

South Sudanese Dinka Customary Law in Comparison with Australian Family Law: Legal Implications for Dinka Families

Buol Juuk
Flinders University

Abstract

Customary laws are considered to be social norms that have become recognised through a shared understanding of rights and obligations. Essentially, these laws are not recognised by a legal body but rather are constructed informally, through customary practice. Therefore, their implications are not constitutionalised but are instead imposed through loss of reputation and status, rather than by virtue of fundamental requirements of the law. In South Sudan, marriage, divorce and child custody are not in a sphere of institutional control, by either church or state. This article aims to compare the legal system of Australian family law with South Sudanese Dinka customary law, highlighting the implications faced by the Dinka community with respect to marriage, divorce and child custody in Australia. In particular, this article will explore marriage in Dinka customary law as compared to marriage in Australian family law system; discuss divorce in Dinka customary law in comparison with divorce in the Australian family law system; and examine the differences with regard to child custody. This article argues that the differences between the Australian family legal system and the South Sudanese Dinka customary legal system present challenges and difficulties for both sides in terms of: the concept of marriage; the validity of marriage; approaches to divorce; and child custody.

Introduction

Australian family law is well-advanced, like many other legal systems in the western world. The Commonwealth has powers to legislate marriage, divorce, matrimonial causes, parental rights, and the custody and guardianship of infants.¹ Australia is a multicultural society (with one in four born overseas²) and has a rich diversity of cultures,

¹ Patrick Parkinson, *Australian Family Law in Context: Commentary and Materials* (Pymont, N.S.W.: Thomson Reuters Professional Australia, 2012).

² Australia Bureau of Statistics (ABS), "Cultural Diversity in Australia," Census 2011 www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013 (accessed 4 October 2013).

languages, religions and ethnicities. Whilst many immigrants come from lands with similar laws to Australia, this is not the case for those who have migrated from African communities, in particular from South Sudan where customary laws are followed. The South Sudanese community has been one of the fastest growing communities in Australia, with the number of entrants rising by an average of 34 per cent every year between 1996 and 2006.³

South Sudan is the newest country on earth, having gained independence on 9 July 2011 from the republic of Sudan. This was achieved through a referendum held 9 January 2011. The referendum was held as the result of a Comprehensive Peace Agreement (CPA) signed in 2005 between the Sudanese Peoples' Liberation Movement (SPLM), representing the people of Southern Sudan, and the National Congress Party (NCP), representing the government of Sudan. After independence, South Sudan adopted a federal system of government with ten states. The Dinka community inhabit six out of the ten states, and share a language and similar customary practices. South Sudan doesn't have a centralised legal system like Australia. There are over 50 'tribes' in South Sudan, each having an individual and distinct body of functioning customary law. There is, however, one overriding justice principle practiced among them, which is the need to achieve reconciliation and to ensure inter-community harmony rather than to punish.⁴

Over the last two decades, an increasing number of South Sudanese people have made Australia their home.⁵ There is evidence to support the contention that South Sudanese family practice comes into conflict with the more intricate Australian local legal system in many ways, both positive and negative. There is a lack of understanding from both South Sudanese Dinka families and Australian society regarding the impact of legal differences. Research suggests that the involvement of family courts with culturally diverse populations is proportionally over-represented in litigated disputes concerning children, but under-

³ Department of Immigration and Citizenship Government, "Sudanese Community Profile," (Canberra Australia 2007).

⁴ Akechak Jok, R Leitch, and Carrie Vandewint, "A Study of Customary Law in Contemporary Southern Sudan," *Juba: World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs* (2004).

⁵ Ben Packham and Jean P, "Australia Shuts Door to Africa," *Herald Sun*, 3 October 2007, <http://www.news.com.au/breaking-news/australia-shuts-door-to-africa/story-e6frfkp9-1111114556079> (accessed 4 October 2013).

represented in family mediation.⁶ This under-representation in help-seeking could suggest a lack of trust, knowledge and understanding of the Australian legal system regarding family law. This could be attributed to the passing of legislation in South Sudan which recognises the existence of customary law through the Civil Procedure Act 2003. This Act applies rules in personal matters such as succession, inheritance, marriage, divorce, and family relations, to be decided by the applicable custom of the parties.⁷

Further, Dinka customary laws have mediators: leaders of formal and informal laws who come in various forms throughout South Sudan, depending on ethnic, religious and political factors.⁸ Judicial courts are provided to administer both statute and customary law, while informal community practices also rely upon local chiefs, known as sultans, to resolve disputes between community members. “The judiciary relies greatly on popular justice for solving disputes through methods of reconciliation and the application of tradition.”⁹ Customary laws generally consist of non-state law systems that are usually based on local customary, traditional or tribal systems of justice. The majority of Dinka marriages and family practices here in Australia come into conflict with Australian family law.¹⁰ Dinka customary law and practice is one of the longest traditional customs in Africa, and has adopted less from other cultures.¹¹ Marriage practice and child custody practices have remained unchanged, even until the present day.

The concept of customary law is defined by Woodman as a set of customs and rules that reflect a certain community’s beliefs, habits and values, also referred to as a mirror of accepted usage.¹² Given this,

⁶ La Trobe University. National Centre for Socio-Legal Studies and Lawrence Moloney, *Managing Differences: Federally-Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction* (Attorney-General’s Department, 1996).

⁷ Government of Southern Sudan, “Civil Procedure Act 2003,” (South Sudan 2003).

⁸ Jok, Leitch, and Vandewint, “A Study of Customary Law in Contemporary Southern Sudan.”

⁹ South Sudan Government, “South Sudan Judiciary System,” edited by Judiciary, South Sudan 2011.

¹⁰ Danijela Milos, “South Sudanese Communities and Australian Family Law: A Clash of Systems,” *Australasian Review of African Studies*, The 32, no. 2 (2011). 143-159.

¹¹ Francis M Deng, “Customary Law in the Cross-Fire of Sudan’s War of Identities,” prepared for the United States *Institute of Peace* (2006), available at <https://www.cimicweb.org/.../FD%20long%20final...> (accessed 4 October 2013).

¹² Gordon R Woodman, “Some Realism About Customary Law-the West African Experience,” *Wisconsin Law Review*. (1969): 128-152.

Dinka customary law is significantly different in its purpose, structure and execution in comparison with Australian family law. There is, however, one major similarity between the two laws, that is, the reinforcement and maintenance of a peaceful society.¹³

Family law in Australia is universal. It is applied to everyone living in Australia regardless of their ethnicity, religion or country of origin. However in South Sudan there are over 50 unique sets of customary law and they are applied within the context of each particular ethnic group. This was reinforced with the passage of the Civil Procedure Act (2003), previously mentioned, which holds that personal matters such as succession, inheritance, marriage and divorce should be decided by customs applicable to the parties involved in the dispute. There is no single unifying legal practice; and thus this article focuses solely on discussion of Dinka family law.

Defining the term 'family' in both the Australian and the Dinka customary law contexts is crucial. According to the Dinka Family Act 1984, 'family' includes all extended members such as grandparents, uncles, aunts, cousins, nephews, and nieces.¹⁴ Values and solidarity within the family are extremely important and respect for elders and hospitality are equally significant. In Australia, according to the Australian Bureau of Statistics, 'family' is defined as two or more persons, one of whom is at least 15 years of age, who are related by blood, marriage (registered or de facto), adoption, step or fostering, and who usually reside in the same household.¹⁵ As a result, details of categories in family law are discussed in relation to the different constructions of 'family'.

Marriage

In Australia, men and women of legal age have the right to marry, regardless of race, nationality and religion. They are entitled to equal rights both during the marriage and upon its dissolution. In South Sudan, however, marriage is considered the basis of forming a family and in tribal communities there is more than one definition of marriage.

¹³ Nsongurua J Udombana, "African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication, An," *Brooklyn Journal of International Law* 28:3 (2003): 811-870.

¹⁴ Mohamed Fadlalla, "Customary Laws in Southern Sudan: Customary Law of Dinka and Nuer," *New York: iUniverse* (2009).

¹⁵ Australian Bureau of Statistics Australian Bureau of, "Census 2001: Australian Social and Housing Characteristics," *REIQ Journal* Aug (2002): 9-13.

According to section 20 of the Dinka Customary Law Act 1984, marriage is defined as a union between one man or his successor and one or more women for the purpose of sexual cohabitation. A second definition defines marriage as a means of procreation and maintenance of the homestead. This also provides that that such a union may take place between one barren or childless woman and another woman for whom male consorts are provided. It can also be defined as a union between a deceased male person and one or more women through his successor. Therefore, marriage in Dinka customary law is not only between a man and a woman (or women), but it can be between a barren woman and another woman or women, or the successor of a deceased or infertile man, for the purpose of continuing the family line. Polygamous marriage is allowed through these definitions and through section 19 of the Dinka Customary Law Act.¹⁶ In Dinka customary law there is no limit to the number of women a man can marry.

On the other hand, the definition of marriage in Australian law is quite different. According to the Family Law Act of 1975 (Cth) (s.43 [a]) and the Marriage Act (1961) (ss.46 [1] and 69 [2]), marriage is defined as the voluntary union of a man and a woman. This is the only form of marriage legally recognised in Australia. Same sex marriage is not recognised in Australia, even if the marriage was legal in the place the marriage occurred, although it is not illegal to conduct a commitment ceremony for same-sex couples provided the ceremony does not purport to be a legal marriage. However, a change of gender, as in the case of *Re Kevin* was considered grounds for a valid marriage.¹⁷

In May 2012 the Federal Government of Australia introduced the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill (2012) into Parliament. One of the amendments proposed was the criminalisation of forced marriage by including it as an offence in the Commonwealth Criminal Code.¹⁸ This amendment could have negative impacts on South Sudanese Dinka young men, who are currently going back to South Sudan and marrying according to

¹⁶ Fadlalla, "Customary Laws in Southern Sudan: Customary Law of Dinka and Nuer."

¹⁷ Rachael Wallbank, "Re Kevin in Perspective," *Deakin Law Review*, 9:2 (2004): 461-502.

¹⁸ Robyn Gregory, "Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 Exposure Draft-Legislative Amendments to Australia's People Trafficking and Slavery Offences," Women's Health West, (2012) http://whwest.org.au/wp-content/uploads/2012/03/SUB_Slavery_Crimes-Amend20121.pdf (accessed 4 October 2013).

customary practice. The marriages they are entering into could include arranged or forced marriages, as most of the wives are either chosen or recommended for them by their families, and sometimes the wishes of the potential bride are not considered. The decision is between the two families who are agreeing on the daughter's marriage.¹⁹

Validity of Marriage

In Dinka tradition, marriage is a mutual agreement between two families and their relatives, not an agreement between the potential husband and wife alone. According to Dinka customary law, a marriage is valid or legal after all the processes of engagement, negotiation, acceptance (*agam* in Dinka terms) and exchange of dowry or the wealth of the bride have been executed. After this, the two parties can perform rituals to receive blessings through the ceremony. In Dinka customary law there is no registration or issuing of a certificate to validate the marriage, yet the marriage is considered binding for life. Marriage can only be brought to an end if the wife dies (or in the case of divorce as described below). As stated earlier, this is not the case for men. According to section 38 of the Dinka Customary Law Act, 'succession' may take place which allows the wife to be inherited by the next of kin, or surviving brother, should the death of the first husband occur.

Further, marriage is divided into three categories, the first being 'single simple' marriage, a marriage between one man and one woman. The second category of marriage is the polygamous marriage, a marriage between one man and two or more wives. This kind of marriage is considered to be a symbol of pride, wealth, and success, with social and political significance. The majority of men who are engaged in such marriages are rich and from large, wealthy families.

Polygamous marriages entered into in another country are recognised as valid marriages in specific situations by the Australian Family Act.²⁰ However, a polygamous marriage contracted overseas is not recognised as a valid marriage if either of the parties were already married in Australia. Therefore any polygamous marriage entered into in South Sudan while the party was in another valid marriage is not recognised here in Australia. In the 2006 Springvale Monash Legal Service Project

¹⁹ Jane Kani Edward, "Women and Customary Law in Southern Sudan," *Sudan Tribune*, 8 March 2007, <http://www.sudantribune.com/spip.php?article20646> (accessed 4 October 2013).

²⁰ Eithne Mills and Marlene, *Family Law* (Chatswood, N.S.W. LexisNexis Butterworths, 2012).

study conducted with Dinka-speaking Victorian South Sudanese,²¹ the participants revealed that they as Dinka found it difficult to understand Australian family law. Some of the main areas of concern were family structure, marriage, child protection and child custody laws.

The third category of marriage is marriage by a deceased kinsman. When a Dinka male dies before he gets married, his parents or siblings arrange his marriage. Dinka customs oblige his parents to ensure that a dead male has a family to continue his name. As a result, the woman could be married to a living kinsman or brother as a proxy and thus the children would belong to the dead man. This type of marriage is usually referred to as ‘ghost marriage’, and Australians sometimes find this hard to comprehend and understand.²² The Springvale study participants claimed that customs oblige children born into such marriages to address their biological father as ‘uncle’, and that these children did not know how to explain this to their peers at school, often becoming confused as to whether to identify their biological fathers to outsiders as ‘uncle’ or ‘dad’. Another sub-category within this type of marriage is the marriage between a barren woman and another woman. The purpose of this marriage is to procreate children for the continuation of her family line, in which case the children bear the name of the barren woman’s husband. Such marriages do not exist in Australia, making it difficult for the children born under these arrangements to understand and explain them to their Australian peers.

Many Dinka families who live in Australia in these circumstances are faced with unwelcome legal implications brought about by conflict between their customary practices and the family law of their adopted country. These consequences may include confusion around the status of a ‘ghost wife’ versus a ‘legal wife’ where family welfare or tax benefits are concerned. The Australian family law system does not have provisions in place for such marriage relationships or categories. Further, it is not legally practical to acknowledge these values, as they breach Australian family law. In contrast, Dinka marriage is only valid when there is an agreement between the couple and the two families.

²¹ Springvale Monash Legal Service Inc Springvale, “Comparative Analysis of South Sudanese Customary Law and Victorian Law,” (Melbourne Australia: Springvale Monash Legal Service Inc., 2008).

²² SMLS, “Comparative Analysis of South Sudanese Customary Law and Victorian Law.”

In Australia, the consent of couples is most important; although parents can voice their thoughts, objections to or support for the marriage, it does not affect the legal status of the marriage should the betrothed choose to go through with it. Under South Sudanese Dinka family customary law, however, disagreements from parents on either side can overturn the marriage and make it invalid. Furthermore, according to section 21 (b) of the Dinka Customary Act 1984, (a) no marriage should be consummated between a boy and a girl until both of them have attained the age of maturity known in Dinka as 'dit'. Maturity according to Dinka customary law is not stipulated by a minimum age, but rather is determined by physical features. Section 21 (b) describes the characteristics of these features: for the girl, it is marked by the first menstrual period and for the boy it is marked by physical changes such as the voice breaking, or the growth of hair in the armpits or genital area.

In addition, traditional marks or initiation rites can also reflect the end of boyhood and the beginning of adulthood in South Sudan. In Australia, any person over the age of 18 may marry, provided that the other person is also of the legal age of consent and is not married to someone else.²³ However, some similarities remain between Dinka customary marriage law and Australian marriage law: they both agree that marriage and sexual relationships are prohibited between immediate and extended family members. Even greater, Dinka customary law prohibits marriage between extended family members extending back to seven or eight generations. Moreover, while it is common in Dinka customary practice for girls to marry at an early age (often between 14 and 18), only a small percentage of boys marry at that age.

More recently, South Sudan has incorporated a few relevant treaties from the United Nations. One example is in regard to the rights of children. According to the South Sudan Child Act of 2008, Penal Code 2008, no girl can now be legally married before the age of 18.²⁴ One example of this law being executed was when Judge Raimondo sentenced over 60 young people in Lakes State, South Sudan, for impregnating girls under the age of 18 years old²⁵ despite the state being predominantly inhabited by Dinka ethnic groups who mostly rely on

²³ Mills and Marlene, *Family Law*.

²⁴ Government of South Sudan, "Child Act 2008 and Penal Code 2008," (Ministry Justice and legal Affairs 2008).

²⁵ Manyang Mayom, Lakes state governor: Rumbek High Court judge to lose seat over pregnancy sentencing" *Sudan Tribune*, 15 April 2011.

their customary laws for family matters. This ruling was so controversial it resulted in the judge being dismissed for his failure to incorporate the role of customary law.²⁶

The second similarity between Australian law and Dinka customary law is that marriage can occur only between members of the opposite sex (that is male and female). However, Australia may be considered to be entering a period of fluctuation regarding sexual and gender diversities. The third similarity is that both Australia and South Sudan are signatories to the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties contain comprehensive protections of fundamental rights such as the right to life, rights to freedom of movement, freedom of speech, and the right to have family.²⁷ Therefore both South Sudan and Australia are subject to enforcement mechanisms concerning these areas at the international level, but not necessarily at a domestic level, unless these rights have been incorporated into domestic legislation.²⁸

While most treaties require signatories to incorporate their provisions into domestic legislation, Australia is unique in that it, unlike other liberal democracies, doesn't have a bill of rights that allows for the legal provision of the rights outlined above.²⁹ The experience of South Sudanese Australians can be vastly different from that of other Australian families.³⁰ The South Sudanese community have stated that, 'family law in Australia is tarnishing South Sudanese customary law.'³¹

Dowry (Thieek) Keeri-Thieek in Dinka

In Dinka cultural practice, dowry is considered a gift paid by the groom in the form of cattle to the family of the bride.³² It is usually done before the couple can come together as husband and wife. The dowry price is determined by the socio-economic status of the groom's family and the

²⁶ Government of Southern Sudan, "Child Act 2008 and Penal Code 2008."

²⁷ U.N. General UN General Assembly, "Universal Declaration of Human Rights," *Resolution adopted by the General Assembly 10:12 (1948)*.

²⁸ Martin M Flynn, *Human Rights in Australia: Treaties, Statutes and Cases* (LexisNexis Butterworths Sydney, 2003).

²⁹ Flynn, *Human Rights in Australia*.

³⁰ Harriet Spinks, *Australia's Settlement Services for Migrants and Refugees* (Parliamentary Library, 2009).

³¹ Springvale, "Comparative Analysis of South Sudanese Customary Law and Victorian Law."

³² Deng, *The Dinka of the Sudan*.

characteristics of the bride, including physical appearance and behaviour. It is widely believed that attractive girls are preferred by many candidates. Dowry is always followed by a marriage ceremony, which starts immediately after the settlement of the bride's price. The ceremony takes different forms and also depends on the status of the groom's family. The ceremony is not required for the validation of the marriage, but is more a ritual to dignify the celebration of the marriage. In Australia there is no dowry required, either socially or by law, for the marriage to be valid, yet to be valid the marriage ceremony must be performed by an authorised celebrant. Celebrants may be a minister of religion registered under the Marriage Act 1961 or registrar of marriages for the state or Territory where the marriage is to take place. Another option is a person authorised by the Commonwealth Attorney-General.³³

Therefore, it could be argued that the general concept of marriage in Australian family law and South Sudanese Dinka has certain similarities, but the procedures and modes of validation of the marriages are very different. Consequently, it could be further argued that a marriage conducted in Dinka customary law in South Sudan, before the couple moves to Australia, could face complications if scrutinised by an Australian family court. Australian law may require a marriage certificate, and the couple in question might not have one if the marriage was conducted in a Dinka customary manner. In addition, the court could not find that a groom be made to pay the bride money or dowry, leading to ongoing conflict between the families, as the Australian family court does not have provision to address dowries or bride wealth.³⁴ This will be discussed in further detail in the child custody section. It could be argued that some of the marriages may not qualify as marriages under Australian family law, and this may cause legal complications between the parties involved.

Divorce in Dinka Customary law (Puoke-ruai/Thieek)

Divorce according to Dinka customary law is the dissolution or ending of marriage. Section 35 of Dinka Customary Law Act 1984,³⁵ states that marriage should be legally ended or divorce granted by the court with the consent of all parties attached to the marriage contract. The court

³³ Alastair Nicholson and Margaret Harrison, "Family Law and the Family Court of Australia: Experiences of the First 25 Years," *Melbourne University Law Review* 24 (2000): 756-761

³⁴ Deng, *The Dinka of the Sudan*.

³⁵ Fadlalla, "Customary Laws in Southern Sudan:..."

process and divorce is made difficult as a means of retention of the families' ties. Secondly, marriage is brought to an end through the court to ensure that it is known to everyone that these families have ended their relationship, especially when adultery was involved. In addition, the party to blame is made public, making it difficult for him or her to remarry. It is particularly more difficult for a woman to remarry than a man, especially when misbehaviour or adultery was the cause of the divorce. Section 41 of the Dinka Customary Law Act 1984 describes the legal effects of releasing the spouse from the obligation to continue the marital relationship, and gives the woman the freedom to remarry and vice versa. A man can still marry whether in a relationship or not, making the above more important for the woman. Furthermore, the man has the right to recover some of his dowry or property and, at the same time, he is allowed to take full custody of the children after the settlement is completed. If he does not take custody of the children he is required to pay five or ten head of cattle (Aruok) per child if the child is left to stay with the maternal family for more than five years.

Conflict arises in many cases during the recovery of the bride's price or property. This is because the returned cattle usually include the offspring and any cattle sold or diseased as a result of negligence, or where the natural death of cattle cannot be proven. According to Dinka customary law, it is the right of the husband to take full custody of the children unless dowry was not paid in full which allows the maternal family to continue to live with the children until all dues have been cleared.

Child Custody

Dinka customary law takes a patriarchal approach when it comes to child custody, an approach which is not shared by Australian family law. Australian family law makes a determination based on the best interests of the child or children, while Dinka customary law looks at the rights granted by the patriarchal customs, giving males rights to full custody in the event of divorce. As discussed earlier, the maternal family has the right to be paid restitution before the children are allowed to live with their paternal family. Australian family law, particularly the new Family Law Amendment (Shared Parental Responsibility) Act 2006,³⁶ also considers the importance of both parents, unless one parent

³⁶ Richard Chisholm, "Making It Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006," *Australian Journal of Family Law* 21:2 (2007): 143-172.

is considered unsafe for the child or children. Therefore it could be said that Dinka customary law does not consider the position of the children or the mother.

Conclusion

This paper discussed some differences and similarities between family law and marriage in both Australia and South Sudanese Dinka customary laws. It is clear that Dinka customary law is different in purpose, structure and mechanisms of enforcement. It has been noted that there are similarities in the general legal aims of both legal systems. However, the definitions of marriage and its validity are significantly different, as evidenced by there being only one concept of marriage in Australia, in contrast to three different categories in South Sudanese Dinka customs. Furthermore, there are administrative and or legal formalities in Australian marriage (such as issuing a marriage certificate), whereas in Dinka customary law there are no formalities (only mutual agreements). It was noted that in Dinka customary law marriage is based on the agreement between two families and their relatives, while in Australia this is not the case. Therefore there is great room for conflict in the cases where South Sudanese customary family law comes face to face with the Australian legal system.

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