The Future of South Sudanese Women:
Restructuring Customary Law in South Sudan

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Abstract

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South Sudan will officially be recognized as an independent country on July 9, 2011; however, a majority of the population will continue to be oppressed under customary law. While the equal rights of women and girls are written into the Constitution and Bill of Rights, the country upholds customary law, which reinforces a cycle of oppression. While it is often argued that the practices of different societies should be understood and appreciated rather than criticized, it is also argued that certain rights that are universal in nature must be upheld. This paper introduces the soon to be independent country of South Sudan and the problems they face pertaining to harmful practices. It also examines the ongoing debate surrounding the theories of universality and cultural relativity and questions whether or not children and women share universal rights that transcend cultural boundaries. In the end, the theory of universality prevails over cultural relativity under the argument that women demand rights throughout the world regardless of where they reside. Furthermore, a practice that oppresses one group over another based on gender differences cannot be justified under the guise of culture, and instead must be reformed as culture is never constant, but rather always evolving.
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CHAPTER ONE:

Introduction

With the succession of South Sudan swiftly approaching, the South Sudanese Government faces a plethora of important issues surrounding the development of the newly independent country that include peace and security, economic reform, the rebuilding of infrastructure, and a stable and efficient political system. However, one of the more important issues facing the young governmental body is that of women and the positions they hold in their households, communities and within the government itself. While the government of South Sudan recognizes the rights of women under the Interim Constitution of South Sudan, the government and people of South Sudan also recognize and uphold customary law that contradicts both South Sudan’s Bill of Rights and the international treaties pertaining to the rights of women.

The argument exists, however, that while the rights of women must be addressed and gender roles be reconstructed, the newly established government cannot adequately reform the laws of South Sudan given the current fragility of the region. Therefore, one must first identify the country of South Sudan as a progression of reform beginning with the government’s acknowledgement of women’s rights. One must then look to South Sudan’s future and create a framework that challenges customary law and implements societal reforms that allow for the
recognition of women's rights at both a state and communal level. Through the
progressive realization of the rights of women under Southern Sudanese civil and
customary law, the country will establish itself as a democratic country that
recognizes its citizens as equals and will better utilize its resources in strengthening
its economy.

Customary law in South Sudan reflects the traditions and cultural practices
that envelop much of the Sudanese society and the ethnic groups for whom it is
comprised. It is therefore essential to the identity of the people and their country,
for which they fought to secure. However, the argument exists that while customary
law in South Sudan enforces values and customs that accentuate the centrality of
kinship, customary law also encourages the marginalization of women by enforcing
a paternalistic society for which the role of women is arguably subordinate. At a
community level, laws are often upheld by chiefs, which comprise and support male
dominance in South Sudan. Women are therefore forced to adhere to a justice
system that is inaccessible and are therefore less likely to seek justice should their
individual rights be violated.

Marriage is a highly valued custom in South Sudanese tradition because it not
only reinforces the family as central to the society, but it also acts as a source of
financial stability for many families who struggle in the developing country.
However, in Southern Sudanese tradition, girls are often married at young ages and
are therefore not expected to achieve high levels of education or find financial
security elsewhere. Furthermore men are expected to pay the bride's family a
dowry, which is essential to the family's income. While many argue that women are
not bound to marriage through a dowry, they are expected to return it should they decide to leave their husbands, which is often difficult to do. Through customary law, women are given little chance in South Sudan to educate themselves and succeed on a level equal to that of a South Sudanese man. Instead it re-enforces a cycle of gender inequality by ensuring that the males in the society receive a basic level of education, which greatly increases their access to both community and government positions. While women receive little representation, they nevertheless are deeply affected by the customs and traditions that govern their lives.

There exist many arguments that support the theory of cultural relativism versus the belief that human rights are universal. It is becoming more common for people to view international human rights as based on Western ideologies, while excusing rights violations as cultural differences. Furthermore, the rights of the child is often contested and raises questions regarding what the best interest of the child is and who determines a child’s best interest. In the case of South Sudan, it becomes a question of whether or not harmful practices of the child are less harmful than denying a child an opportunity to engage in such traditions.

Although many argue that customary law is dependent on cultural practices that cannot be understood by outsiders, it remains imperative that South Sudan reconstruct the role of the woman. While the country is recovering from decades of war and destruction, economic hardship, and faces a host of challenges as a young and developing state, a framework that addresses the future rights of women must eventually be implemented. The Government of South Sudan must either reform statutory and federal law to supersede customary law in the event that customary
law infringes upon the rights of girls and women, or laws must be enacted that afford girls and women their individual rights. For example, girls should be required to attend school despite the negative implications this might cause on the families and communities. Instead, the government must eventually offer assistance to families who suffer financially in educating their daughters. Additional reforms will be laid out in the framework proposed within the body of this paper. It is my argument that until the laws that most affect the livelihood of women in South Sudan are reformed, the women of South Sudan will not experience the same peace that men experienced following the end of the civil wars. The government must do more to ensure that the rights of women outlined under the constitution are eventually recognized and satisfied. If the people of South Sudan are to succeed in creating an independent country that achieves economic development and greater equality amongst individuals, then it is imperative that the women of South Sudan, who represent over half of the entire South Sudanese population, be empowered.
CHAPTER TWO: Section One
An Autonomous South Sudan

Sudan's history of colonial rule, ethnic conflict, and a struggle for identity greatly influences both customary laws and the desire to uphold such traditions. Prior to Sudan’s independence from colonial rule, Egypt controlled the northern territory of Sudan, which comprised of a predominant Arab and Muslim population, while Britain controlled the southern half, which comprised a Christian and African majority. In 1953, Egypt and Britain forged an agreement that promised Sudan independence within the following three years, officially granting Sudan independence on January 1, 1956. In that month, Sudan joined the Arab League and on February 6, 1956 was admitted to the United Nations. Shortly following the country's independence, however, Sudan faced economic difficulties and increased conflict in the South. Despite the newly appointed leadership's promise to Southerners to implement a federal system, the government maintained religious and Arab ideology disregarding the differences that existed amongst the people of Sudan. The South responded by engaging in a civil war that would last over a decade.

In November of 1958, General Ibrahim Abboud seized control of the government in a military coup, notifying Sudanese citizens over the radio of his ascent to power. The United States government distrusted the new regime after Abboud increased relations with the Nasser government of Egypt, continued the
war in the south and expelled hundreds of missionaries from Sudan. Abboud “opted for intensified Arabization and Islamization of non-Muslims”, which only escalated the conflict between the North and the South. In 1964, after failing to improve the Sudanese economy and stabilize the region, Abboud was forced to step down as Prime Minister and was replaced by the First Committee of Sovereignty (Anderson, 1999, p.12).

In May of 1969, the Sudanese army in a coup led by Ja’far Nimeiri overthrew the government of al-Azhari. Nimeiri gained the support of the West and the people of Sudan by ending the civil war between the North and the South through the Addis Ababa agreement. The agreement would grant autonomy to the South by grouping the southern provinces together into a self-governing region. “Reserved to the sovereign national government were defense, foreign affairs, currency, inter-regional communications and the broad functions of economic, social and educational planning” (Holt and Daly, 2000, p.170). The South, however, would succumb to political conflict, corruption, and ethnic differences including a Dinka majority and therefore lose its ability to self-govern.

In 1983, Nimeiri unilaterally broke the Addis Ababa agreement and enforced Sharia Law throughout the entire country of Sudan, causing the Second Sudanese Civil War. He implemented the September Laws of 1983, which allowed for punishments including “amputation of limbs for theft [and] flogging for alcohol consumption” in an effort to exploit the Muslim religion (Anderson, 2003, p.13). Corruption and mismanagement of funds in the country led to increased economic struggles, and the government of Sudan was obliged to borrow from the
International Monetary Fund. After the IMF and World Bank learned that Sudan was unable to pay the loans, they halted disbursements. While visiting the United States in 1985, Nimeiri was overthrown, and the Transitional Military Council seized control.

John Garange, the leader of the Sudan People’s Liberation Army, the south-based opposition group, was as important actor in the peace settlement between the North and South. Garange argued that the conflict between the North and the South was “more about cultural, economic, and political marginalization of the peripheries than race and religion” (Jok, p.14, 2007). During the Carter Administration, Garange was invited as a guest of honor to Capitol Hill where he conducted interviews with the press and promised support for peace in the region. The SPLA leader sought a unified Sudan, but argued that the country was controlled by a northern monopoly. He cooperated with the Department of State and promised to maintain a ceasefire; however, he informed the United States that while the SPLA desired peace in the region, the government of Khartoum did not and therefore mediation from the United States would not be effective (Anderson, 1999, p.192). In 2005, a ceasefire between the Khartoum government and the SPLA was achieved when the two warring parties signed the Comprehensive Peace Agreement.

The CPA “established a new government of National Unity and the Interim Government of Southern Sudan and called for wealth-sharing, power-sharing, and security arrangements between two parties” (U.S. Dept. of State, 2010). That same year, Omar al-Bashir was re-elected as President of Sudan and the leader of the SPLA, John Garange, was elected Vice-President of the country. The agreement
stated that in 2010, the South would hold elections for its own government officials and six years following the signing of the CPA, a referendum would be held for the South in which the citizens could choose to secede from the North, creating a sovereign Southern state. In January of 2011, the South succeeded in holding a referendum that resulted in a majority of Southern Sudanese choosing secession from the North. In July of 2011, South Sudan will officially gain recognition as an independent state.

The civil wars that devastated the South over decades affected the people of the South in various ways including a prolonged effect on women and a desire by most to create and maintain a Southern identity. While the majority of those killed during the Sudanese civil wars were men, it can be argued that women are among the greatest victims. Northern militias often used rape as a tool of war against women in the South, although Northern women experienced such brutalities as well. The Northern Muslim army justified their actions by targeting women in the South who were non-Muslim and were therefore beyond the jurisdiction of religious morality. Many women were abducted and brought to the North to serve as sex servants, concubines or wives “whose potential children [were] raised Arab and Muslim, therefore injecting Arab blood and culture into the Southern population. Any able-bodied men were executed by shooting or by nailing them to trees with iron spikes” (Jok, p.165, 2007).

The wars between the North and the South were attempts by the North to diminish the identity of the predominantly African and non-Muslim South and extend the culture and the religious ideologies of the North throughout the country.
The success of a South Sudan therefore is not only contingent on a thriving economy and the rebuilding of infrastructure, but more importantly it centers on the survival of the Southern identity and the culture of the people. For this reason, the issues surrounding customary law in South Sudan, which at times violates the rights of women and children, must be approached with great sensitivity and understanding because customary law in South Sudan is synonymous with the identity for which many fought to defend.
Customary law in South Sudan envelops the traditions and beliefs that pervade Sudanese society. According to a study for World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs, customary law is defined as a “body of traditions, mores, social conventions and rules that through long usage and widespread acceptance direct and govern traditional African society” (Jok, Leitch, and Vandewint, 2004, p. 11). More specifically in relation to the people of South Sudan, Chief Justice Ambrose Thiik of South Sudan believes customary law to “[embody] much of what [they] have fought for these past twenty years...” (Jok, Leitch, and Vandewint, 2004, p. 7)). Unlike statutory laws that are written into legislation, customary laws are often practices that act as societal norms and are therefore upheld by local chiefs and elders rather than courts and federal systems. Furthermore, many of the customary laws vary by ethnic groups in South Sudan, where it is estimated that over fifty tribal groups reside, each comprising of its own body of laws.

Many of the tribal groups, including the Dinka and Nuer, however, maintain commonalities throughout their laws, which follow a decentralized legal system where individuals at a local level exercise social and legal powers (Jok, Leitch, and Vandewint, 2004, p. 13). Issues addressed under the customary laws of these groups are divided into subgroups, the most controversial being family law which include marriage, divorce, and child custody. It is argued that the issues for which
customary law addresses and often supports jeopardizes the rights of the woman and child in South Sudanese society. The complexities surrounding family law deepen as the practices of marriage and the role of the women are matters of the home and not the state. This makes it more difficult to incorporate international rights laws when addressing such issues. The role of the chief, although his role has weakened as a result of decades of civil war, is to reinforce the traditional practices that undermine the inherent right of the woman. However, the argument stands that the practices of marriage and the gender roles for which men and women adhere to in Sudanese society are vital to both the identity of the people and the livelihood of their culture and should therefore be preserved in a time where the newly independent state faces social fragility.

It is important to recognize the fact the customary laws among the Southern Sudanese is not solely comprised of societal norms that reinforce gender roles, but also acts in conjunction with criminal and civil law. Throughout the tribes in South Sudan, the basis of customary law seeks “to achieve reconciliation and to ensure community harmony rather than to punish” (Jok, Leitch, and Vandewint, 2004, p. 21). Punishments or penalties often consist of payment in the form of cows amongst herders, and tools amongst agriculturalists. Harsher crimes as in the case of murder may result in the payment of cows and young girls to the family of the victim by the perpetrator. Customary law, therefore, is much more than traditions in the Sudanese society, but also maintains order by enforcing rules and consequences, although they may not be written into statuary law. In cases, however, when customary laws are brought to the upper courts, the judge can either integrate the
law into the legal system or adjust the law, thereby altering a practice at a societal level. However, it is argued that while the courts are present in the Sudanese society to either enforce or change customary law, the majority of civil and criminal cases are handled within customary law. In an analysis conducted by the United Nations Population Fund, “over 90 percent of day to day criminal and civil cases are executed under customary law which favors men” (Kagumire, 2011, Global Issues). While the South Sudanese Bill of Rights emphasizes the rights of women as equal to those of their male counterparts, women in the region argue that the South Sudanese justice system is “almost non-existent” and therefore offers little hope to women (Kagumire, 2011, Global Issues).

Family Law in South Sudanese customary practice consists of marriage, divorce, custody of children and law of obligations. Marriage is one of the more highly contested practices in South Sudan because while it is vital to not only the tradition of the people as well as the financial security of the families, it confines predominantly young girls to a system in which they can no longer attain independence through education. According to a report published by UNICEF and USAID,

“poor families may regard a young girl as an economic burden and her marriage as a necessary survival strategy for her family. They may think that early marriage offers protection for their daughter from the dangers of sexual assault, or more generally, offers the care of a male guardian” (UNICEF, 2005).

Furthermore, the civil wars between the North and South Sudan had an extremely negative affect on the economy of South Sudan. Although the southern half of the country is rich in natural resources including a lucrative oil supply, pipelines
connecting the South's oil to the North ensured that the wealth remained disproportionate at the expense of the Southern Sudanese. Marriage is one way in which the people of the South receive income. Throughout the tribe of South Sudan, it is customary that the husband pays a bride price to the family of the bride, usually in the form of cows. The bride price not only ensures the bride’s family financial security but also reflects the status of the family within the community. Therefore, instead of attending secondary schools, girls as young as twelve are forced into marriages to men who are often much older. The bride price also makes it more difficult to divorce, which is socially unacceptable, by forcing the bride to repay the dowry should she choose to leave her husband.

While divorce is difficult for women in that they must repay their bride price for which their family was most likely dependent on, women must also give up their children in cases of divorce. Under customary law in South Sudan, the child in cases of divorce often goes to the father, which is a reflection of the patriarchal society. If the father failed to pay the bride’s family a dowry, then the child often goes to the maternal uncle. Therefore, women suffer the greatest losses during divorce. Furthermore, to appeal her case, a woman must consult with the local elders or village chief who is most likely to be male. In such cases, it is likely that the chief will side with the husband rather than bring the case before the upper courts. Like divorce, customary law undermines the equal status of women under the law of obligations. In a case where a person is convicted of murder, a young girl from the family must be given to the victim's family as compensation. Therefore, while
customary law seeks to “achieve reconciliation” and “ensure inter-community harmony”, it often does so at the expense of the girl and woman.

Customary law in South Sudan reflects the traditions and the customs for which the Southern Sudanese fought endlessly to secure; however, many argue that such customs are no longer acceptable as they fail to respect the rights of women in the region. While the young government implemented laws, which assure women greater representation in the government as well as programs to allow for more girls to attend school, customary law remains central to the development of the country and more importantly to the liberation of women as a result of its ability to supersede statuary law. The problem, however, lies in the manner in which to approach the issues of customary law and whether or not the violations of the rights of the woman and children should be subjected to radical change, minimally altered, or accepted under the guise of cultural relativism.
CHAPTER THREE:

Literature Review

The difficulty in addressing issues of customary law in South Sudan lies in the fact that many of the practices deemed to be in violation of the rights of the woman and child are practices that are both celebrated by members of the society and often times essential to the wellbeing of the people. It is therefore often argued that international laws, which seek to protect an individual’s rights, adhere to Western norms and fail to acknowledge the cultural differences that exist throughout the international sphere. Religious and cultural practices are sometimes contingent on rituals that are argued to be in violation of human rights treaties. Examples include child custody laws that require that the child be left in the custodial care of the father in cases of divorce. While it may be in the best interest of the child to reside with his or her mother, the court might argue that religious and social obligations require otherwise. Therefore, what is best for the child according to the society for which he or she resides is dependent upon the customs and beliefs practiced in that particular society, and not on the laws implemented by the international bodies. The following sections will address the controversies that surround the issues pertaining to human rights by analyzing conflicting arguments on the rights of the woman and child. Furthermore, the topic of cultural relativism versus universalism will be discussed in the context of human rights in an effort to better determine
whether or not violations against the rights of individuals under the international treaties should be excused as cultural differences or modified to adhere to the norms acceptable under international law, despite any repercussions these changes might have on a society and its people.
On August 3, 1990, the country of Sudan ratified the Convention on the Rights of the Child which outlines the responsibilities of the state to ensure that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child be primary consideration” (UN General Assembly, 1989). However, while the South Sudanese work effortlessly to ensure the best for their families, it is argued that the customary laws involving the child often violate the international convention for which the government acknowledges. Child marriage is among the more controversial practices because it disregards the child’s freewill by forcing her into marriage without her consent. As a result, she is denied the education that her brothers will most likely attain, and she is much more likely to be impregnated before her body is developed enough to give birth. This is not only harmful to her health and increases her chance for maternal mortality, but it also increases the likelihood that her child will be born unhealthy.

The law of obligations under South Sudanese customary law requires that in cases of murder, a young girl be given to the victim’s family as compensation for the crime. It is argued that this practice also violates the right of the child by forcing her to leave her familial environment against her will. Furthermore, in South Sudan it is much more likely that a male will be educated while his sister tends to chores at home. In Southern Sudanese society, it is assumed that the young girl will eventually
grow to be a wife and mother and therefore a formal education is unnecessary. It is more important to the wellbeing of the family and to her future that she remain at home, assist her mother with the younger children, and fetch drinking water miles away. This practice of keeping girls home arguably violates the international treaty by denying a child the right to education based on her gender. However, others argue that the families, who live in extreme poverty, are dependent on not only the labor of their daughters, but also the dowry, which is given in exchange for marriage. Therefore, adhering to the laws outlined in the Convention on the Rights of the Child could ultimately result in more harm for the child and her family.

In their work, “The Best Interest of the Child: Towards a Synthesis of Children’s Rights and Cultural Values”, Paul Alston and Bridgette Gilmour-Walsh introduce arguments pertaining to the U.N. Convention on the Rights of the Child, which was adopted by the United Nations on November 20, 1989. The CRC was the first of the international treaties to address all universal human rights including civil, political, social, economic, and cultural rights, specifically those of all human beings under the age of eighteen. In their work, the authors address the notion of “the best interest of the child” written in Article III of the convention which reads, “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration” (UN General Assembly, 1989). The authors argue that while the United Nations require that every member state adhere to the articles of the convention and therefore ensure that the best interest of every child is considered, it is impossible to define a child’s best interest under a
set of universal guidelines. It is often difficult to determine a child’s best interest in a state whose social norms are identical to those outlined under the convention because according to Alston, it is something that cannot be calculated until years later. Therefore, Alston and Gilmour-Walsh raise the important question of who, therefore, determines the best interest of the child. The authors introduce John Eekelaar, a family law specialist who promotes the theory of “dynamic self-determinism”. In his argument, Eekelaar argues that the person most able to determine the child’s best interest is the child. He believes that a “child is exposed to a wide range of influences [and] as the child develops, it is encouraged to draw on these influences in such a way that the child itself contributes to the outcome” (Alston and Gilmour-Walsh, 1996, p.12). The counter-argument to Eekelaar’s theory on dynamic self-determinism, however, questions whether or not a child is capable of deciding her own self-interest. If the child were capable of engaging in behaviors that are self-destructive, then Eekelaar’s theory would only encourage the prolongation of such behaviors. Therefore, a child might not be suitable to determine her self-interest. Eekelaar believes however that so long as the child incorporates rationality and possesses a foundation from where he or she can derive basic wisdoms, then behaviors that are self-destructive would be prevented. The goal of self-determinism, according to Eekelaar, is to “ensure that the child develops into an adult with the ‘maximum opportunities to form and pursue life goals which reflect as closely as possible an autonomous choice’” (Alston and Gilmour-Walsh, 1996, p.13). Therefore, rather than have an international body or
state determine the best interest for the child, Eekelaar believes that the child, with adequate competency, is capable of determining her own best interest.

Alston and Gilmour-Walsh go on to discuss the indeterminacy theory, which regards the best interest of the child principle as open-ended and argues that while several cases may result in the best interest for the child, the procedures leading to such results may differ given the variations within each case. In other words, it impossible to apply the same guidelines to different cases and assume that each case will end in the best interest of the child. They go on to discuss the differences in societies that may warrant conflicting procedures. For example, in some societies upholding tradition is just as important as tending to the physical and emotional well-being of the child. In South Sudan, for instance, many argue that child marriage is detrimental to the physical and emotional wellness of the child; however, others who attach great significance to the tradition of marriage might argue that should the child be denied early marriage, she could be ostracized by her community and subjected to a more difficult life. Therefore, it could be argued that marriage is in the best interest of the child among the South Sudanese. In the case of Eekelaar’s self-determinism, a child who chooses to reject traditional practices that he or she might find to be unacceptable could equally face exclusion in a society where conformity and submission to one’s elders is demanded.

Another example addresses the issue of child labor. While child labor is often protested in many Western states under the argument that it is physically and mentally damaging to the child and prevents the child from acquiring an education, which is more socially acceptable, the authors argue that in many societies, refusing
to provide a child with formal education is in his or her best interest. By working, the child is more likely to develop the skills that are essential to his or livelihood as well as to the survival of the entire family unit. In South Sudan, it could be argued that education is less vital for a girl’s future given her inevitable role as a wife and mother. Therefore in the case of the Southern Sudanese girl, it is more beneficial for her that she assist her mother with household chores and develop the skills she can later use when tending to her own family.

Alston and Gilmour-Walsh recognize the benefit of the Convention on the Rights of the Child in that it “provides the broad ethical framework that is often claimed to be the missing ingredient which would give a greater degree of certainty to the content of the best interests principle” (Alston and Gilmour-Walsh, 1996, p.32); however, they question the ability of all states to adhere to the best interests principle outlined in the convention. While the convention requires that all member states realize the rights of the child progressively and without discrimination, some countries that lack the available resources might find it difficult to provide for the child. For example, the authors argue that Egypt found itself in a predicament where the government was unable to provide education for all of the country’s children. Therefore, the country was forced to make a decision on whether or not they should educate all of the children for half a day, or educate half of the children for a full day. Should they choose to educate all of the children, then every child would receive an inadequate education, thus jeopardizing the future of all of Egypt’s youth. However, choosing to educate half of the country’s children would violate the CRC by discriminating against half of the population. Therefore, while the treaty demands
that every child be given the opportunity to receive an education, the best interest of the children was that they be educated for a full day, therefore ensuring a more promising future.

The best interests principle under the Convention on the Rights of the Child is essential to human rights because it facilitates a general consensus amongst the majority of states on their obligation to ensure that every child receives an adequate upbringing. However, it fails to consider the diversity that exists among all member countries and the different interpretations they associate with the best interests principle, which they can only base on their own societal norms and not on those who drafted the treaty. Therefore, it may be the child who is best able to establish her best interest given she attains the appropriate competency to do so. The question remains, however, at what point is a child deemed competent enough to inform her own decisions.

In a study conducted by Gerison Lansdown for Save the Children, the author addresses the “Evolving Capacity of the Child” which is referred to in Article V of the Convention on the Rights of the Child. The article states that:

“states parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child” (UN General Assembly, 1989).

Article XVIII goes on to demand that the best interest of the child be the basic concern of the parent or guardian. The convention, therefore, recognizes the role of the parent in the decision-making process for the child. While the capacity for a child to autonomously decide her own future develops over time, Lansdown argues
that it does so to varying degrees given the diversity amongst childhood experiences. Therefore, it is the parent’s duty to make informed decisions with the child’s best interest in mind. Like Alston and Gilmour-Walsh, Lansdown continues to criticize the theory that child development is a universal process and that the experiences of the world’s children are shared. While the convention acknowledges the evolving capacity of the child to unilaterally decide her best interest, it disregards the fact that children throughout the world are exposed to diverse social environments.

Lansdown introduces the state as a third party that is responsible for upholding the best interests principle under the convention. According to Lansdown, the state has an obligation under the convention to “transfer rights from the adult to the child in accordance with their level of competence, and protect the rights from exposure to activities likely to cause harm” (Lansdown, 2005, p. X). Until it can be determined whether or not the child has reached such a capacity, however, the parent or guardian continues to bear responsibility for all decisions pertaining to the child so long as they are in accordance with the articles under the convention.

The Committee on the Rights of the Child works to ensure that the child is “not forced to engage in activities that expose them to responsibilities, risks or experiences that are inappropriate or harmful in view of their youth”, however, making assessments on what constitutes “inappropriate” or “harmful” poses a challenging task (Lansdown, 2005, p. X). As argued by Alston and Gilmour-Walsh, often times the most harmful practice for a child could be the failure to conform to practices considered inappropriate by Western norms. For example, in Kenya, the girl child is subjected to the practice of female genital cutting, which is strongly
protested by many countries, primarily in the West. Cutting, however, ensures that she will eventually be married and enjoy physical and financial security. If she does not partake in the cultural practice, she might be marginalized by her society and struggle to find security by other means. Therefore, in a society where controversial practices are considered essential to the well-being of the child, it can be argued that it is more appropriate to allow for such customs.

Lansdown develops his argument by claiming that in the West and most developing countries, “economic and social necessity, rather than objective assessments of capacity, are key determinants of whether children are perceived as competent to undertake responsibilities within the family, and the goals of child development are adjusted accordingly” (Lansdown, 2005, p.11). For example, much of the West has seen an increase in female employment and as a result, an increase in child labor within the household. While child’s rights advocates and the convention itself view child labor as contrary to the rights of the child, development guidelines have been adjusted by many Western countries to allow for the contribution of child labor given the economic and social necessity. Therefore, the economic needs of the family supersede the objective rights of the child. The capacity for a child to assume responsibilities are no longer subject to objective assessments, but rather are determined by her economic and social needs. In South Sudan, where economic struggles are common amongst many families, it is necessary that the child, predominantly the girl child, contribute to the labor of the family to ensure economic stability. While many advocates argue that it is not in the best interest of the child to work rather than acquire formal education in developing
countries, it can be argued that families in the West only adhere to the guidelines under the convention so long as it is economically feasible. Otherwise, the rights of the child and the child development goals of the state and international community would also be adjusted to adhere to the needs of the family. The goals of the society therefore become the goals of child development.

Lansdown continues to address the evolving capacity of the child by arguing that the child does not act as a passive observer when it comes to actions that compliment or disregard her rights. Instead, “children take part in the social world and possess individual agency, capable of interpreting and influencing their own lives” (Lansdown, 2005, p. 12). More recently, developmental psychologists have applied a theoretical framework in which child development is understood as a “cultural process and childhood is understood as a product of specific economic, social and cultural processes” (Lansdown, 2005, p.12). In other words, childhood does not necessarily follow a natural pattern and instead is dependent on the social structures constructed by any given society in which the child grows and develops. He goes on to say that even the adults that establish close connections with the child and from whom the child acquires much of her beliefs and ideas about who she ought to be are socially constructed. Therefore, it is extremely difficult to associate a universal set of principles that claim to follow a natural pattern of growth to individuals who are diversely constructed. Childhood is therefore a matter of society rather than biology, and though it is argued that children contribute to the decisions that govern their development and have a right to do so given they have achieved a
certain mental capacity, the choices they make and the rights they choose to uphold will dramatically differ based on what they believe to be in their own best interest.
In South Sudan, it is not only the girl child whose rights are violated, but the woman as well. Despite the fact that the young independent country drafted a new Bill of Rights which recognizes the rights of the woman as equal to those of men, it is argued that women are continuously subjected to gender discrimination that is supported by customary law, which often supersedes civil and criminal law. According to a UN Population Fund report on South Sudanese women, “over 90% of day to day criminal and civil cases are executed under customary law” (Kagumire, 2011), and while 65% of the South Sudanese population are women, UNWomen.org reported that over 90% are illiterate (UNWomen.org, 2011). While legislation has been transformed to allow for a greater emphasis on the rights of women, it is the customs and traditions that are upheld by society that enforce the marginalization of women. Therefore, it remains a strong argument that customary law must be addressed in an effort to recognize the rights of women under the international treaties on human rights, and as a moral obligation to women as human beings.

The efforts by many, including the South Sudanese women, to obtain the recognition of their rights and the rights of all females in South Sudan is dependent on a theory that is contradictory to the more current definition of cultural relativism. While the practice of cultural relativity was developed by anthropologists as a means of understanding another’s culture or belief systems in an objective manner and without assuming that one is more acceptable than the other, it is argued that
the theory has evolved into one that excuses human rights violations in the name of diversity. The arguments of Alston, Gilmour-Walsh, and Lansdown reject the idea of universality. That is that human rights can be measured by universal guidelines and principles. Like many who speak on the issue of human rights, they argue that the international treaties are based on the social norms of Western societies and fail to consider the immense diversities that exist in the world. What constitutes human rights violations amongst one group of people might be necessary for the survival of another. Sonia Harris-Short, however, in her work on “International Human Rights Law: Imperialist, Inept, and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child”, presents the argument that states are capable of violating the rights of its people and excusing those violations as cultural differences. However, according to her study, often times the state is a proponent of expelling harmful traditional practices in an effort to modernize and better assimilate with the West. For example, the practice of Female Genital Cutting is outlawed by the state in several African countries; however, it remains a widespread practice because the people themselves believe it to be imperative to tradition. In Sudan, FGM (Female Genital Mutilation), has been outlawed since 1925, yet continues to be practiced primarily in the North but also amongst rural societies. Furthermore, while criminal and civil laws have been adjusted to adhere to the rights of the people, members of the communities believe the laws to be influenced by Western outsiders and instead rely on their customary laws as the only relevant form of law. In the case of FGM, the enforcement of the law is dependent on the complaint of the people, and because the people accept the practice, they are unlikely to seek legal
action. Therefore, in many cases, the problem of changing the tradition of harmful practices is not necessarily a problem of the state, but rather one that must be addressed amongst the people.

The author goes on to argue that human rights as outlined in the Conventions are not necessarily Western norms. While the Western countries were most active in drafting the human rights Conventions, many Western countries do not acknowledge economic, social, and cultural rights as entitlements of any human being. For example, while the United States signed and ratified the International Covenant on Civil and Political Rights, they refused to also sign and ratify the International Covenant on Economic, Social, and Cultural Rights, arguing that human beings were not naturally entitled to such rights. She goes on to raise the argument that in some countries, people protest the laws in their country that they feel violate their natural rights, proving that there are sets of universal rights that transcend cultures. In Sudan, for instance, women have played an active role in protesting customary traditions that prevent them from receiving an education based on gender differences, force young girls into marriage, and require that a young girl be given as reparation for murder. If the idea of women’s rights were truly central to Western ideology and did not transcend cultural boundaries, then women in many developing countries and states where they are considered second-class citizens would therefore accept their roles rather than demand the recognition of rights. Furthermore, some violations against human rights that are practiced at a state level cannot be traced back to traditional practices. For example, in many African states, citizens are denied access to a judicial system, wrongfully
incarcerated for demanding rights from their governments, and denied access to information. These violations do not comprise of cultural norms, however, and instead are methods of ensuring that oppressive leaders and regimes remain in power. These are acts, therefore, that cannot be veiled in the theory of cultural relativism and cannot be interpreted as Western ethnocentrism.

Harris-Short continues the argument that cultural relativity, as an excuse for human rights violations, merits little credibility because the history of many states, predominantly in Africa, allude to an onset of violations post colonialism. Following independence from colonial rule, many African leaders understood the importance of a strong economy and a strong military versus a strong sense of social welfare. However, some leaders desired the support of the people and sought to invest in their well-being. Struggling to recover from financial hardship, however, forced many governments to seek the help of international institutions such as the World Bank and the International Monetary Fund. The loans, however, required that the governments adhere to the conditionalities under the Structural Adjustment Programs.

The SAPs, which are often criticized as detrimental to the development of poorer countries, forced governments to cut funding to social programs, and resulted in the accumulation of large amounts of debt and interest. The goal of the governments, therefore, transitioned from focusing on the well-being of their constituents to securing their political positions by any means necessary. According to the author, prior to post-colonialism, social bonds were central to the traditions of the people and marginalized groups were less of a commonality; however, “the
introduction of a capitalist market system, the commodification of products, or a socialist command economy in conjunction with an avaricious elite have devastated the pre-colonial subsistence economy and trading patterns” (Harris-Short, 2003, p. 342). Therefore, the oppression of certain groups, primarily women and girls, can be attributed more to repressive leaders and less to traditions that precede modern history.

In Chile and Argentina, adultery is a punishable crime, yet only when committed by a woman, and more reservations are made against the Convention of the Elimination Against all forms of Discrimination Against Women than any other human rights convention. Therefore, it can be argued that women and girls are amongst the most disregarded groups when it comes to human rights. Carole Nagengast, an anthropologist and author of “Women, Minorities, and Indigenous Peoples: Universalism and Cultural Relativism”, argues that while the theory of cultural relativism should never be discarded as a practice, the theory of universalism is relevant in the fight against human rights violations. According to Nagengast, “the concept of cultural relativity...is deployed to excuse, rationalize, or explain the differential treatment before the law of women...and to justify what many call human rights abuses” (Nagengast, 1997, p.352). She speaks of the criticisms that Non-Governmental Organizations and human rights activists face when they protest what they believe to be unjust practices. They are often accused of failing to acknowledge the cultural differences that exist between societies and seeking to employ neo-liberal ideologies on groups that have suffered from imperialism in the past. Others argue that because many atrocities including
“marital battering, marital rape, dowry violence, wife burning, and genital surgeries are regrettable but are essentially private acts committed against private individuals”, outside organizations and individuals should not interfere (Nagengast, 1997, p.353). Another argument that was also addressed by Harris-Short is the fact that although it may appear that women choose to uphold practices that are considered harmful to their health and livelihood, in actuality they have no choices because the norm is chosen for them. Should they choose to reject the customs that are vital to their cultural beliefs, they will be rejected by their societies. That leaves them with a choice of adhering to their traditions or being rejected from their communities, which in essence is no choice at all. Therefore, while practices of female genital mutilation, adolescent marriages, child labor, and male superiority are considered cultural in nature, it can easily be argued that the protest by women in oppressive states and the harm inflicted on one gender over another lends to the argument that practices that violate the individual rights of women are not only a matter of Western ideologies, but rather transcend cultural boundaries and make a case for universal human rights.

Culture, according to Nagengast, is an “evolving process” and so whether or not it forces states to differ on their interpretation of human rights, it can always allow for adjustments in ensuring marginalized groups such as women and girls equal rights. While the arguments in favor of cultural relativism for the treatment of the child are valid in that they recognize the failure of international treaties to consider cultural differences, the case for universalism is stronger in that it recognizes human rights as independent from Western ideologies and protested by
the very women who experience harmful traditions. Women and children who reject customary practices face persecution and marginalization, however, “it is not culture that lies at the root of the problems...but lack of education about the concept of equality and lack of access to, and experience with, political and economic power”(Nagengast, p.360). In many countries, including South Sudan, legislation recognizes the rights of women as equal to those of men, but also acknowledges customary law, which violates the rights of women. The best interests of the girl child are not upheld because she is denied a proper education and is forced to marry before she is of a proper age. While it is argued that the age in which she should marry is subjective, and that marriage assures she and her family financial security, she does not have the same chance a male does in her society of gaining financial independence. Instead, she will always be dependent on her spouse, who will likely marry other women. It is therefore not in her best interest because it denies her the same opportunities that males have in her society. Furthermore, although women were subjected to extreme violence during the civil wars, they had little participation in the peace process between the North and South Sudan. In the Comprehensive Peace Agreement; however, they were recognized and required to represent 25% of the South Sudanese government, yet women's lack of educational opportunities in the region has prevented them from assuming such positions. Therefore, while their rights are acknowledge by the government, so long as customary law is upheld, women and girls will continue to live as second-class citizens with little hope for a shared independence. The denial of such opportunities
cannot be attributed to cultural differences but rather the oppression of women’s universal rights.
CHAPTER FOUR:
Future of South Sudan: The Problem of South Sudan

The previous chapter presented the arguments for and against cultural relativity and universalism with the theory of universalism prevailing in the case of the South Sudanese woman. In South Sudan, the constitution contradicts itself by acknowledging the rights of women as equal to those of men, yet recognizes customary law that enforces their marginalization and inability to acquire independence from their family and spouse. In South Sudan, “more than 70% aged 15-49 have no knowledge of HIV prevention. One out of seven who become pregnant will likely die from pregnancy-related causes [and] domestic violence and other forms of gender-based violence are common” (Duran, 2011). Furthermore, “South Sudan has proportionately fewer girls going to school than any country in the world” (Brown, p.20), and girls, according to a report by the United Nations Population Fund, “are more likely to die in childbirth than to finish primary school” (UNFPA, 2011). These are not issues of cultural differences that exist in South Sudan, or problems faced by a post-war society suffering from economic hardship. Rather, it is a problem of discrimination against a particular group based on gender differences. It is a problem of children dying and women suffering for the sake of upholding traditions that negatively affects one group over another. While South Sudan gains independence from the North, where women are argued to be
victimized by Islamic law, those in the South are not only oppressed by customary laws and financial difficulties many families in the South face, but are also negatively affected by the Islamic law that continues to influence Southern society. Women must adhere to the demands of their husbands, and those who refuse are subjected to domestic abuse and marital rape. Because most civil and criminal cases are handled under customary law, women are forced to seek assistance from male chiefs or elders who will most likely side with their husbands, making women reluctant to seek legal counsel. Furthermore, should they choose to divorce their husbands, they lose custody of their children and are forced to repay their dowries, which is difficult to do without an individual income or the training to find paid work. Therefore, a framework must be constructed that considers the fragility of the post-war society, yet recognizes the imperative need to empower a people that has been repressed for far too long.

The problem of customary law in South Sudan runs deeper than the oppressions it bestows on the female population. Since the beginning of Sudanese liberation from colonial rule, the Southern Sudanese have fought an exhausting and deadly battle to secure the identity of their people. Now, at a time when the Southern people are praising the independence they have sought for decades, they must also compromise many of the traditions that are arguably central to their culture. Therefore, although customary law in South Sudan must be changed, it is understood that any changes made will take time given the fragility of the post-war country.
Although the Interim South Sudan Constitution and Bill of Rights recognize the rights of women, more must be addressed within the documents to distinguish the importance of civil and statutory law over customary law. While it is acceptable to acknowledge customary law, clauses must be incorporated into legislation that upholds the rights of women over customary practices. The upper courts must then protect those rights by demanding that cases of abuse or rights violations be addressed in the courts of law rather than amongst chiefs and elders. The international human rights treaties require that women have access to a judicial system, and so the Southern Sudanese government therefore has an obligation to do so. In many societies, the problem of human rights violations is one of the people versus the state. At times it is the people who choose to engage in harmful practices; however, a lack of education on the affects of such practices and on the rights of women as individuals is to be blamed. If women in South Sudan, most of who are uneducated and illiterate, are unaware of their rights and how to seek justice, then they will always choose those practices they are familiar with, regardless of how oppressive they might be. Therefore, women must be educated on their rights, and families must be encouraged to send their daughters to school. Forced marriages for Southern Sudanese girls are detrimental to their well-being because they not only expose young girls to spousal abuse and maternal mortality, but also denies them an opportunity to succeed as individuals. Despite financial incentives for families to marry off their daughters and receive dowries, incentives must be given instead to families by the government to encourage the education of young girls. They must be taught that education provides opportunities that can offer long-term securities for
their daughters and their families and the government must be more active in encouraging such behaviors. In Mexico and Brazil, families are given monetary stipends as incentives for sending their children to school and ensuring they remain as healthy as possible. While the young government of South Sudan might not be in a financial position to offer incentives, the international bodies such as the World Bank, which plans to invest in South Sudan’s infrastructure and agriculture, should require that greater equality be given to women and girls as a conditionality. As Nagengast argued in chapter three, culture is “an evolving process, always changing” (Nagengast, 1997, p. 356). Therefore, it is possible for a culture that supports the discrimination of one group based on their gender differences to transform into one that recognizes and upholds gender equality.

While the country of South Sudan has a long way to go in assuring that the rights of women and girls under the international human rights treaties are upheld, it is important to acknowledge the steps that the young government has taken in combating harmful practices. Currently, the UN Population Fund works with the Southern Sudan Police Service to “support and expand” Special Protection Units that specifically target gender-based violence. The units assist survivors of gender-based violence in accessing medical care, psychological support, counseling, legal aid and protection (UNFPA, 2011). On March 8, 2011, members of the Southern Sudan government stood with the women of the country to commemorate International Women’s Day, foreshadowing changes that are expected to follow regarding the rights of women. Furthermore, women’s rights organizations are actively working within communities to educate women and girls on their individual rights. While
women continue to suffer under customary law in South Sudan, their future is expected to bring positive changes. As the country secedes from the North, displaced persons will return to the homeland they escaped from during war. With them they will bring different ideologies that they adopted from the countries they found refuge, and demand the rights and opportunities they were allotted. Also, the spread of globalization will continue to affect the South Sudanese customs that are unacceptable in the eyes of much of the world. Technology will continue to expose the oppressed to the rights that fellow human beings enjoy abroad, which will empower them to demand rights of their own. Women in Southern Sudan are raising their voices and educating themselves, while others are occupying government positions in an effort to change the status of women from the top. While more must be done for the women of South Sudan, it is only a matter of time until they, like many women in the past, achieve equality for both themselves and their daughters.
CHAPTER FIVE:

Conclusion

It is argued that the women and girls of South Sudan are victims of a system that is embedded deep within the compounds of Sudanese culture. While international human rights treaties and the Interim South Sudan Constitution acknowledge the rights of women as equal to those of men, the country uphold customary law which supports the early marriage of young girls, the payment of a bride-price to her family by her husband, the transfer of a young girl as punishment for murder, and the denial of custody rights to women in cases of divorce. Furthermore, it reinforces the role of the girl as an uneducated and young mother, and grants the males superiority over their wives. Many argue that the practices, which are considered to be in violation of human rights, cannot be understood in the context of Western ideology and should instead be accepted under the veil of cultural relativism. However, the discrimination of one group of people based on gender differences, and the protests of many women who experience violations in South Sudan, account for the fact that these practices are not acceptable as cultural differences, but should rather be viewed as a violation of universal rights that transcend cultural boundaries. Furthermore, while many argue that the best interest of the child is dependent on the child’s social environment, it is unacceptable to consider all rights as reliant on cultural differences. In any culture, children should not be subjected to customs that threaten their well-being and
damages any opportunity they might have to succeed as independent beings. Forced marriages and a lack of educational opportunities for the Southern Sudanese girl based on her gender goes beyond cultural differences and must be addressed by both the government of South Sudan and the people. While the country is recovering from decades of civil war and devastation, a framework must be constructed that upholds the rights of women and girls and weakens the threat of customary law. It is not enough to enact legislation that has no merit against traditions. The issue of gender discrimination must be approached from both the top at a state level as well as the bottom, amongst the people. While the country of South Sudan celebrates its independence, until the women of the country are liberated as well, South Sudan's independence will remain incomplete.
References


