of male litigants.³⁸³ To that end, matters are neither held in cases of sexual offences such as rape in an open court, and women are always required to testify in the public giving a full account of the story which many find humiliating and end up abandoning their cases for fear of further embracement. This inadvertently affects and violates their right to access to justice guaranteed under Article 20 of the T.C.S.S, 2011³⁸⁴ and their right to dignity under Article 16 (1) of the T.C.S.S, 2011.³⁸⁵

Customary law courts also include practices that discriminate against rape victims. A girl who has been raped is often stigmatized by society, which can affect her ability to marry and the amount of bride wealth that she can generate for her family. The customary court Judges will sometimes force the girl to marry her rapist as a way to avoid this social stigma and maximize her potential bride wealth.³⁸⁶ This practice contravenes Article 15 of the T.C.S.S, 2011 which provides 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'.³⁸⁷ Since the responses to sexual violence against women and girls are determined in part by their bride wealth value and the social relations that are at stake, customary courts typically view rape as an issue that demands social reparation, rather than justice for harm done to the individual. The customary courts sometimes view a mature woman who is raped to be unworthy of compensation or the pursuit of justice, while the rape of an unmarried young

³⁸³ Small Arms Survey, 2012, 'Sudan Human Security Baseline Assessment (HSBA)' Geneva, Switzerland, p. 4. <http://www.smallarmssurveysudan.org>.

³⁸⁴ Article 20 of the Transitional Constitution of South Sudan 2011, provides that, 'The right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to courts of law to redress grievances whether against government or any individual or organization'.

³⁸⁵ Article 16 (1) of the Transitional Constitution of South Sudan, 2011 provides that, 'Women shall be accorded full and equal dignity of the person with men'.

³⁸⁶ David K. Deng. D.D. 2013, study on 'challenges of accountability: an assessment of dispute resolution processes in rural South Sudan', *South Sudan Law Society*, p. 55.

³⁸⁷ Article 15 of the Transitional Constitution of South Sudan, 2011.

woman is considered to be a greater crime.³⁸⁸ The response does not necessarily look primarily to the harm done to the woman in question, but rather the harm to the family as a result of her diminished bride wealth. This unequal treatment of the same offence committed on the same sex discriminates against women on the basis of social status contrary to Article 14 on equality before the law.³⁸⁹

3.3.3 Use of uncontested Evidence:

In evaluating the concept of the right to a fair trial, there is need to also look at the quality of evidence that customary law courts sometime base on unverifiable evidence such as witch craft to deliver judgments. John Wuol Makec argues that justice cannot effectively be achieved if there are no rules of procedure and evidence to regulate how the rules of substantive law are to be applied. Hence, a system of law whose objective is undoubtedly the administration of justice must embody some form of procedure to provide a court of law with an effective mechanism to enable it to achieve a qualitative judgment in a given case,³⁹⁰ while safe guarding the rights of all parties. John's argument is that for there to be qualitative judgment and safe guard of human rights, there has to be rules of evidence and procedure. It is true that customary courts have their own unwritten procedures neither based on the Constitution nor on the concept of fair trial. For instance, the customary courts entertain cases involving immaterial evidence such as witch craft with no clear way of verifying it and punishments can be passed based on such superficial grounds without according the accused person the opportunity to rebut the evidence,³⁹¹ which grossly affects the litigant or the accused's right to

³⁸⁸ David K. Deng. D.D. 2013, 'study on challenges of accountability: an assessment of dispute resolution processes in rural South Sudan', *South Sudan Law Society*, p. 55.

³⁸⁹ Article 14 of the T.C.S.S, 2011, provides that, 'All persons are equal before the law and are entitled to the equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status'.

³⁹⁰ Wuol Makec John W.M, 1988, *The Customary Law of the Dinka People of Sudan: in comparison with aspects of western and Islamic Laws*, Afrowold Publishing Co. London, p. 217.

³⁹¹ Jan Arno Hessbruegge J.A., 2012 "Customary Law and Authority in a State under construction: The case of South Sudan" *African Journal of Legal Studies* 5, 295-311, p. 308.

defend him/herself.³⁹² The question that arises is whether relying on such evidence violates the litigant's right to a fair trial as he/she cannot call witnesses or challenge credibility of such evidence.

In the case of *Taban Dut Koding Vs. Macar Mailier*, Supreme Court Civil Review No. 7 of 2008, where the appellant lost 11 cows but did not know who stole them and consulted the spiritual leader who told him that it was the respondent who stole the cows and the court convicted the respondent on the evidence of the spiritual leader. The matter went up to the Supreme Court. While dismissing the case, Justice Lako Tranquilo Nyombe at page 5 noted that;

'It is really unfortunate that some of our professional Judges even at the High Court level still believe in spiritual leaders that they have the supernatural powers of knowing and identifying the thieves and other unseen matters and therefore refer matter to be settled by them. The statements which were believed to be from the super natural powers are not admissible as evidence to determine the rights of parties and any judgment based on such statements without hearing the parties and their witnesses is a real miscarriage of justice. Superstitious evidence which is not legally recognized and such practices is a real miscarriage of justice'.³⁹³

It can therefore be urged that a fair trial in a legal process is conducted with due regard to the rights of the parties and it figures prominently in efforts to guarantee human rights in any form of court proceedings.³⁹⁴ By the customary courts failing to adhere to the concept of fair trial, they do not only offend Article 19 (3) of the T.C.S.S, 2011, but they also fall short of the legal requirement set for them under Section 112 (2) of the Local Government Act, 2009. The said Section 112 (2) provides that, 'In the exercise of the delegated and/or deconcentrated powers,

³⁹² Article 19 (7) of the T.C.S.S, 2011, provides that, 'Any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice or to have legal aid assigned to him or her by the government where he or she cannot afford a lawyer to defend him or her in any serious offence'.

³⁹³ *Taban Dut Koding Vs. Macar Mailier*, Supreme Court of South Sudan, Civil Review No. 7 of 2008.

³⁹⁴ Namakula Catherine. N.C. 2012, 'Language rights in minimum guarantees of fair criminal trial', *The international journal of speech, language and the law*, p. 74.

the Traditional Authorities shall observe, respect and adhere to the Act of Rights as enshrined in the Comprehensive Peace Agreement, the National, Southern Sudan and State Constitutions'.³⁹⁵

3.3.4 Corporal Punishment as a form of Punishment:

The application of none judicial corporal punishment by the customary law courts in South Sudan is very prevalent and is one of the commonest forms of punishment imposed upon conviction by the customary law courts. Corporal punishment is always imposed in cases of adultery, domestic violence, theft, disturbing of public order and dishonesty. In countries like Botswana, corporal punishment is limited to offences created by the Penal Code or other written laws in force in Botswana,³⁹⁶ for instance, the Penal Code of Botswana provides that, 'No person shall be sentenced to undergo corporal punishment for any offence unless such punishment is specifically authorized by this Code or any other law'.³⁹⁷ South Sudan, however, has no similar provisions and does not have any written law prescribing for corporal punishment, instead at the heart of its Constitution is the principle of protection against torture, inhuman and degrading treatment. Article 18 of the T.C.S.S, 2011 is to the effect that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.³⁹⁸ Unfortunately, South Sudan has not had any legal challenge for the courts to pronounce themselves on the practice of flogging, caning and whipping of people in the customary law courts as a form of punishment. However, in other jurisdictions, this practice has been held to be unconstitutional as it is inhuman and degrading.

In the South African case of *State V Williams and others*, Constitutional Court Case No. 20 of 1994, the court declared corporal punishment unconstitutional on the grounds that it is inhuman and degrading both to the victim and person inflicting the punishment. The court held

³⁹⁵ Section 112 (2) of the Local Government Act, 2009, Laws of South Sudan.

³⁹⁶ Bonolo Ramadi Dinokopila. B.R. 2012 "The constitutionality of judicial corporal punishment in Botswana" *University of Botswana law journal* volume 15, p. 4.

³⁹⁷ Ibid, also see: Section 28, Cap 08:01, Laws of Botswana.

³⁹⁸ Article 18 of the Transitional Constitution of South Sudan, 2011.

that the severity of the pain inflicted is arbitrary, depending wholly on the person administering the whipping.³⁹⁹ Langa, J. delivering the unanimous judgment of the court said;

*‘Corporal punishment involves the intentional infliction of physical pain on a human being by another human being at the instigation of the State. This is the key feature distinguishing it from other punishments. The degree of pain inflicted is quite arbitrary, depending as it does on the person who is delegated to do the whipping. The court merely directs the number of strokes to be imposed. The objective must be to penetrate the levels of tolerance to pain; the result must be a cringing fear, a terror of expectation before the whipping and acute distress which often draws involuntary screams during the infliction. There is no dignity in the act itself; the recipient might struggle against himself to maintain a semblance of dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice which debases everyone involved in it’.*⁴⁰⁰

Langa, J. in paragraph 11-12, observed that, the South African jurisprudence has been experiencing a growing unanimity in judicial condemnation of corporal punishment for adults. Criticism of the practice has been consistent and emphatic, it being characterised as ‘punishment of a particularly severe kind, brutal in its nature, a severe assault upon not only the person of the recipient but upon his dignity as a human being’, ‘a very severe and humiliating form of punishment’, ‘cruel and inhuman punishment’. Lang, J. continues that this tone of condemnation is to be found not only in many decisions in this Country, but also in other jurisdictions. If adult whipping was to be abolished, it would simply be an endorsement by our criminal justice system of a world-wide trend to move away from whipping as a punishment.⁴⁰¹

³⁹⁹ State Vs. Williams and others (CCT20/94) [1995] ZACC 6; paragraph 11-12, 1995 (3) S.A 632 ; 1995 (7) BCLR 861 (CC) (9 June 1995).

⁴⁰⁰ Ibid. Also see: Bonolo Ramadi Dinokopila. B.R. 2012 “The constitutionality of judicial corporal punishment in Botswana” *University of Botswana law journal* volume 15.

⁴⁰¹ In the matter of : The State Versus Henry Williams, Jonathan Koopman, Tommy Mampa, Gareth Papier, Jacobus Goliath, Samuel Witbooi, Constitutional Court case no. 20/1994, paragraph 11-12.

Based on Justice Lang, J.'s observation, it would therefore follow that the customary law courts in South Sudan have a role to play in the promotion and development of a new culture founded on the recognition of human rights, in particular, with regard to those rights which are enshrined in the Constitution.⁴⁰² Article 10 of the T.C.S.S, 2011 requires all the courts to uphold and protect the Bill of Rights.⁴⁰³ As a way of re-enforcing the constitutional provisions, Section 112 (2) of the Local government Act, 2009 in a strongly mandatory tone provides that, 'The Traditional Authorities shall observe, respect and adhere to the Act of Rights as enshrined in the Comprehensive Peace Agreement, the National, South Sudan and State Constitutions'.⁴⁰⁴ To this end, the legal provisions require that, the customary law courts should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of individuals who appear before them. Vigilance is an integral component of the above role, for it is incumbent on structures set up to administer justice to ensure that as far as possible, these rights, particularly of the weakest and the most vulnerable groups, are defended and not ignored.⁴⁰⁵ One of the implications of the new constitutional order is that old rules and practices in the customary law courts that do not conform to the whims of the Constitution can no longer be taken for granted regardless of them being mere practices and not based on any legal provisions. They must be subjected to constant re-assessment to bring them into line with the provisions of the Constitution. By so doing, it will be an attestation that, customary law court practices are no longer gauges on the standards of statutory law but on the bench marks set by the Constitution itself.

3.3.5 Use of girls for Compensation:

A common remedy for homicide under customary law is for the perpetrator and his or her family to compensate the victim's family for their loss. This compensation takes different forms

⁴⁰² Ibid, paragraph 8.

⁴⁰³ Article 10 of the T.C.S.S 2011, provides that, 'Subject to Article 190 herein, no derogation from the rights and freedoms enshrined in this Bill shall be made. The Bill of Rights shall be upheld, protected and applied by the Supreme Court and other competent courts; the Human Rights Commission shall monitor its application in accordance with this Constitution and the law'.

⁴⁰⁴ Section 112 (2) of the Local Government Act, 2009, Laws of South Sudan.

⁴⁰⁵ In the matter of the State Vs. Henry Williams and others, Constitutional Court Case No. 20 of 1994, para. 8.

basing on the resources available to that particular community. The principle of compensation is based on Section 98 (3) of the Local Government Act, 2009⁴⁰⁶ which provides that;

'In deciding cases, the Customary Law Courts shall, inter alia apply the following principles;

(a) Adequate compensation shall be awarded to victims of wrongs;

(b) Voluntary mediation and reconciliation agreements between parties shall be recognized and enforced'.

This remedy is in line with the customary laws' focus on restorative justice and the lack of police and prison services in rural parts of South Sudan. However, complications can arise when perpetrators and their families cannot afford the compensation payment say in terms of cattle.⁴⁰⁷ In such circumstances, the customary courts will sometimes allow perpetrators' families to give one of their daughters to the family of the homicide victim, a practice known as 'girl child compensation'.⁴⁰⁸ This practice is very prevalent in the communities in Eastern Equatoria.⁴⁰⁹ David Deng summarizes the whole girl compensation process in the following phrase;

"When someone is killed, the girl will be told to go to those people (the victim's family). Then there is a ritual always performed. They will come to the court. Things will be documented, that from today onward, such a girl by name so-and-so is delivered to such a clan because the relative killed the relative of that deceased. So the girl will be given over.

⁴⁰⁶ Local Government Act 2009, Laws of South Sudan.

⁴⁰⁷ Section 71, of the Re-statement of Bahrel-Gazal region Customary law (Amended) Act 1984, provides that, 'A person who has caused the death of another is bound with his relatives on the parental side to pay compensation 'apuk' of thirty (30) cows to the relatives of the deceased.

⁴⁰⁸ David K. Deng. D.D. 2013, study on 'challenges of accountability: an assessment of dispute resolution processes in rural South Sudan', *South Sudan Law Society*, p. 59.

Samson S wassara. S.S. 2007 "Study on Traditional Mechanisms of Conflict Resolution in South Sudan" *Berghof Foundation for peace Support, Berlin*, available online at www.berghof-peacesupport.org (accessed on March 20,2012)

Also see: U.N.I.C.E.F Eastern and South Africa media center South Sudan, 31 July 2013: Article on, ending violence against children is everybody's responsibility: accessed at http://www.unicef.org/esaro/5440_13131.html on 7/20/2014.

Article in the daily beast of April 6, 2012 at <http://www.thedailybeast.com/articles/2012/04/06/in-south-sudan-girls-are-given-away-to-settle-family-feuds.html> visited on 7/20/2014.

⁴⁰⁹ Ibid.

Then it depends on how the girl will feel like. There are those who will say, 'No, I have a boyfriend. I cannot be compensated'. Then they will report to the boyfriend. Then that man will give cows and that will be given for compensation (to the murder victim's family)".⁴¹⁰

Deng argues that for girls who are unable to avoid the arrangement through marriage to their boyfriends, being given over to the family of the deceased murder victim, is often a traumatic experience. The girl is a constant reminder to the victim's family of the wrong that was done to them and their loved one.⁴¹¹

This cultural practice contravenes several provisions of the laws of South Sudan including the Constitution as it violates the rights of the child that are guaranteed there under. Article 17 (1) (g) & (h) of the T.C.S.S, 2011 is to the effect that, 'Every child has the right (g) not to be subjected to negative and harmful cultural practices which affect his or her health, welfare or dignity; and (h) to be protected from abduction and trafficking'.⁴¹² In a similar way, the Child Act, 2008, as well as the U.N Convention on the Rights of the Child prohibit subjecting children to negative and harmful practices that affect their health, welfare and dignity. Every child has the right to be protected from early marriage, forced circumcision, scarification, tattooing, piercing, tooth removal or any other cultural right, custom or traditional practice that is likely to affect the child's life, health, welfare, dignity or physical, emotional, psychological, mental and intellectual development.⁴¹³

A close look at the two legal provisions would suggest that by removing a girl from her parents in a very crude, inhuman and degrading manner for compensation purposes exposes the child

⁴¹⁰ David K. Deng. D.D. 2013, study on 'challenges of accountability: an assessment of dispute resolution processes in rural South Sudan', *South Sudan Law Society*, p. 58.

⁴¹¹ Ibid, Section 26 (1) of the Child Act, 2008, laws of South Sudan, provides that, 'Every female child has a right to be protected from sexual abuse and exploitation and gender-based violence, including rape, incest, early and forced marriage'.

⁴¹² Article 17 (1) (g) & (h) of the Transitional Constitution of South Sudan, 2011.

⁴¹³ Section 23 (1) of the Child Act, 2008, Laws of South Sudan.

to emotional, physical, psychological torture and is not in the best interest of the child as required by Section 4 (4) and (5) of the Child Act, 2008.⁴¹⁴ The Section provides that, '(4) Nothing in this Act shall prevent, discourage or prohibit the application of customary and traditional laws that are protective of the rights of the child except where those laws are contrary to the best interests of the child. (5) Where there are provisions of any other law that are contrary hereto or less protective, the provisions of this Act shall prevail'.⁴¹⁵ In terms of Section 4 (4) and (5) of the Child Act, 2008, the practice of girl child compensation became null and void because it does not meet the legal requirement of customs or customary law that is protective of the rights of the child. The provisions of Section 4 (2) of the Child Act, 2008 represent the minimum standards that must be applied to all the judicial proceedings in or before any Court in Southern Sudan, except for civil and criminal proceedings under the National Laws, which will be governed by national legislation review.⁴¹⁶ The Section uses the phrase 'proceedings in or before any court'⁴¹⁷ and this therefore includes the customary law courts as they are established and recognized by the Transitional Constitution of South Sudan, 2011⁴¹⁸ and established under Section 97 (1) of the Local Government Act 2009.⁴¹⁹ The customary practice of girl child compensation with all its illegality is also discriminatory in nature as it is only girls that are used for compensation and this alone could make it unconstitutional as it is discriminative on grounds of sex.

⁴¹⁴ Section 4 (4) and (5) of the Child Act, 2008, Laws of South Sudan.

⁴¹⁵ Ibid.

⁴¹⁶ Section 4 (2) of the Child Act, 2008, Laws of South Sudan.

⁴¹⁷ Section 5 of the Child Act, 2008, laws of South Sudan, defines 'Court' to mean any Court in South Sudan competent to hear a particular matter.

⁴¹⁸ Article 131 (1) of the Transitional Constitution of South Sudan, 2011, provides that, 'The establishment, composition, competences and procedures of County and other courts at lower levels shall be determined by law'. Article 167 (1) provides that, 'The institution, status and role of Traditional Authority, according to customary law, are recognized under this Constitution. (2) Traditional Authority shall function in accordance with this Constitution, the state constitutions and the law. (3) The courts shall apply customary law subject to this Constitution and the law'.

⁴¹⁹ Section 97 (1) of Local Government Act 2009, provides that, (1) There shall be established Customary Law Courts as follows;

- (a) 'C' Courts;
- (b) 'B' Courts or Regional Courts;
- (c) 'A' Courts or Executive Chief's Courts; and
- (d) Town Bench Courts.

3.4. Effectiveness of National and International Standards in the Customary Law Courts of South Sudan

As much as South Sudan is a signatory to some of the international and regional human rights instruments. The implementation of such provisions let alone the bill of rights as contained in the transitional constitution 2011 is still a big challenge as most of the practices in the customary law courts possess a big challenges as it offends the real core values for which South Sudan is founded. Article 9 of the transitional constitution of South Sudan 2011, states that, 'The Bill of Rights is a covenant among the people of South Sudan and between them and their government at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy'⁴²⁰. The failure by the customary law courts to observe and respect human rights in their court system only leads to a logical analysis on the ineffectiveness of the state to ensure the strict implementation of the national and international norms by the different law enforcement agencies and the justice system that is accessed by the majority of the population.

3.5. Chapter Conclusion:

In conclusion, therefore, the underlying reason for the ongoing acceptance of the customary practices that violate human rights in the customary law courts may be related more to expediency by a weak justice system than to cultural conservatism. From that perspective, efforts to strengthen the justice system by improving linkages to the statutory courts in urban areas, providing security for the Chiefs at all levels and improving enforcement of cattle compensation agreements, may help to reduce the instances of girl child compensation.⁴²¹ To that end, the key question for engagement with customary law courts must be the provision of effective human rights protection in the particular context.⁴²² To achieve this, there is dire need

⁴²⁰ Article 9 of the Transitional Constitution of South Sudan 2011.

⁴²¹ David K. Deng. D.D. 2013, study on 'challenges of accountability: an assessment of dispute resolution processes in rural South Sudan', *South Sudan Law Society*, p. 58.

⁴²² U.N.D.P, U.N Women, U.N.I.C.E.F, 2012, 'Study on Informal Justice System: Chartering a way for human based engagement' page 11.

for the legislation to clearly stream line the workings of the customary law courts by prescribing the various forms of compensation. Civic education will also go a long way in changing the Chiefs' minds to ensure equality before the law, regardless of someone's sex, gender, age or social status. This is because legislation alone without legal awareness for both the customary law courts' Judges and the populace can never stop the human rights abuse/violation in the customary law courts.

The most powerful argument in favour of sustaining customary law/the customary law courts and hence allowing free pursuit of cultural rights is that the customary courts take into account the current social practices and therefore rest on a foundation of popular justice. However, it is also believed that for this system to be fair and just to all the citizens, it should widely embrace the Bill of Rights and conform to the Constitution. This is so since the of Bill of Rights is a covenant among the people of South Sudan and between them and their Government at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in the Constitution; it is the cornerstone of social justice, equality and democracy as a foundation of a modern democratic State.⁴²³ It is a challenge to reconcile these cultural practices with contemporary standards of human rights. Nevertheless, the main concern is the wellbeing of all persons that are living in the communities and the need to respect their choices as well. As Bennett contends, the human rights regime is part of a modern zeitgeist that is difficult in the long term to resist.⁴²⁴ If the decision to implement a human rights code is framed or practiced in terms of denying one group individual rights and protecting another group simply on grounds of cultural affiliation, discrimination is bound to occur and if human rights are not formally implemented, the customary law courts cannot deliver the desired justice. It therefore follows that, the various customary practices as practiced in the customary law courts particularly on the aspect of lack of equality before the law, unfair trial, use of uncontested evidence, use of girl child in compensation and collective responsibility for a wrong/offence committed by an individual contravene the basic fundamental rights guaranteed by the Bill of

⁴²³ Article 9 (1) of the Transitional Constitution of South Sudan, 2011.

⁴²⁴ T.W. Bennett, 1991, "The Compatibility of African Customary Law and Human Rights", *ACTA JURIDICA*, 18, 18-35, p.35.

Rights in the Transitional Constitution of South Sudan, 2011 and therefore have to be reformed. The subsequent chapter provides and gives an insight into some of the recommendations of how the customary law courts can be reformed in order to uphold the bill of rights as well as the international human rights standards to which South Sudan is a party.

CHAPTER FOUR:

GENERAL CONCLUSION AND RECOMMENDATIONS:

4.1. Introduction

Having regard to the historical background of the customary law courts, the current legal status of the customary law courts as well as the hierarchy, jurisdiction and procedures adopted in the customary law courts and the concept of human rights. This chapter provides the general conclusion of the study, the emerging recommendations and remarks on the study.

4.2. General Conclusion

There is no doubt of the invaluable role played by the customary justice system in the delivery of justice in South Sudan and in particular by breaching the gap where the state judiciary has failed to deliver justice because of its limited capacity and resources. This underpins the justification for the constitutional recognition of the customary law and the customary justice system at par with the statutory laws and its justice institutions.⁴²⁵ However, the major challenge of this legal pluralism is the competition for existence between the customary laws and its dispute settlement institutions and the formal justice system.⁴²⁶ This poses a question as to the quality of justice in a state of plural legal orders which are merely competitive rather than supplementary and whether the customary justice system can uphold, protect and promote the Bill of Rights. For instance, a specific dispute or subject matter may be governed by multiple norms, laws or forums that co-exist within a particular jurisdiction,⁴²⁷ as such, the population is left with no clear idea as to the jurisdiction of the Courts but rather engage in 'forum shopping'.⁴²⁸ The usual expected outcome of this ill-defined legal pluralism is that

⁴²⁵Article 5 of the Transitional Constitution of South Soudan, 2011, provides that, 'The sources of legislation in South Sudan shall be: (a) this Constitution; (b) written law; (c) customs and traditions of the people; (d) the will of the people; and (e) any other relevant source'.

⁴²⁶ Tsehai Wada Wourji. T.W, 2012 "Coexistence between the Formal and Informal Justice systems in Ethiopia: Challenges and prospects", *African Journal of Legal Studies* 5, 269-293. P. 269.

⁴²⁷ Ibid page 273.

⁴²⁸ Jan Arno Hessbruegge J.A., 2012 "Customary Law and Authority in a State under construction: The case of South Sudan" *African Journal of Legal Studies* 5, p 295-311. p. 304.

enforcement and execution of court orders become a big challenge especially where the same case was adjudicated in more than one court. That is to say, in the customary court and the statutory court. The ultimate effect of the ill-defined legal pluralism is justice that does not meet the required constitutional standard.

In further regard, the ambiguity of these overlapping lines of authority between the customary justice system and the statutory courts gives rise to a degree of unpredictability for the court users. One can never be certain if a final judgment has been rendered or if the losing party will resurrect the dispute in a different forum rather than lodging an appeal. This problem is also encountered due to the fact that statutory laws have not prescribed the appeal procedures in the customary courts. This is indicative of a justice sector in a dire state of reform and reorganization and in such an environment; it is unlikely that acceptable justice can be meted out. However, one point clear is that, despite all these ill-fated procedures and lack of jurisdictional clarity, the customary law courts remain the major forum for dispute resolution in South Sudan. This being the case, it would therefore naturally follow that the challenge of moving Southern Sudan from conflict to lasting peace lies squarely in establishing a legal system that can peacefully resolve disputes and provide a sound legal order to its citizens. To reach this end, a legal framework needs to be established that disentangles jurisdictional issues between the fledgling statutory system and customary law, while maintaining the authority and support to the customary courts that further its important position on the front line of judicial access. In short, a modern legal status pluralist that blends both the international and cultural values needs to be created.

The other point of consideration is that the customary justice system in South Sudan has received an equal legal status with statutory law in the current constitutional dispensation by recognizing it as one of the sources of legislation in South Sudan.⁴²⁹ However, there remain

⁴²⁹Article 5 of the Transitional Constitution of South Sudan, 2011, provides that, 'The sources of legislation in South Sudan shall be;
(a) this Constitution;
(b) customs and traditions of the people;

many areas where the customary law practices and norms conflict with the Constitution and the International human rights norms and standards. For instance, the unfair trial in the customary courts whose decisions reflect more patriarchal views than a qualitative court decision, discrimination against certain groups such as women and girls. In the customary law court women can only institute cases through their husbands or parents. This continuous conflict even under the current constitutional order is due to the fact that in the past, indigenous/customary law was seen through the common law lens which did not allow customary law to develop in its own right. Section 7 of the Chiefs' Court Ordinance, 1931, provided therefore that, 'The Chiefs' court shall administer (a) 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'.⁴³⁰ It therefore follows that, customary law courts must now be seen as an integral part of the South Sudan judicial system. Like all other courts, practices in the customary law courts must depend on the Constitution for their ultimate force and validity. Its validity must now be determined by reference not to common law, but to the Constitution.⁴³¹ This approach avoids the mistakes which were committed in the past and which were partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of the common law or other systems of law.⁴³² In so doing, it will ensure that the customary justice system and the operations of the customary law courts are aligned to the Constitution and give effect to the Bill of Rights as required by the Constitution.

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- (c) the will of the people; and,
 - (d) any other relevant source'.

⁴³⁰ Section 7 (a) of the Chiefs' Courts Ordinance, 1931 Laws of Sudan

⁴³¹ Article 3 of the Transitional Constitution of South Sudan, 2011, provides that, '(1) This Constitution derives its authority from the will of the people and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of Government throughout the Country. (2) The authority of Government at all levels shall derive from this Constitution and the law. (3) The States' Constitutions and all laws shall conform to this Constitution'.

⁴³² T.W. Bennett, 1997, *Human Rights and African Customary Law under the South African Constitution*, Juta & Co., Ltd, Cape Town, p. 63

4.3. Emerging Recommendations:

In ensuring the proper function of the customary justice system, the process should commence with a proper and well managed process of establishment of the customary courts, the law should mandate the Chief Justice of the Judiciary upon a request by the Local Government Authority to establish a customary law court. The request should indicate the reasons for the necessity of the court to be established, including the types of cases that are prevalent. This shall not only help in curtailing the proliferation of the customary courts that are created without any due regard to the law but it shall also help the judiciary and the Government to know how many customary courts are in existence in each area and the kind of cases they are trying. In the same vein, all warrants of establishment of the customary courts should indicate the substantive jurisdiction of the courts and other matters concerning their operation including their funding and court fees to be charged in filing of the respective cases if any. This shall help in eliminating the issues of varying fees in the different customary courts for the same cases and the charging of fees in criminal cases which sometimes scares litigants away and resort to revenge instead of solving their cases in the courts of law or other dispute resolution channels which are always in the Chief's court since it is closer to the people. In terms of supervision, the Judiciary should be given powers to oversee the technical legal functioning and operation of the customary courts while the Local Government should be responsible for the administrative functioning of the courts, like collecting the fees and fines according to the uniform standards.

One of the biggest challenges of the customary justice system is lack of clear jurisdictions on the cases customary courts try. The jurisdiction of customary courts should exclusively be limited to customary matters, except when a criminal matter has been referred to it by a competent Statutory Court. This will go deep in easing the tension between the customary courts and the statutory courts on the jurisdictional limitations of each court. The clarity on the jurisdiction will also save the many litigants who suffer and the many people who are always

remanded or imprisoned by the customary courts in matters they have no jurisdictions. When customary courts refocus on the real customary issues, they act as the back bone for developing customary law jurisprudence which is required for customary law to evolve in line with the new constitutional dispensation that takes into account the Bill of Rights as enshrined in the Transitional Constitution of South Sudan, 2011.

In addition to the re-organization of the customary justice system, a uniform code of practice or procedure for the customary law courts needs to be established and adopted by all the customary courts across the country. Currently customary law courts are functioning in different ways in terms of procedure regardless of whether it is in the same community or locality. The adaptation of a uniform code will streamline the operations of the customary courts and create a culture of uniformity just like the statutory courts. However, each court should adopt a dispute resolution mechanism of a particular community that it serves as long as such practice or mechanism is in line with the Constitution as the supreme law of the land.

From the analysis and review of the practices in the customary justice system, it is quite obvious that most of the practices in the customary justice system such as inheritance of widows or levirate marriages, denial of property rights to women as well as discriminatory family laws need to be transformed and aligned with the Constitution and this can be done through cultural transformation. The question then is how to ensure that people enjoy the same rights within while respecting the cultural autonomy of those communities. As Albie Sachs, the South African jurist, put it, human rights are to be the same and the right to be different.⁴³³ This profound insight calls for the next question of how to realize this delicate balance to treat all people in the same way, without distinction on such grounds as sex, gender, religion or belief (that is, without discrimination), while respecting the equally important right to distinctive personal and collective identity.⁴³⁴ This can be attained through a constructive relationship between custom and human rights in the context of cultural

⁴³³ An-Na'im Abdulahi. A.A. (2002) *Cultural Transformation and Human Right in Africa*, Zed Books Ltd, London), page 6.

⁴³⁴ Ibid.

transformation which can find its concrete and practical expression and application through the legal norms and institutions of the modern State. Article 16 (4) (b) of the T.C.S.S, 2011, provides that, 'All levels of Government shall enact laws to combat harmful customs and traditions which undermine the dignity and status of women'.⁴³⁵ For instance, there is need to develop a family law that provides a statutory alternative to marriages under customary law. It should be designed to give meaning to the rights in the Transitional Constitution and the Child Act by laying out clear procedures for combating practices that harm women and children, such as forced marriage, abduction, and denial of inheritance rights as well as the circumstances in which individuals may access fair trial in the customary law courts. In the same vain, there is need to develop a gender-based violence prevention law to establish and strengthen mechanisms that protect women and girls from violence. This law could explicitly prohibit the most egregious and widespread forms of gender-based violence by defining and prohibiting domestic violence practices such as wife chastisement by husbands or facilitate girl child compensation in settling customary blood feuds. In a way, this will transform the customary justice system in line with the Bill of Rights.

Given the pathetic state of the customary courts that they operate under trees with no office premises, no administrative or court clerks, no records of proceedings, it makes the whole justice system complicated in particular when it comes to record keeping and matters are complicated further when appeal papers are required. In a bid to improve the customary justice system, the Government needs to construct courts rooms for the customary courts rather than operating under trees, there is no justification for the system that caters for over 90% of the cases not to have office premises. Clerks and administrative officers should be appointed in the customary courts as employees of the judiciary so that they can help the Judges in recording of the cases. This shall greatly improve on the justice processes in the customary courts in terms of case management and record keeping which the courts have to embrace as a matter of

⁴³⁵ Article 16 (4) (b) of the Transitional Constitution of South Sudan, 2011.

urgency and as a way of ensuring an accountable and transparent social justice system that gives effect to the constitutional provisions.

4.4. Final Remarks on the Study

The main objective of this study was to analyze the role of the customary law courts in the delivery of justice in South Sudan. The customary law courts operate alongside the state courts or formal courts but in a parallel manner with almost no linkages between the two systems. The discussion touched on many issues including the historical background of the customary law courts, the current legal status of the customary law courts, their jurisdiction and procedures adopted in dispute resolution and the major principles applied in the customary courts. The challenges faced by the customary law courts were discussed as well as the concept of human rights in the customary law courts. One sticking point is that, most of the disputes in South Sudan are resolved in the customary law courts.

This research established that, as much as the customary law courts are recognized under the transitional constitution of south Sudan 2011, there are no warrants of establishment of the customary law courts and the law is not explicit on the criteria of the establishment of the customary law courts and the body responsibly whether the Judiciary or the Local Government Board and this has led to the proliferation of these courts hence posing an accountability challenge, which in turn affects the quality of justice in the customary law courts due to administrative related issues.

The other very serious challenge is how to ensure human rights norms and standards in the customary law courts due to the various customary law practices in the these courts that violate the basic fundamental rights guaranteed under the transitional constitution of south Sudan 2011. It is therefore, recommended that, more studies be done on the issues surrounding the operation of the customary law courts in South Sudan and provide recommendations and more insight on how to stream line the work of the customary law courts to function in a more transparent and accountable manner as required by the law.

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