

**“I don't think there will be a legal system for me.”**

**Meeting the legal needs of South Sudanese communities  
in Australia**

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## ABSTRACT

Access to justice has traditionally meant access to lawyers and courts. However, over the past fifty years, access to justice has evolved to include access to alternative dispute resolution, non-lawyer advice and self-help remedies. It has been claimed that these services have allowed people who could not access lawyers or courts to access justice. Through a critical evaluation of the concepts of access to justice and legal needs, this thesis argues that the current access to justice framework is too formalistic, creating structural barriers to access to justice for vulnerable groups. In addition, the concepts are insensitive to cultural difference, and so create additional barriers to migrants and refugees.

The thesis examines the legal needs of South Sudanese refugee background communities in Adelaide, South Australia. Through a qualitative analysis, it investigates the legal and everyday problems experienced by 22 participants, and the actions taken to resolve those problems. It is argued that due to their unique pre-arrival experiences of war and human rights violations, participants have low levels of confidence in the formal legal system, viewing the system as alien and disconnected from their daily lives. Furthermore, the thesis explores the South Sudanese customary resolution process, arguing that it is still widely utilised throughout the suburbs of Australia. Therefore, rather than accessing formal legal services available to resolve problems, participants more often seek advice from their communities and community leaders.

It is concluded that this customary system of dispute resolution should be recognised by the Australian legal system. However, this system is based on patriarchal values and prone to human rights violations. Therefore, recognition of plural legal orders is not necessarily easy, and it is important that the inclusion of legal plurality does not further marginalise vulnerable groups within refugee background. The thesis concludes that the access to justice framework needs to expand, recognising and responding to the plurality of legal orders and multiple concepts of justice, and explore culturally appropriate methods of meeting the legal needs of diverse groups.

# DECLARATION

I certify that this thesis does not incorporate without acknowledgement any materials previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

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In loving memory of  
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# CHAPTER 1

## INTRODUCTION

Access to justice is often described as an essential element of democracy and the rule of law, enabling people to protect their rights against infringements by others.<sup>1</sup> Access to justice has traditionally been seen as access to lawyers and courts for the purpose of resolving legal disputes. Over the past fifty years, access to justice has evolved to include access to alternative dispute resolution mechanisms, effective advice and information and self-help remedies in order to resolve legal disputes. In addition, accessibility of law is seen as both the ability to understand what the law is and the ability to make use of it.<sup>2</sup> Therefore, in order to access justice, one must first be aware of their rights, the infringement of those rights and the available avenues for seeking justice. Once this awareness is achieved however, one must have the ability and confidence to pursue those avenues, and there are a number of structural barriers that stand in the way of this.

Disadvantaged groups, such as homeless people,<sup>3</sup> people from low-socioeconomic backgrounds,<sup>4</sup> as well as migrants and refugees,<sup>5</sup> have received significant attention in the access to justice literature over the past fifty years, suggesting that they experience numerous difficulties accessing the legal system. Studies have shown that migrants and refugees are one of the most disadvantaged groups in terms of access to justice.<sup>6</sup> This may be due to a number of individualistic factors such as language barriers, pre-arrival experiences and ignorance of

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<sup>1</sup> Access to Justice Taskforce, (2009b), *A Strategic Framework for Access to Justice in the Federal Civil Justice System - A guide for future action*, Attorney-General's Department, Commonwealth of Australia, p.1

<sup>2</sup> Atkinson, R., (2004), 'Access to Justice: Rhetoric or Reality', Australasian Law Reform Agencies Conference, Wellington, 13-16 April 2004

<sup>3</sup> Lynch, P. & Klease, C., (2003), *Homelessness and Access to Justice*, Submission to the Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice, Commonwealth of Australia

<sup>4</sup> Cass, M. & Sackville, R., (1975), *Legal Needs of the Poor*, Law and Poverty Series, Australian Government Commission of Inquiry into Poverty, AGPS, Canberra

<sup>5</sup> Australian Law Reform Commission, (1992), *Multiculturalism and the Law*, Report Number 57, Commonwealth of Australia

<sup>6</sup> Senate Legal and Constitutional References Committee, (2004), *Legal Aid and Access to Justice*, Commonwealth of Australia, p.143

the law and legal services. Reports have also acknowledged that the assumptions underlying the legal system have served to discriminate and alienate disadvantaged groups such as migrants and refugees, causing numerous structural barriers such as lack of confidence in the system.<sup>7</sup> This thesis explores the individualistic and structural barriers South Sudanese communities face in their quest for justice in Australia.

In recent years, there has been a perception in Australia that Sudanese entrants face a number of problems integrating into Australian society. This perception has stemmed from negative media representations as well as government policies and reports. In 2007, former Immigration Minister Kevin Andrews justified cuts in the intake of African refugees by claiming that Sudanese refugees in particular face difficulties during their resettlement in Australia.<sup>8</sup> Newspaper stories focused on a few isolated violent acts involving the Sudanese community, representing Sudanese youth as ‘gangs’ assembling to cause trouble.<sup>9</sup> Some newspaper reports even went so far as to say that Sudanese entrants ‘may never fit into the Australian society’ and ‘have a capacity to drag down our culture.’<sup>10</sup> These representations suggest that Sudanese people in Australia experience adaptation difficulties and problems as a result.

In order to establish whether these representations reflect the actual situation, a study of the legal needs of Sudanese refugee communities in Australia and the way in which they utilise the legal system to resolve those problems is necessary. This study also examines the underlying concepts of access to justice and legal needs, questioning whether the current approaches to access to justice suit the needs of Sudanese refugees. Furthermore, recognising that South Sudanese communities are likely to be unfamiliar with formal legal processes, the study explores non-legal remedies and the ability of current approaches to cope with multiple

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<sup>7</sup> Access to Justice Advisory Committee, (1994), *Access to Justice: An action plan*, Commonwealth of Australia, AGPS p.28

<sup>8</sup> Hanson-Easey, S. & Augoustinos, M., (2010), 'Out of Africa: Accounting for refugee policy and the language of causal attribution', *Discourse and Society*, Vol.21, No.3

<sup>9</sup> See Packham, B. & Jean, P., (2007), 'Australia Shuts Door to Africa', *Herald Sun*, October 3 ; Crawshaw, D., (2007), 'Immigration Being Rebalanced, PM Says', *News.com.au*, October 3; Bolt, A., (2007), 'Sudanese Youths Allegedly Attack Policemen', *Herald Sun*, October 11

<sup>10</sup> Lehmann, M., (2006), 'Ethnic Crime: Somalian and Sudanese', *Australian News Commentary*, 26 January

legal orders. While previous studies have observed that vulnerable communities, such as migrants, face specific barriers to justice, these studies have largely assumed that the existing conceptual access to justice framework is sufficient. This thesis does not start with that assumption, and instead, explores the ways of meeting legal needs from the starting point of the perspectives of refugee background communities themselves.

A qualitative methodology was chosen in order to gather in-depth data from semi-structured, face-to-face interviews. Twenty-two participants were interviewed in Adelaide, South Australia between 2008 and 2010. The interviews provided detailed information on the participants' lived experiences with the Australian legal system, allowing for an in-depth analysis of participants' legal needs. An extensive literature review was also conducted, exploring the development and policy use of the concepts of access to justice and legal needs. It also examined the political and legal systems of Sudan, and the resettlement difficulties faced by Sudanese refugees.

This research is important and unique for a number of reasons. While numerous Australian and international studies have explored the settlement difficulties of Sudanese refugees, most of these studies label their subjects as 'African refugees',<sup>11</sup> 'African Australians',<sup>12</sup> 'Horn of Africa refugees'<sup>13</sup> or 'Sudanese refugees'.<sup>14</sup> These labels are useful in summarising the common issues experienced by the communities in general. However, they do not take into consideration the unique differences and resettlement difficulties of South Sudanese refugee communities. Sudanese people in Australia are not one homogenous group with the same background and experiences. During the long standing civil war between the Sudanese Northern government and Southern rebel groups, most of the fighting took place in the South

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<sup>11</sup> Hancock, P.J., (2009), 'Recent African Refugees to Australia: Analysis of current refugee services, a case study from Western Australia', *International Journal of Psychological Studies*, Vol.1, No.2

<sup>12</sup> Australian Human Rights Commission, (2010a), *In Our Own Words: African Australians: A review of human rights and social inclusion issues*

<sup>13</sup> Pittaway, E. & Muli, C., (2009), *The Settlement Experiences of Refugees and Migrants from the Horn of Africa*, Horn of Africa Relief Development Agency, The Centre for Refugee Research, University of New South Wales

<sup>14</sup> Shakespeare-Finch, J. & Wickham, K., (2010), 'Adaptation of Sudanese Refugees in an Australian Context: Investigating helps and hindrances', *International Migration*, Vol.48, No.1

of the country. This consequently led the people of South Sudan to leave their homes and find refuge in other countries. As a result, most Sudanese refugees in Australia and elsewhere are from South Sudan.<sup>15</sup> Moreover, North and South Sudan have recently separated into two different countries, and their people have different values and practices, leading to different problems upon resettlement. Taking these factors into consideration, this study focuses specifically on the legal needs of South Sudanese communities in Adelaide.

Furthermore, this study differs from previous studies in that it does not label participants as South Sudanese refugees, but defines the group as South Sudanese Australians with a refugee background. At first glance, this might not appear to be a significant distinction. Most studies exploring the settlement issues of African and Sudanese refugees focus on the refugee experience of trauma and distress, thus representing participants as traumatised victims.<sup>16</sup> While this study acknowledges the refugee background of South Sudanese communities and explores their resettlement difficulties in detail, it recognises that most participants are now Australian citizens or residents, and no longer refugees. Therefore, this study does not label participants as traumatised individuals in need of treatment and specialised services, nor investigate the coping strategies adopted. Instead, it explores the unique resettlement difficulties of South Sudanese refugee background Australians, and analyses, in-depth, the actual legal problems they have experienced in Australia and the assistance they believe they need in order to access justice.

While this study focuses on the legal problems experienced by South Sudanese communities, it also recognises the importance of everyday problems that may be connected to legal problems. These everyday problems, such as difficulties accessing housing and employment, are just as significant to the people who experience them, and they often have an

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<sup>15</sup> In recent years fighting has broken out in Darfur in the Northern region of Sudan, resulting in large numbers of refugees. However, as this fighting occurred after most the participants (who are all from South Sudan) had resettled in Australia, the thesis does not include this group.

<sup>16</sup> Tempany, M., (2009), 'What Research Tells us about the Mental Health and Psychological Wellbeing of Sudanese Refugees: A literature review', *Transcultural Psychiatry*, Vol.46, No.2; Poppit, G. & Frey, R., (2007), 'Sudanese Adolescent Refugees: Acculturation and acculturative stress', *Australian Journal of Guidance and Counselling*, Vol.17, No.2 and Stoll, K. & Johnson, P.J., (2007), 'Determinants of the Psychological Adjustment of Southern Sudanese Men', *Journal of Refugee Studies*, Vol.20, No.4

accumulative effect, leading to further, more serious problems.<sup>17</sup> Therefore, the everyday problems are investigated in order to provide a complete analysis of the legal needs of South Sudanese communities in Australia. The study also explores the participants' perceptions of law, investigating their level of confidence in the system.

What are the different ways in which people access law to resolve their problems? How does the legal system respond to the needs of vulnerable groups, and how does it appear to reflect the changing needs of society? My research has been motivated by these questions and this thesis attempts to provide an in-depth and considered response to them. I did not possess prior knowledge in the area, and started with the premise that different groups have different needs. My challenge was to find a group of people who were particularly disadvantaged in terms of accessing justice, and one which had not attracted significant prior academic attention.

In order to choose a group that fitted this description, I focused on the media and current affairs. Numerous stories on Sudanese refugees suggested that they were experiencing difficulties adjusting to the Australian community. Understanding that this group came from a country that was significantly different to Australia, I became interested in the process of this life transition. There had been little academic interest examining the legal needs of Sudanese communities, and indeed, other refugee groups, in Australia. This was a significant gap, especially since it seemed that the mainstream community had little knowledge of this group of people and yet seemed quick to judge negatively. As a result, my research focus has been to look further into the problems South Sudanese refugee communities face in order to try to understand why issues occur and importantly, how they can be overcome.

My own experience of coming to Australia as a refugee when I was a child and the understanding of the difficulties of resettlement is another important factor driving this thesis. Like the South Sudanese, I had also experienced war and unrest in my country of birth, which forced my family to leave Bosnia, find temporary refuge in Germany and finally resettle in Australia under a humanitarian program. As a child, I remember this journey to be difficult, as

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<sup>17</sup> Currie, A., (2009), 'The Legal Problems of Everyday Life', in *Access to Justice*, R.L. Sandefur, Emerald, Bingley UK; Genn, H., (1999), *Paths to Justice*, Hart Publishing, Oxford

I had to learn a new language, find new friends and adjust to a new culture in two different countries. Consequently, I empathised with South Sudanese entrants, who to me seemed to be experiencing similar, if not worse, difficulties. Rather than seeing my embodied experience as a bias, I see it as a productive force that propelled me to undertake this research even if to find that the similarities of our experiences came with substantial and important differences.

After conducting further background research, I realised that refugees from South Sudan were experiencing different difficulties, as they came from a place which was not 'westernised'. Unlike me, most South Sudanese entrants did not have televisions, radios or CD players where they came from. In fact, they had probably never used electrical appliances, caught the bus to school or had running water. Suddenly, the difficulties that I had experienced as a European refugee seemed trivial to the challenges South Sudanese refugees were facing. It became apparent that on top of the traumatic experiences of forced migration, South Sudanese refugees were also facing culture shock upon arrival in Australia.

I further realised that South Sudanese refugee background communities are vulnerable and disadvantaged, and that I, as the researcher, would face numerous difficulties during the research process. Vulnerable people in research, according to Liamputtong, are 'individuals who are marginalised and discriminated against in society due to their social position based on class, ethnicity, gender, age, illness, disability and sexual preferences.'<sup>18</sup> South Sudanese refugee background communities fit into this category due to their ethnicity and marginalisation and discrimination in Australia. Liamputtong further shows that vulnerable people are difficult to reach and require special consideration in research. This vulnerability creates a number of challenges for social researcher, often causing researchers to avoid researching the vulnerable due to the fear that the research may become too difficult.<sup>19</sup>

The empirical data upon which this thesis is built involves in-depth, face-to-face interviews with 22 members of the South Sudanese community living in South Australia. Interviewees were all refugees who fled South Sudan during the second civil war and spent large amounts

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<sup>18</sup> Liamputtong, P., (2007), *Researching the Vulnerable*, Sage, London, p.194

<sup>19</sup> *Ibid.*, p.20



of time in refugee camps or countries of asylum. Accessing participants represented a major barrier, especially as the research involved asking questions about experiences of legal problems, and many people were suspicious of talking about their experiences to an outsider. To overcome these barriers, I accessed community leaders, community organisations and refugee service providers in order to familiarise the community with my research and build rapport. This method has not necessarily provided a representative sample of South Sudanese refugee background communities living in South Australia, however, the aim of this research is to provide an in-depth investigation of refugees' experiences of legal problems and how they attempt to resolve these problems. My method provides the rich data that is appropriate to answer this research question. Many other studies have used surveys, and while they have obtained large, representative samples of respondents, the voices of hard-to-reach communities such as refugees are often missing from these studies.

As a sensitive researcher, I needed to find ways to bring the voices of the vulnerable people to the fore, as otherwise they may never be heard.<sup>20</sup> For me, the only appropriate way of exploring the legal needs of South Sudanese communities and hearing their voices was to actually speak to them. After all, some research questions can only be answered by the vulnerable groups themselves. Therefore, despite the challenges, it was important to conduct qualitative, in-depth research that permitted these vulnerable participants to express their voices and concerns. Face-to-face interviews also allowed the participants to ask for clarification wherever necessary, and were integral in discovering and collecting invaluable data that was not originally covered in the interview schedule.

Chapters Two to Four form the literature review. Chapter Two explores the concepts of access to justice and legal need. The way people access justice and resolve their legal problems came to the attention of researchers and service providers in the 1960s. Since then, a substantial body of research exploring people's legal needs and avenues of accessing justice has emerged. However, to date, there has not been a comprehensive and critical assessment of the legal needs and access to justice framework. This chapter critically unpacks these concepts and provides a comprehensive history and analysis of the important developments

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<sup>20</sup> Ibid., p.21

and policy changes. Throughout the chapter, it is argued that access to courts and lawyers does not necessarily equate to access to justice, as different groups of people experience different needs. This is especially the case with vulnerable groups such as migrants and refugees, as they are faced with additional barriers to access to justice. Furthermore, the concept of justice itself may differ from group to group, as access to legal advice and services does not equate to access to justice for groups such as migrants and refugees who do not know how to use these services. The chapter concludes that the services established throughout the past fifty years have not been efficient at providing access to justice for marginalised and vulnerable groups, and the Australian legal system needs to explore different types of justice as well as the different ways of accessing that justice.

Chapter Three provides a detailed account of Sudan's political and legal history since independence from Britain and Egypt in 1956. Such a historical assessment is necessary in order to understand the reasons behind the large numbers of South Sudanese refugees around the world, and to highlight their unique pre-arrival experiences. The persecution and human rights violations experienced during fifty years of civil war are likely to translate into distrust in governments, legal systems and government officials as well as difficulties settling into a new country. This chapter also examines the importance of legal pluralism in South Sudan, where the customary law legal system of each tribe has been the main process of dispute resolution in over 95 per cent of disputes.<sup>21</sup> As a result, most South Sudanese people have never had any dealings with the formal legal system and are unaware of their formal rights and entitlements. This can cause additional barriers to access to justice for this group in Australia, which need to be considered and explored.

Chapter Four examines the existing research concerning the resettlement experiences of African refugees. It explores the pre-migration, in-transit and post-migration experiences of African refugees, illustrating the many difficulties and traumas encountered during this process. The story of the Lost Boys and experiences of Kakuma Refugee Camp are given particular attention, as they represent common experiences of people fleeing South Sudan.

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<sup>21</sup> Akechar, A.J., Leitch, R.A. & Vandewint, C., (2004), *A Study of Customary Law in Contemporary Southern Sudan*, World Vision International and The South Sudan Secretariat of Legal and Constitutional Affairs, p.30

The chapter further demonstrates the violence and human rights violations South Sudanese refugees endured, both in Sudan as well as refugee camps. It also shows that the challenges do not stop once the refugees resettle in Australia, but continue in the form of acculturation difficulties and employment and education barriers. While the existing studies have been crucial in the delivery of appropriate services to African refugee communities in Australia, this chapter concludes that they often overgeneralise the experiences of African refugees.<sup>22</sup> The thesis argues that South Sudanese refugee background communities have unique pre-arrival experiences, which in turn lead to unique settlement difficulties. It is important to acknowledge these experiences in order to fully understand the complexity of the process of resettlement, and in order to begin to ask the right research questions.

Chapter Five details the research design and methodology of the current study. A qualitative approach was adopted in order to give participants a voice and provide an in-depth and focused exploration of participants' experiences of the Australian legal system. As South Sudanese communities are a vulnerable group in research, certain limitations and barriers existed and the steps taken to overcome these are listed in this chapter. Data was collected through semi-structured, in-depth interviews with 16 men and 6 women who came to Australia through a humanitarian program. The interview schedule was designed to gain an understanding of the different legal problems participants experienced in Australia, the ways they resolved those problems and their views and understanding of the Australian legal system. My approach to data collection as well as analysis was based on grounded theory, which allowed for the emergence of themes throughout the phase of collection and analysis. The three chapters that follow provide a detailed analysis of the data derived from this study.

Chapter Six explores the range of legal problems experienced by participants. Participants were asked whether they encountered a list of ten possible problems, and if so, were asked to comment about the actions taken to resolve the problem and their satisfaction with the outcome. This chapter demonstrates that South Sudanese communities in Adelaide do in fact

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<sup>22</sup> For example, Australian Human Rights Commission, 2010a, op.cit. examines human rights and social inclusion issues of African refugees in detail, suggesting further services. However, the study does not differentiate between the different African groups. Furthermore, Pittaway & Muli, 2009, op.cit. explore the settlement experiences of Horn of Africa refugees, generalising their experiences.

experience a number of legal problems, as well as numerous everyday problems which have legal aspects and consequences. The most common types of problems experienced are tenancy issues, followed by driving and workplace problems. An important finding from this chapter is that the everyday problems experienced have the potential to lead to further, more serious problems and be the cause of further social exclusion amongst already vulnerable groups. This chapter highlights the importance of recognising and responding to everyday problems in a timely manner in order to prevent further social exclusion and loss of confidence in the Australian legal system.

Chapter Seven explores the individualistic and structural barriers to access to justice experienced by participants. Issues understanding and dealing with family law were identified as most significant, due to the difference in family dispute resolution processes and changing gender roles. South Sudanese women and young people are identified as particularly vulnerable, due to the collective nature of the South Sudanese culture and expectation to keep domestic violence within the home. Furthermore, while participants viewed the legal system as important, they expressed a lack of power and confidence in the system, preventing them from accessing legal services where available.

Chapter Eight explores the participants' legal consciousness, situating it as the main reason behind their inability and unwillingness to access legal services to resolve their disputes. It is argued that refugees' unique pre-arrival experiences as well as their reliance on customary dispute resolution processes result in a lack of trust and confidence in the formal legal system. These prior experiences and understandings shape their legal consciousness, that is the way they understand how legal rules and regulations affect their daily lives. I argue that participants' legal consciousness can thus be situated in what Ewick and Silbey term 'before the law', viewing the law as a distinct, authoritative and unattainable body external to their daily lives. This chapter concludes with the participants' recommendations on how best to address their legal needs, illustrating the problem with increased legal education and community involvement, and suggesting some culturally appropriate responses.

The thesis concludes that that current access to justice framework does not deal well with difference, and does not meet the needs of diverse, vulnerable groups. Through critically evaluating and unpacking the concepts of legal needs and access to justice, it is argued that the current framework is too thin and descriptive. The formalistic nature of the Australian

justice system further marginalises and discourages South Sudanese refugee background communities from accessing formal legal services. As a result, the communities do not access formal legal services, and instead rely on customary dispute resolution mechanisms that often violate human rights standards. It is concluded that the access to justice framework needs to expand to recognise the diverse needs of people, to explore emerging methods of meeting diverse needs, and to understand different concepts of fairness and justice.

## **CHAPTER 2**

### **ACCESS AND NEED**

#### **2.1 INTRODUCTION**

The way people access justice and resolve their legal disputes has received considerable attention over the past five decades across many countries, including the UK, US, New Zealand, Canada and Australia. Researchers and service providers in these countries have undertaken numerous quantitative and qualitative studies exploring legal needs, and have attempted to adjust their services accordingly to meet those needs. However, despite all these developments, justice is still not equally accessible to all. Disadvantaged groups, such as poor people, migrants and refugees still have difficulties accessing the legal system, due to the many barriers to access to justice. This chapter explores the concepts of access to justice and legal needs, providing a comprehensive history of the important developments and policy changes. To date, no one has presented a comprehensive assessment of the legal needs and access to justice framework. This has meant that many studies have treated these concepts uncritically. Therefore, this chapter provides a critical analysis of access to justice and legal needs.

First, this chapter shows that legal needs and access to justice do not necessarily have the same meaning. Many researchers and policy makers alike have used these concepts interchangeably and therefore have advocated that access to justice is best achieved by meeting the legal needs of people, and that an increase in access to justice will automatically lead to a decrease in legal needs. This has also resulted in the view that access to justice is best achieved through access to the formal legal system in the form of providing access to courts and lawyers. However, I argue that access to justice means more than access to lawyers and courts, and the way we view access to justice needs to change to reflect this.

Further, this chapter explores the ways the legal needs and access to justice research has been utilised by policy makers over the past fifty years. Throughout the early to mid 1970s, the research was primarily used to expand the availability of legal aid, as access to courts and lawyers was seen to increase access to justice. Throughout the 1980s however, the focus

changed and some authors have argued that the access to justice research was used to target legal aid and justify cutbacks in legal aid funding. Researchers also started reporting that access to legal education and advice was more effective at providing access to justice than simply access to courts and lawyers. This research was used to fuel the governments' desire for efficiency and effectiveness in legal aid, producing cutbacks in funding and greater state control. In this way, the research which was helping advance access to justice by focusing on providing people with the necessary knowledge and skills to pursue their legal cases, was ironically used to take away the ability of these people to access lawyers who could help them access formal legal processes.

Finally, this chapter explores the main barriers to access to justice by vulnerable groups, highlighting the many additional barriers groups such as migrants and refugees face. With reference to recent developments in access to justice and research on barriers experienced by migrants and refugees, some possible solutions are posed. By critically evaluating the historical developments in access to justice, it is argued that the services which have been developed throughout the years do not help meet the needs of these groups or help overcome some of the structural barriers. In fact, increasing current services, such as lawyers and self-help remedies may disadvantage these groups even further, as their disadvantage is not being recognised nor met. It is concluded that rather than simply exploring the different ways of providing *access* to justice for people, the Australian (and other) legal systems need to critically evaluate the concept of *justice* itself, as justice often means more than simply access to the law.

## **2.2 DEFINITIONS**

Access to justice is premised on the idea that the legal system exists to aid people in upholding their legal rights and resolving their legal disputes. There are a number of factors that may stand between an individual and justice, and access to legal services helps to overcome those factors. It has been argued that access to legal services is thus critical to the

notion of democracy, and lack of access undermines the rule of law.<sup>23</sup> In this way, '[e]ffective access to justice can thus be seen as the most basic requirement – the most basic 'human right' – of a modern, egalitarian legal system which purports to guarantee and not merely proclaim, the legal rights of all.'<sup>24</sup>

Cappelletti and Garth, in the first large scale study into access to justice in the 1970s, defined the concept of 'access to justice' in the following way:

The words 'access to justice' are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system – the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just.<sup>25</sup>

The most important elements of this legal system were seen to be courts and lawyers. During this time, many researchers believed that lawyers were essential to solving legal problems, and when people failed to use lawyers to resolve their legal problems, they experienced 'unmet legal need'.<sup>26</sup> In this way, the legal system was seen as a means for vindicating rights and bringing equal justice for all, and lawyers were the tool necessary in order to fully take part in that system and achieve just and fair outcomes.

Forty years later, the term has evolved and access to justice means something more than simply access to lawyers and courts. Schetzer *et al* refer to access to justice as

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<sup>23</sup> Curran, L. & Noone, M.A., (2007), 'The Challenge of Defining Unmet Legal Need', *Journal of Law and Social Policy*, Vol.21, No.1, p.84-5

<sup>24</sup> Cappelletti, M. & Garth, B., (1978a), 'Access to Justice: The worldwide movement to make rights effective, A General Report', in *Access to Justice, Vol.1: A World Survey*, M. Cappelletti and B. Garth, Sijthoff and Noordhoff, Alphenaaandenrijn, p.9

<sup>25</sup> *Ibid.*, p.6

<sup>26</sup> Abel-Smith, B., Zander, M. & Brooke, R., (1973), *Legal Problems and the Citizen: A study in three London boroughs*, Heineman, London; Cass & Sackville, 1975, op.cit; Galanter, M., (1975), 'Why the "Haves" Come Out Ahead: Speculations on the limits of legal change', *Law and Society Review*, Vol.9, No.1



...the desire for a form of 'justice' which may or may not be possible through the existing legal system and therefore may involve a substantial reform of the actual system rather than merely a mechanism for utilising it.<sup>27</sup>

The concept of access to justice can today be understood as the 'various mechanisms by which an individual may seek legal assistance.'<sup>28</sup> These mechanisms may still include lawyers and courts, however other mechanisms are now available, such as community legal centres and self-help remedies.<sup>29</sup>

The concept of legal need can also be understood in terms of individuals realising and utilising their legal rights. Much like access to justice, unmet legal need has evolved to mean more than the failure of use of lawyers and courts. Schetzer *et al* differentiate between the concepts of legal need and access to justice, arguing that legal need is a more restrictive concept. In this way, they refer to legal needs as 'a limited set of possible actions for securing existing legal rights available within a given system'.<sup>30</sup> In other words, legal needs must be met if people are to uphold their legal rights and be able to access justice.

These two elements, that is access to justice and legal need, are conceptualised to work interchangeably, as one must be aware of their rights and the breach of them in order to take action and seek legal assistance. Further, even if people are aware that they have a legal problem, they also need to have the ability and the will to take action in order to access justice. Lynch and Klease explain:

A person's ability to access legal services or court or tribunal systems, is contingent, at least in part, on that person being aware that they have a 'legal problem' or that they have 'legal rights' that are being

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<sup>27</sup> Schetzer, L., Mullins, J. & Buanamano, R., (2002), *Access to Justice and Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW - Background Paper*, Law & Justice Foundation of New South Wales, p.5

<sup>28</sup> *Ibid.*, p.6

<sup>29</sup> Examples of such self-help remedies include do-it-yourself divorce kits and law handbooks.

<sup>30</sup> Schetzer, *et al.*, 2002, *op.cit.*, p.5

infringed ... [as well as] that person having the level of confidence and empowerment required to seek legal assistance.<sup>31</sup>

This is further complicated by the fact the people do not tend to think about their every-day conflicts from a rights-based point of view, and therefore do not consider the possibility of filing a legal complaint.<sup>32</sup> In this way, the right to access justice is said to be the most ignored right, as it requires that a person:

- (a) be aware of his or her rights,
- (b) be aware that there is also a right to exercise those rights, and
- (c) be used to reading some of his or her social conflicts as legal questions.<sup>33</sup>

However, awareness of rights and processes becomes redundant if the structures that prevent access persist. Legal researchers tend to view the world as made up of individuals who make rational choices, and do not always recognise structural constraints on choice.<sup>34</sup> An individualistic rights based focus can increase legal awareness and knowledge, but, as the following historical developments will demonstrate, does not go a long way in increasing the actual access to services and to justice for vulnerable groups.

The following sections explore the history of access and need, highlighting the development of research, the impact of research upon policy and continuing problems with the use and application of these concepts.

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<sup>31</sup> Lynch & Klease, 2003, op.cit., p.26

<sup>32</sup> Abregu, M., (2000), 'Barricades and Obstacles: The challenges of access to justice', Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century: Global Conference, Washington DC, 5-7 June 2000, The World Bank, p.63

<sup>33</sup> Ibid., p.64

<sup>34</sup> Morris, P., (1973), 'A Sociological Approach to Research in Legal Services', in *Social Needs and Legal Action*, P. Morris, R. White and P. Lewis, Martin Robertson, London

### **2.3 THE 'UNMET LEGAL NEED' MOVEMENT - 1960S AND 1970S**

During the 1960s, the way people accessed justice came to the attention of lawmakers and reformers across the world. This started in the US, where in 1965 the US Office of Economic Opportunity established a Legal Services Program interested in exploring unmet need in the legal system. They realised that justice may not be accessible to all, and that there was a need for more access to formal legal processes. High priced lawyers and complex adversary proceedings were leaving some people disadvantaged when it came to accessing justice, and something needed to be done.<sup>35</sup> Soon after, the 'War on Poverty' movement began across many western countries including the UK, Australia, Canada and the Netherlands, and studies exploring the unmet needs of poor populations started to emerge.<sup>36</sup>

One such study was that of Abel-Smith, Zander and Brooke in England, which started with the assumption that there was a considerable amount of unmet need for legal services, and this unmet need was most prevalent among poorer people.<sup>37</sup> The study explored a list of legal problems experienced by members of the public in three London boroughs, and found widespread unmet need among participants. They concluded that 'not much more than a quarter of the cases which in our view needed an independent lawyer's attention received it.'<sup>38</sup>

Galanter furthered the argument that more lawyers were needed in order to ensure access to justice for poorer people. Galanter argued that legal disputes often occur between the 'haves' and the 'have-nots' in terms of power, wealth and status. The 'haves' have the ability to produce more favourable results through greater access to legal resources such as specialised

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<sup>35</sup> Cappelletti, M., (1978), 'Foreword', in *Access to Justice, Vol.1: A World Survey*, M. Cappelletti and B. Garth, Sijthoff and Noordhoff, Alphenaanenrijn, p.vii

<sup>36</sup> These studies include The Florence Access to Justice Project, (1978), *Access to Justice - Vol. I, II and III*, Ed. M. Cappelletti, Sijthoff and Noordhoff, Alphenaanenrijn as a comparative world study; Curran, B.A., (1977), *The Legal Needs of the Public: A final report of a national survey*, American Bar Association, Chicago and Cahn, E.S. & Cahn, J.C., (1964), 'The War on Poverty: A civilian perspective', *The Yale Law Journal*, Vol.73, No.8 in America; Abel-Smith, *et al.*, 1973, op.cit. in England; Cass & Sackville, 1975, op.cit. in Australia amongst many others.

<sup>37</sup> Abel-Smith, *et al.*, 1973, op.cit.

<sup>38</sup> *Ibid.*, p.219

legal representation. Therefore, in order to provide the 'have-nots' with the necessary means to compete with the 'haves', more lawyers and legal resources were needed. Galanter argued that more litigation meant more power and more favourable results for the 'have-nots', resulting in an increase in access to justice for the less powerful groups.<sup>39</sup>

The Florence Access-to-Justice Project headed by Cappelletti and Garth in 1978 closely followed this research.<sup>40</sup> Cappelletti and Garth started looking at the concept of access to justice comparatively, something that until then, had not yet been researched. A three-volume world survey of access to justice resulted from this project, exploring the needs of twenty-three countries and the responses of their legal systems. The project highlighted the existence of numerous legal services policies available to governments and legal services providers, such as legal aid, pro bono services and private legal expense insurance.<sup>41</sup> This comparative research was important in bringing access to justice to forefront, providing policy makers with different options of delivering access to justice.

In Australia, the legal needs movement also gained momentum in the 1970s. The Australian Government Commission into Poverty launched the 'Law and Poverty Series' in 1973, which produced a number of research studies on the legal needs of poor people throughout the 1970s.<sup>42</sup> Much like the English study, the goal of Cass and Sackville's study was to examine the unmet need for legal services in three poor suburbs of Sydney. The study found that 69 per cent of people surveyed reported experiencing a legal problem in the previous five years.<sup>43</sup> This was much higher than any other previous studies, due to the disadvantaged nature of the sample, as well as the shift in interpreting problems as legal. A significant

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<sup>39</sup> Galanter, 1975, op.cit., p.140-41

<sup>40</sup> Cappelletti, M. & Garth, B., eds., (1978b), *Access to Justice, Vol.I: A World Survey*, Sijhoff and Noordhoff, Alphenaaandenrijn

<sup>41</sup> For a detailed discussion of Sweden's private legal expense insurance policy, refer to Regan, F., (2003), 'The Swedish Legal Services Policy Remix: The shift from public legal aid to private legal expense insurance', *Journal of Law and Society*, Vol.30, No.1

<sup>42</sup> These include Cass & Sackville, 1975, op.cit.; Henderson, R.F., (1975), *Poverty in Australia*, First Main Report of the Australian Government Commission of Inquiry into Poverty, AGPS, Canberra; and Sackville, R., (1975a), *Law and Poverty in Australia, Law and Poverty Series*, Commission of Inquiry into Poverty, AGPS, Canberra

<sup>43</sup> Cass & Sackville, 1975, op.cit.

number of the respondents failed to seek legal advice when faced with legal matters such as work-related accidents, criminal charges or tenancy issues.<sup>44</sup> This was mainly due to the high cost of consulting lawyers, the lack of knowledge of their legal rights and a fear to take action due to their disadvantage. The study concluded that more legal education about the role and benefit of lawyers was needed among the poor, specifically migrants, who needed more specialised services.

In a further report exploring the availability and accessibility of legal aid in Australia, Sackville found that while the existing legal aid schemes played a vital role in the provision of legal services, they were inadequate at meeting the legal needs of disadvantaged people in the community.<sup>45</sup> He concluded that in order to make justice accessible to all, more needed to be done than simply the provision of free lawyers – ‘legal aid schemes should take measures to educate the most vulnerable groups in the community as to their legal rights and obligations and the sources of assistance available to them.’<sup>46</sup> These findings led to a further study in the ‘Law and Poverty Series’ focusing primarily on the legal needs of migrants in Australia, which is discussed in detail later in the chapter.<sup>47</sup>

### 2.3.1 Resulting Policy Changes

The research of the 1960s and 1970s was valuable for a number of reasons. First, it identified the particular legal needs of specific social groups and illustrated that some groups such as poor people and migrants experience more unmet need than the rest of the society. In addition, it helped shape legal policy and develop further legal services to meet the needs of the community in an attempt to make the justice system more equal and accessible. The studies on legal needs widened the scope of legal services and of the role of lawyers. Blankenburg points out that ‘[r]esearch findings have been used to legitimise the expansion of

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<sup>44</sup> Ibid., p.89

<sup>45</sup> Sackville, R., (1975a), *Legal Aid in Australia, Law and Poverty Series*, Commission of Inquiry into Poverty, AGPS, Canberra, p.para 1.1

<sup>46</sup> Ibid., p., para 1.6

<sup>47</sup> Jakubowicz, A. & Buckley, B., (1975), *Migrants and the Legal System*, Law and Poverty Series, Australian Government Commission of Inquiry into Poverty, AGPS, Canberra

legal services into fields that previously were the prerogative of social policy rather than legal policy.’<sup>48</sup> Therefore, this research into legal needs meant that people’s unresolved problems became legal problems; that is problems where a legal resolution seemed feasible.<sup>49</sup>

Consequently, research into legal needs resulted in the establishment of more comprehensive publicly funded legal aid schemes for the people who could not afford justice. This expansion was very evident in Australia. While the Australian Commonwealth Legal Services Bureaux was established in 1942 to provide legal assistance to the people who could not afford it, this assistance was limited.<sup>50</sup> Law society schemes were also established in most states in the 1950s and 1960s that provided representation in serious criminal trials and some civil matters.<sup>51</sup> However, the test of merit in civil matters for these schemes meant ‘an applicant was to have both a “reasonable cause” of action and a reasonable chance of success’, making it difficult to qualify for assistance.<sup>52</sup> There was also a lack of preventative law in both the Bureaux and law society schemes, as they did not usually provide legal advice if it was unrelated to a litigated matter and in most cases did not provide more than legal representation.

Resulting from the acknowledgment of the existing legal aid schemes as ineffective, the Australian Legal Aid Office (ALAO) was established in 1973.<sup>53</sup> Its ambitious goal was ‘to satisfy the requirements of all underprivileged Australians in need of legal help.’<sup>54</sup> A new scheme was devised intending to include general legal advice on all matters be they litigated or not, address the lack of assistance in divorce and ancillary proceedings and the absence of

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<sup>48</sup> Blankenburg, E., ed., (1980), *Innovations in the Legal Services*, Oelgeschlager, Gunn & Hain, Cambridge, p.2

<sup>49</sup> Reifner, U., (1980), 'Types of Legal Needs and Modes of Legalization: The example of the Berlin tenants initiative ', in *Innovations in the Legal Services*, E. Blankenburg, Oelgeschlager, Gunn & Hain, Cambridge, p.37

<sup>50</sup> Noone, M.A. & Tomsen, S.A., (2006), *Lawyers in Conflict: Australian lawyers and legal aid*, Federation Press, Sydney, p.29

<sup>51</sup> *Ibid.*, p.30

<sup>52</sup> *Ibid.*, p.31

<sup>53</sup> Sackville, 1975a, *op.cit.*

<sup>54</sup> Noone & Tomsen, 2006, *op.cit.*, p.53

representation in thousands of Magistrates' Courts cases on a daily basis. The Office was also to provide referral services in all matters where no other assistance could be provided.<sup>55</sup>

Free and voluntary legal aid centres emerged in the early 1970s, starting with the first Aboriginal Legal Services Centre in Redfern Sydney in 1970, and the Fitzroy Legal Services Centre in 1972. Noone and Tomsen argue that these new centres challenged the established legal culture by seeing legal aid as 'a means to produce structural change and achieve justice for the poor rather than preserving the status quo.'<sup>56</sup> They managed to achieve this to some extent, in that they provided advice and representation to people who could otherwise not afford it. However, they did not produce meaningful change for the poor, as the poor continued to experience structural barriers to access justice that could not be addressed by advice. The most important new feature of these centres was the 'commitment to making legal information accessible and to reforming unjust laws.'<sup>57</sup> This commitment led to the publication of the 'Legal Resources Book' by the Fitzroy Legal Service Centre in 1977, which was the first plain English guide to law in Australia.

It is clear that the legal needs research expanded publicly funded legal services in Australia throughout the 1970s. The UK also expanded their public funding schemes significantly by the 1970s, producing a dramatic increase in the demands for lawyers.<sup>58</sup> While the legal needs research did have an impact in the US, legal aid was not a common means of providing legal services to the disadvantaged. The US opted to provide assistance through pro bono work rather than publicly funded legal services.<sup>59</sup> A federally funded legal services program came into operation in the 1960s, but was not well received by the legal profession who saw it as a

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<sup>55</sup> Ibid.

<sup>56</sup> Ibid., p.70

<sup>57</sup> Ibid., p.72

<sup>58</sup> For further detail on the developments in the UK refer to Sommerlad, H., (2004), 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid', *Journal of Law and Society*, Vol.31, No.3 and Moorhead, R., Paterson, A. & Sherr, A., (2003), 'Contesting Professionalism: Legal aid and nonlawyers in England and Wales', *Law and Society Review*, Vol.37, No.4

<sup>59</sup> Sandefur, R.L., (2007), 'Lawyers' Pro Bono Service and American-Style Civil Legal Assistance', *Law & Society Review*, Vol.41, No.1, p.85; Sandefur, R.L., ed., (2009), *Access to Justice*, Emerald Group Publishing, Bingley UK, p.xii

threat to their independence. Legal aid lawyers were seen to operate as neutral partisans for the poor, which stood in contrast to the emerging public interest lawyers who cared about the political ends of legal representation and used law to enact social change.<sup>60</sup> As a result, during the 1970s pro bono was changed from an ad hoc individualised service, to a more institutionalised service and emerged as the most significant source of free representation for the poor.<sup>61</sup> Therefore, while the methods differed across the countries, the legal needs research of the 1960s and 1970s resulted in additional services providing more lawyers to meet legal needs.

### 2.3.2 Resulting Criticisms

The legal needs and access to justice research, and the changes in the legal system that were linked to this research, do not come without criticism. One of the central critiques is that of Lewis, who disagrees with the fact that simply because people have legal problems, they should be provided with state funded legal representation.<sup>62</sup> He argues that defining a problem as 'legal' creates problems in itself, as to have a legal problem 'is to have a problem which requires legal knowledge to solve it or the taking of action before some legal institution.'<sup>63</sup> It further implies that in order to create an equal society, legal aid programs should be responsible for providing legal services to those who need it as '[t]hose who have legal problems should have a lawyer if they cannot afford one because others can afford one.'<sup>64</sup>

Lewis does not disagree with the fact that state funded legal services should be provided to disadvantaged citizens. He states, 'if we give people rights we are acting in vain unless we

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<sup>60</sup> Cummings, S.L., (2004), 'The Politics of Pro Bono', *UCLA Law Review*, Vol.52, No.1, p.14

<sup>61</sup> The Council on Legal Education for Professional Responsibility (CLEPR) emerged tying together '...the pro bono role of the profession, the public service obligation of the law school, and the utilization and education of law school students.' The program brought poverty-orientated lawyers into legal education where, together with law students, they provided legal services for the poor and established law school legal clinics. See Trubek, L.G., (1994), 'U.S. Legal Education and Legal Services for the Indigent: A historical and personal perspective', *Maryland Journal of Contemporary Legal Issues*, Vol.5, No.2, p.385

<sup>62</sup> Lewis, P., (1973), 'Unmet Legal Needs', in *Social Needs and Legal Action*, P. Morris, R. White and P. Lewis, Martin Robertson, London

<sup>63</sup> *Ibid.*, p.74

<sup>64</sup> *Ibid.*, p.78



give them the ability to enforce them.’<sup>65</sup> Instead of assuming that most problems can be solved by litigation and funding legal advice and representation, Lewis argues that alternative ways of resolving problems should be considered.<sup>66</sup> He is hesitant about accepting a lawyer’s enforcement of a right in the courtroom as the most effective way of improving someone’s position.<sup>67</sup> This argument promotes the view that legal aid should not just provide free legal representation – but should set up advice centres and provide education on alternative ways of resolving disputes in order to let the parties formulate their own interests.<sup>68</sup>

Similarly, Lyons maintains that the type of need a person has depends on the eye of the beholder.<sup>69</sup> He argues that the reason unmet legal needs surfaced in the 1960s and 1970s is not because they did not exist before then, but because that is when they caught the attention of lawyers who defined these needs as ‘legal’. Much like Lewis, Lyons believes that a legal solution is not always the best solution, and recognising the needs of poor people as legal needs is not always helpful. He suggests that perhaps instead of ‘unmet legal needs’ we could look at the needs of the poor as ‘unmet political needs’. As Morris explains, people who experience these needs are not very likely to categorise them into neat boxes such as ‘legal’, ‘housing’ or ‘domestic’ and treat them as separate entities. Rather, these needs overlap and more often than not contain a social as well as a legal competent.<sup>70</sup>

Calabresi agrees with this line of argument, and further criticises the access to justice literature for not addressing the needs of the very poor. He argues that the very poor and uneducated are largely unaware of their rights and how to enforce them, and simply providing legal aid will not benefit them as they will continue to be unaware.<sup>71</sup> Instead, other changes

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<sup>65</sup> Ibid., p.95

<sup>66</sup> Ibid., p.79

<sup>67</sup> Ibid., p.81

<sup>68</sup> Ibid., p.85

<sup>69</sup> Lyons, G., (1983), 'Defining Unmet Legal Need', *Legal Service Bulletin*, Vol.8, No.4, p.165

<sup>70</sup> Morris, 1973, op.cit., p.52

<sup>71</sup> Calabresi, G., (1979), 'Access to Justice and Substantive Law Reform: Legal aid for the lower middle class', in *Access to Justice, Vol.III: Emerging Issues and Perspectives*, M. Cappelletti and B. Garth, Sijthoff and Noordhoff, Alphenaaandenrijn

and services are needed, such as neighbourhood centres that are able to provide information to the very poor. He argues that people need more help accessing the legal system than simply legal aid, and creating a category for the 'poor' and providing funding does not mean that the disadvantaged will have access to justice. They need information on how to access the services as well as the opportunity to do so. Reifner agrees with this, stating '[i]n defining poverty simply as the 'lack of money', they overrate the power of money. Money is merely one means of satisfying social needs under given circumstances. It cannot solve all problems.'<sup>72</sup> He argues that in order to resolve legal problems, 'courage, persistence, self-confidence, specific knowledge, and abilities and contacts are often more important than money.'<sup>73</sup>

#### **2.4 THE ACCESS TO JUSTICE MOVEMENT – 1980S AND 1990S**

The 1980s and 1990s provided an opportunity to respond to the criticisms of the 1970s. A number of influential studies on unmet legal needs were produced, with increasing attention paid to barriers to meeting these needs. However, while the research focused on the continuing problems faced by disadvantaged groups in accessing justice, the 1980s and 1990s also saw a dramatic decrease of public funding for legal services. The cutbacks largely followed the reduction of the welfare state that occurred right across western democracies, including Australia. The changes followed growing concerns that costs were not being contained, and followed the election of conservative governments in the UK and US. The 1980s further saw welfare increasingly provided through market competition, the privatisation of state service and the strengthening of the discursive divide between the deserving and undeserving poor.

The Royal Commission on Legal Services in Scotland published its report on legal services in 1980. 'The Hughes Report', as it is widely referred to, concluded that more emphasis was needed on providing legal information in order to address unmet legal needs. Without

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<sup>72</sup> Reifner, 1980, op.cit., p.42

<sup>73</sup> Ibid.

information about possible legal solutions, people cannot make fully informed choices.<sup>74</sup> Therefore, in order for people to use the legal services and access justice, they must first be informed about the existence and availability of these services. The report found that public funds should be spent to advertise changes in the law and the availability and accessibility of legal services. The Commission also recommended that the eligibility of legal aid be more inclusive, so that middle-class persons would also be able to access funds to legal services when necessary.<sup>75</sup>

In Australia, the Access to Justice Advisory Committee was appointed in 1993 to make recommendations for the reform of the justice and legal system ‘...in order to enhance access to justice and to render the system fairer, more efficient and more effective.’<sup>76</sup> The Committee believed that access to justice contained three elements: ‘equality of access to justice’; ‘national equality’; and ‘equality before the law’. Equality of access to justice means that all Australians should have access to the legal services and dispute resolution mechanisms where necessary. The Committee argued that national equality meant that legal services and assistance should be equally available so that every individual can enjoy the right to access the services necessary. Finally, equality before the law means equal opportunity for every Australian regardless of their race, gender, ethnic origins or disability. This equality in law and access required a form of substantive equality, as some groups require further or different assistance in order to have equal access to justice, such as access to interpreters in order to understand the information presented to them.<sup>77</sup>

These findings reflected the 1992 ‘Multiculturalism and the Law’ report by the Law Reform Commission. The Commission found that migrants and people from non-English speaking backgrounds experience a number of unique needs that must be addressed, such as a lack of information about legal services and language barriers. The Commission made a range of

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<sup>74</sup> Pleasence, P., Buck, A., Goriely, T., Taylor, J., Perkins, H. & Quirk, H., (2001), *Local Legal Need*, Research Paper 7 - Legal Services Research Centre, United Kingdom, p.15

<sup>75</sup> Zander, M., (1980), ‘Scottish Royal Commission on Legal Services Report’, *American Bar Association Journal*, Vol.66, No.9, p.1092

<sup>76</sup> Access to Justice Advisory Committee, 1994, op.cit., p.3

<sup>77</sup> Ibid., p.8

recommendation to address these difficulties, including community legal education initiatives, more comprehensive and inclusive interpreting services, the consideration of an offender's cultural background in criminal cases and the simplification of the language of consumer contracts.<sup>78</sup>

The 1990s also saw the publication of Hazel Genn's 'Paths to Justice: What People Do and Think About Going to Law', arguably the most influential research on legal needs to date. The study was based on large-scale quantitative research conducted across England. The research helped to evaluate access to justice and legal needs and paved the way for other studies including Scotland,<sup>79</sup> New Zealand<sup>80</sup> and Australia,<sup>81</sup> focusing on the needs of specific groups, such as homeless and disabled people. Genn saw the importance of asking people directly what they thought about the effectiveness of the legal system. Her focus was on the ways civil, justiciable problems were being dealt with at the time and what people thought about going to law or the courts to resolve their legal disputes. She argues that:

Discussion about access to justice and lack of access to justice proceeds largely in absence of reliable quantitative data about the needs, interests and experiences of the community that the system is there to serve... We have little information about what the civil justice system delivers and the extent to which the courts are regarded as valuable or irrelevant to those for whom they ostensibly exist.<sup>82</sup>

Genn broadened the field to include people who did not know what a legal problem was or that they in fact had one, or that a legal resolution was possible by referring to such a problems as a 'justiciable events', meaning:

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<sup>78</sup> Australian Law Reform Commission, 1992, op.cit.

<sup>79</sup> Genn, H. & Paterson, A., (2001), *Paths to Justice Scotland: What people in Scotland do and think about going to law*, Hart Publishing, Oxford

<sup>80</sup> Maxwell, G.M., Smith, C., Shepherd, P. & Morris, A., (1999), *Meeting the Legal Service Needs*, Institute of Criminology, Victoria University of Wellington, Wellington, p.5

<sup>81</sup> Schetzer, *et al.*, 2002, op.cit.; Coumarelos, C., Wei, Z. & Zhou, A.Z., (2003), *Justice Made to Measure: NSW legal needs survey in disadvantaged areas*, Access to Justice and Legal Needs, Vol 3, Law & Justice Foundation of New South Wales

<sup>82</sup> Genn, 1999, op.cit., p.1

... a matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being 'legal' and whether or not any action taken...involved the use of any part of the civil justice system.<sup>83</sup>

Her study explores the self-help remedies people undertook in order to resolve their justiciable problems, such as seeking assistance from advice centres as well as lawyers and courts.<sup>84</sup> Genn is also critical of approaches that focus on kinds of people and highlights the importance of focusing on the kinds of problems people experienced.<sup>85</sup>

Genn's study was specifically examined only "justiciable" problems, meaning those problems where there was a potential legal solution. Genn's research is significant, especially as it highlighted unmet legal needs and barriers to accessing justice. However, according to Curran and Noone 'the concept of "justiciability" has implicit in it the right and capacity to sue as a key measure of legal need.'<sup>86</sup> The focus on justiciable legal problems has meant that other avenues beyond accessing the formal legal system are not investigated, and it may be that legal solutions are not the only nor the best remedy in all circumstances. Arguably the next step in the study of justiciable problems is to look at non-legal remedies, or as Curran and Noone point out that a better remedy may exist in improved processes instead, as the harm that is caused by the adversarial process can, in some instances, exacerbate the wrong.<sup>87</sup>

Genn's study was nonetheless one of the most influential in the access to justice movement. Genn found that out of 1134 people interviewed who had experienced justiciable problems, only 20 per cent decided to access the justice system and commence legal proceedings.<sup>88</sup> Five per cent came under the 'lumpers' category, meaning that they took no action at all to resolve the problem.<sup>89</sup> Just over one third of the cases involved eventually solved their problem by

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<sup>83</sup> Ibid., p.12

<sup>84</sup> Pleasence, *et al.*, 2001, op.cit., p.25

<sup>85</sup> Curran & Noone, 2007, op.cit., p.79

<sup>86</sup> Ibid., p.82

<sup>87</sup> Ibid.

<sup>88</sup> Genn, 1999, op.cit., p.147

<sup>89</sup> Ibid., p.146

agreement without resorting to legal proceedings.<sup>90</sup> All together, about half of the respondents had not achieved any resolution or agreement to their problem, and in most of these cases the respondents had no intention of taking any further action or proceedings.<sup>91</sup> The reason for not wanting to take any further action are summarised in the table below.

Table 2.1: Reasons for not wanting to take further action.<sup>92</sup>

<b>Reason</b>	<b>Number</b>
Want to see what would happen next	23%
Felt nothing else could be done	22%
Costs too much	7%
Had enough of the problem	7%
Too much hassle to fight the problem	5%

Genn’s research highlights ‘a great unmet demand for information, advice and assistance’ across a wide spectrum of people to help deal with their problems.<sup>93</sup> This study helped identify and quantify the legal problems people experience and also provided valuable data on people’s actions and perceptions about going to law to resolve disputes. Genn’s research was also important in identifying the barriers to access to justice, which are addressed later in the chapter.

2.4.1 Policy changes

At the same time that research was highlighting the continuing unmet legal needs of the disadvantaged, public funding for legal aid was being reduced. Starting from the early 1980s, the expansion of legal aid started to be seen as too expensive and not sufficiently effective.

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<sup>90</sup> Ibid., p.148

<sup>91</sup> Ibid., p.148-9

<sup>92</sup> Ibid., p.149

<sup>93</sup> Ibid.

Service providers became interested in developing more effective and cheaper ways of providing access to justice and to legal services.

In Australia, the National Legal Aid Advisory Committee was established in 1987 to advise the Attorney General on the efficiency of legal aid.<sup>94</sup> The Committee found that legal aid was becoming too expensive, and was still not addressing the need for access to justice in the community. They concluded that:

- there are identifiable unmet needs for legal aid which should be addressed
- existing and serious barriers of access to justice in the Australian community affect the demand for and cost of legal aid
- unless access to justice and the productivity of the legal and administrative systems is improved in the 1990s the cost of legal aid will continue to rise and attainable service levels decline.<sup>95</sup>

The Committee recommended a set of national principles and guidelines be adopted, and legal policies to be more integrated and responsive.

This new focus on efficiency and economy was an important policy shift. The increasing cost of delivering expanded legal aid started to be seen as a problem, and there was a rollback of the welfare state in most western nations. Policy makers used the findings from empirical studies to argue for the need to reallocate existing financial resources to better use, as it was assumed that not all services were actually needed.<sup>96</sup> Studies such as Genn's were used to shift away from universal services to targeting services identified as being most in need. In particular, policy makers focused on studies that emphasised that information and education was more effective than legal aid,<sup>97</sup> thus the attention turned to educating the public on their legal rights and setting up alternative methods of accessing justice. State sponsored alternative dispute resolution and self-help remedies processes were developed throughout the 1990s,

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<sup>94</sup> National Legal Aid Advisory Committee, (1990), *Legal Aid for the Australian Community*, AGPS, Canberra, p.xv

<sup>95</sup> Ibid.

<sup>96</sup> Pleasence, *et al.*, 2001, *op.cit.*, p.7

<sup>97</sup> Such as the Hughes Report and Genn's study discussed above

shifting the responsibility to the consumer with an aim to 'extend advice and the availability of expertise to cover the concerns of marginalised groups.'<sup>98</sup>

Giddings and Robertson, however, warn that these innovations in the delivery of legal services, especially self-help services, were being introduced in order to cut legal budgets rather than to improve the services available.<sup>99</sup> They argue that as studies pointed to the need for legal education, and this education was far less expensive to provide than representation, education became the focus of legal service providers. Access to justice and legal needs research thus started to be used by the governments to justify funding cutbacks to legal aid.

This new focus also created a shift in legal service delivery from state-funded lawyers to state-funded lay advisors and community legal services, starting in England and Wales. This allowed lawyers and non-lawyers to contest in the delivery of legal help and services, creating a competitive legal aid market. Three main benefits of this scheme as suggested by the government at the time were that non-lawyers would be cheaper than lawyers, together they could maximise quality and access of services and that they would each contribute something different to the public.<sup>100</sup> As such, community legal centres and publicly funded non-lawyer legal services started to emerge.

With the intention of testing whether the above claims were realised, Moorhead *et al* compared lawyer and non-lawyer legal services. They found that although lawyers were more expensive per hour, non-lawyers took longer to respond to the problem, resulting in a small difference in price overall. Their results concluded that it is possible for non-lawyer agencies to perform at the same or a higher level of quality than lawyers.<sup>101</sup> The study highlights the importance of specialisation over professional status, arguing that both lawyers and non-

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<sup>98</sup> Sommerlad, 2004, *op.cit.*, p.361

<sup>99</sup> Giddings, J. & Robertson, M., (2003), 'Large-scale Map or the A-Z? The place of self-help services in legal aid', *Journal of Law and Society*, Vol.30, No.1

<sup>100</sup> Moorhead, *et al.*, 2003, *op.cit.*, p.767

<sup>101</sup> *Ibid.*, p.795



lawyers have their place and should be working together to create a ‘more subtle system balancing regulation and market forces.’<sup>102</sup>

Moorhead and Pleasence’s research emphasises the benefits of moving away from the simplistic notion of access to justice of the 1960s and 1970s, that is the provision of free/cheap lawyers to the needy. They show that new models based on effectiveness rather than equality, such as public legal education and self-help, provide ‘a set of tools for alternative and more effective management of limited resources.’<sup>103</sup> These models challenge the conventional private profession legal aid order by providing cheaper services delivered by administrators rather than lawyers.<sup>104</sup> The authors emphasise the dangers of adversarialism, that is the ‘assumption that certain problems are best resolved by legal means and by traditional legal professionals’ and illustrate a number of ways in which this could be overcome, such as privatisation of legal services and legal expense insurance schemes.<sup>105</sup> They conclude that in societies where funding for legal aid is scarce, other avenues and possibilities must be explored and different ways of meeting the needs of the people considered.

However, the efficacy of these alternative ‘more effective and efficient’ legal services has been criticised. For example, self-help remedies, or ‘a legal service that involves the consumer taking personal responsibility for completing all or part of the relevant legal transaction’ have been criticised by Giddings and Robertson for further marginalising vulnerable groups.<sup>106</sup> While these remedies have numerous benefits to the consumer and provider, such as convenience, informality and greater workplace flexibility, for these benefits to be realised ‘the clients require a high level of literacy and comprehension and also need to

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<sup>102</sup> Ibid., p.799

<sup>103</sup> Moorhead, R. & Pleasence, P., (2003), 'Access to Justice after Universalism: Introduction', *Journal of Law and Society*, Vol.30, No.1, p.2

<sup>104</sup> Ibid.

<sup>105</sup> Ibid., p.3

<sup>106</sup> Giddings & Robertson, 2003, op.cit., p.103; Giddings, J. & Robertson, M., (2001), 'Informed Litigants with Nowhere to Go: Self-help legal aid services in Australia', *Alternative Law Journal*, Vol.25, No.4

want to help themselves and have the confidence to do so.’<sup>107</sup> Clients who do not possess the confidence, knowledge, language or ability to deal with the matter are likely to feel abandoned by the process rather than empowered. Giddings and Robertson conclude that self-help remedies on their own provide only community education and are best accompanied with advice and representation to constitute a complete legal service.<sup>108</sup>

Melville and Laing further found that while self-help remedies such as Personal Action Plans work well in other fields such as healthcare, they have limited potential within the current framework of legal services. This is mainly due to the resistance of lawyers to relinquish control to their clients and their tendency to focus only on the legal problems at hand rather than taking a holistic approach.<sup>109</sup> Therefore, while self-help remedies became preferred over the provision of legal aid and were considered as more efficient, they did not necessarily provide a more effective service to the people. The responsibility to deal with problems was placed on the clients, who were provided with the knowledge to pursue a case but not necessarily the means to do so.

Furthermore, while the 1980s and 1990s saw the expansion of legal services, the underlying assumption that law is inherently just still remained. Much like the research of the 1960s and 1970s, the barriers to access to justice research as well as the new avenues of accessing justice all assume that justice means access to lawyers, legal advice, courts or some form of legal resolution. So while the means of accessing justice were critiqued and extended, the concept of justice, being only connected to the formal legal sphere, remained unchallenged.

The research of the 1980s and 1990s introduced reliable quantitative data about different types of legal needs and helped identify the barriers standing between the individual and justice. It brought to the attention that different groups of people experience different need and that there are numerous ways of meeting this need. It also saw the expansion of legal services to include services other than lawyers and courts, the establishment of legal centres

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<sup>107</sup> Giddings & Robertson, 2003, op.cit., p.114

<sup>108</sup> Giddings & Robertson, 2001, op.cit.

<sup>109</sup> Melville, A. & Laing, K., (2008), 'Personal Action Plans: Evaluating self-management initiatives in family law', *International Journal of Law in Context*, Vol.4, No.2, p.165

and laypeople and the move past professionalism. While this research was used to justify cutbacks in legal aid and did not address the structural barriers to access, it was crucial in moving forward from a simplistic model of service delivery to a more effective one, utilising the different types of services available.

## **2.5 BARRIERS TO ACCESS TO JUSTICE**

Another major finding resulting from the access to justice literature was the existence of barriers to access to justice, that is, the common factors which stand in the way of accessing justice. The studies also discovered that some groups of people experience additional or unique barriers to others, such as poor people or people from non-English speaking backgrounds. This section summarises the barriers to access to justice people experience on a daily basis.

As discussed earlier, Cass and Sackville discovered that a large number of respondents had in fact experienced a number of problems where legal advice should have been sought but was not. A major reason respondents did not seek legal advice and did not take legal action was the cost associated with those actions. ‘Plainly the expense of consulting private solicitors was a substantial barrier which prevented many respondents gaining access to legal assistance’, and this was particularly so where small amounts of money were at stake.<sup>110</sup> Genn’s study also highlights cost as a barrier to access to justice, with seven per cent of respondents reporting that they did not try to resolve their problem because it would have cost too much.<sup>111</sup> These findings further emphasised the view that poor people had unmet legal needs and were in a more disadvantaged position when pursuing justice than people who were financially well off, and cost was reported as the major barrier to access to justice in most subsequent studies.<sup>112</sup>

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<sup>110</sup> Cass & Sackville, 1975, op.cit., p.90

<sup>111</sup> Genn, 1999, op.cit., p.149

<sup>112</sup> For example Karras, M., McCarron, E., Gray, A. & Ardasinski, S., (2006), *On the Edge of Justice: The legal needs of people with a mental illness in NSW*, Law & Justice Foundation of New South Wales; Schetzer, *et al.*, 2002, op.cit; Lynch & Klease, 2003, op.cit.

Furthermore, if the dispute involves a small amount of money, the costs involved in formal legal processes may exceed the amount that is claimed and the dispute may not be worth pursuing.<sup>113</sup> The financial resources of the other party can also stand as a barrier to access. If the other party is financially better off, then they can not only afford to litigate but can also afford to withstand the delays in the court system, making the claimant intimidated and discouraged from taking their case forward. As Bottomley and Bronitt point out, '[t]he party who has more money, power, or experience will likely enjoy an advantage in any legal contest.'<sup>114</sup>

Another barrier to access to justice is the amount of time required for a case to be finalised in the court. In many countries, court cases are dragged out through the courts for a minimum of two or three years before an enforceable judicial decision is made. This delay increases costs and decreases the plaintiff's willingness to keep fighting the case. In some circumstances, it is simply not worth taking a case through the court system, or the claimant is likely to abandon the case or settle for a less desirable outcome.<sup>115</sup>

Lack of information and awareness of rights is a further barrier to access, causing ignorance of the available avenues and services.<sup>116</sup> If people are unaware of their legal rights and needs, it does not matter how many services exist to help them deal with their legal problems – they will not know to access these services without this knowledge. Therefore, for some, 'it is simple ignorance that they have the basis of a possible claim.'<sup>117</sup> Lack of understanding about the law and the processes of pursuing a legal case prevent people from engaging with the legal system and accessing justice.<sup>118</sup> Some people may be aware that they have a legal problem, and may know that services exist. However, their lack of legal education may

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<sup>113</sup> Cappelletti & Garth, 1978a, op.cit., p.13

<sup>114</sup> Bottomley, S. & Bronitt, S., (2006), *Law in Context*, 3rd edn, The Federation Press, Sydney, p.15

<sup>115</sup> Schetzer, L. & Henderson, J., (2003), *Access to Justice and Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW - Stage 1: Public Consultations*, Law & Justice Foundation of New South Wales, p.136

<sup>116</sup> Lynch & Klease, 2003, op.cit., p.26

<sup>117</sup> Zander, 1980, op.cit., p.47

<sup>118</sup> Lynch & Klease, 2003, op.cit., p.26

prevent them from seeking to resolve their legal problem in the courts. People simply may not know where to go or what to do, or how to navigate their way through the legal system.

The psychic willingness to utilise the legal system can also be a barrier to access to justice. In some cases, even those who know how to seek legal resolutions may not do so.<sup>119</sup> People may have personal reasons for choosing not to take action as the legal needs studies have shown, such as fear of repercussions or the belief that it maybe too difficult or make matters worse. However, individual choices concerning someone's decision to pursue a case are related to structural barriers such as power difference. As Galanter has argued, powerful parties are advantaged in litigation as they have greater access to expertise and resources. Less powerful parties often lack the experience and resources to win a legal case.<sup>120</sup> In addition, less powerful parties may not event have the confidence to pursue a legal case in the first place.

#### 2.5.1 Barriers faced by migrants and refugees

One of the main findings of the legal needs and access to justice research is that while the general barriers to access to justice are problematic and affect a large section of the population, there are groups who experience additional and/or different barriers when accessing the legal system. One such group are non-English speaking migrants and refugees. Jakubowicz and Buckley found that most non-English speaking migrants were working-class and possessed few skills.<sup>121</sup> This means that they are not in a position where they are earning high incomes, and therefore are likely to form part of the poor community in Australia. It was further concluded that non-English speaking migrants face additional barriers to those experienced by the rest of the poor Australian population, placing them in a higher risk, vulnerable position.

Before exploring the legal problems of both, it is necessary to define and differentiate between migrants and refugees. This definition is important, as the experiences of migrants and refugees may differ significantly and this study deals primarily with the specific

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<sup>119</sup> Zander, M., (1989), *Matter of Justice: The legal system in ferment*, Oxford University Press, Oxford, p.51

<sup>120</sup> Galanter, 1975, op.cit.

<sup>121</sup> Jakubowicz & Buckley, 1975, op.cit., p.65

experiences of refugees. A refugee, according to the UN Refugee Convention of 1951 is a person who:

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.<sup>122</sup>

Due to the unique nature of African refugees, the African Union (formerly known as the Organization of African Unity) expanded this definition in 1969 to also apply to:

...every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>123</sup>

A migrant on the other hand, is a person who makes a conscious decision to come a country, has the opportunity to choose which country they want to migrate to and learn about the country before arriving.<sup>124</sup> Therefore, the main difference between migrants and refugees is that while migrants choose to leave their country and prepare for the move, refugees are forced to flee their homes in a hurry and generally do not choose where they will settle or when and if they can return home.

The main reason for including migrants in this section is that there are certain problems that both migrants and refugees experience equally when settling in Australia (such as language issues). Furthermore, certain studies focus on the problems experienced by both groups, and

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<sup>122</sup> United Nations Convention Relating the Status of Refugees, 1951, Geneva, Article 1

<sup>123</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Article 1

<sup>124</sup> Refugee Council of Australia, (2011), 'Australia's Refugee Program', accessed 11/11/2011, from <http://www.refugeecouncil.org.au/arp/faqs.html>

some studies do not differentiate between the two.<sup>125</sup> Therefore, understanding the problems some migrants face will help in understanding some of the problems that refugees face.

One of the most obvious difficulties non-English speaking migrants and refugees face in terms of access to justice is the lack of English language skills. This can be a significant barrier and may hinder a person's ability to 'understand information or advice concerning legal rights, obligations and consequences of certain actions, unless that information/advice is provided in their preferred language.'<sup>126</sup> Providing advice and information in a sufficient number of languages is very difficult, especially in the case of Sudanese entrants, as in the country of Sudan alone, more than 400 different languages or dialects are spoken.<sup>127</sup>

Apart from only having access to information that cannot be understood, non-English speaking migrants and refugees may not be able to communicate well with authority figures, such as police officers or judges, which can lead to some misunderstandings. As the Australian Law Reform Commission concludes, '[a] person who cannot communicate with those providing a service does not have access to that service equal to that of a person who can.'<sup>128</sup> Therefore, the difficulty in understanding the information and advice, as well as the difficulty in communicating with and understanding service providers, places migrants and refugees at a disadvantage when accessing justice.

Furthermore, migrants and refugees face a number of cultural barriers in accessing justice. These include a lack of knowledge about the system and the failure of courts and other officials involved in the legal system to recognise and acknowledge the cultural differences in a person's behaviour.<sup>129</sup> Differences in family structures and in the role of certain family

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<sup>125</sup> For example, Pittaway & Muli, 2009, op.cit. explore the experiences of Horn of Africa migrants and refugees, while Nolan, D., Farquharson, K., Politoff, V. & Marjoribanks, T., (2011), 'Mediated Multiculturalism: Newspaper representations of Sudanese migrants in Australia', *Journal of Intercultural Studies*, Vol.32, No.6 refer to Sudanese migrants.

<sup>126</sup> Schetzer, *et al.*, 2002, op.cit., p.25

<sup>127</sup> Department of Immigration and Citizenship, (2007a), *Sudanese Community Profile*, Commonwealth of Australia, p.16

<sup>128</sup> Australian Law Reform Commission, 1992, op.cit., para 3.19

<sup>129</sup> Schetzer, *et al.*, 2002, op.cit., p.27

members also exist, as well as other factors preventing groups of people from accessing the legal system such as legal action being seen as ‘dishonourable’ in their culture.<sup>130</sup>

Cass and Sackville further concluded that non-British migrants were more ignorant when it came to knowledge of legal services, and therefore were less likely to access such services.<sup>131</sup> This was mainly due to the language barrier, as non-British migrants experienced problems understanding the services available to them in the first place, as well as understanding the advice of lawyers if they were to access them. Schetzer *et al* argue that:

...these people have as great (or perhaps greater) a legal need as those who are aware that they have a legal problem but cannot access the legal system, since they are excluded from its operation from the start by their ignorance.<sup>132</sup>

The lack of understanding of the Australian law may lead non-English speaking migrants to be ‘unfamiliar with the values and practices of participatory democracy, including rights, responsibilities, and the role of different authorities’, possibly resulting in legal problems.<sup>133</sup> This is a very important issue, as a large amount of legal problems may arise out of the lack of information about the legal system, which could have been prevented had that knowledge been there. The governments and legal systems in some African countries, for example, are very different than those of Australia. The newly arrived migrants and refugees may not know the law or their responsibilities, and may find themselves in trouble with the law without knowing they are doing something wrong.

Ignorance concerning the workings of the legal system results in the denial of opportunity for individuals to participate in the process or to understand the reason why the legal system affects them in particular

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<sup>130</sup> Barendrecht, M. & de Langen, M., (2008), *Legal Empowerment of the Poor: Innovating Access to Justice*, in 'The State of Access: Success and Failure of Democracies to Create Equal Opportunities', Innovative Governance in the 21st Century Report, Washington D.C, Brookings Institution Press, p.255

<sup>131</sup> Cass & Sackville, 1975, op.cit., p.91

<sup>132</sup> Schetzer, *et al.*, 2002, op.cit., p.6

<sup>133</sup> Department of Immigration and Citizenship, (2007b), *Settlement Needs and Arrivals, South Australia - SGP Funding Round 2008-2009*, Commonwealth of Australia, p.3



ways... barriers to accessing information are greater for those whose first language is not English, who are used to different methods of acquiring knowledge, or who are used to a different legal system.<sup>134</sup>

On the other hand, they may also be wronged by another party, but may not know that they have a right or the ability to do something about that problem. As the Australian Law Commission stated, '[f]undamental principles of access and equity require that all Australians know their legal rights, duties and responsibilities, the role of the state, the basis on which it will intervene and how the courts and the legal system operate.'<sup>135</sup> People who are not provided with this knowledge are at a disadvantage and do not possess the ability to use the legal system to protect them.

Even when migrants and refugees realise that they have a legal problem and that they can do something about it, they are more likely to be reluctant to take legal action due to a lack of confidence and empowerment. As Zander explains, quite often it is assumed that taking the problem through the legal system is too much trouble and may not result in an appropriate outcome.<sup>136</sup> Anderson notes that in some cultures there is reluctance to become entangled in the court system, and litigation can be seen as making trouble 'while a brush with the police can be interpreted by the local community as guilty until proven innocent.'<sup>137</sup> This was indicated in the NSW Legal Needs Survey, which found that due to numerous individual and structural barriers, people from non-English speaking backgrounds were 1.5 times less likely to report legal events than people from English speaking backgrounds.<sup>138</sup>

### 2.5.2 Refugee specific barriers

While refugees experience many of the same problems as migrants and the general public, they are also likely to experience further specific problems based on their pre-arrival experiences and country of origin. For example, a refugee who came from the war torn

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<sup>134</sup> Schetzer, *et al.*, 2002, *op.cit.*, p.26

<sup>135</sup> Australian Law Reform Commission, 1992, *op.cit.*, para 2.2

<sup>136</sup> Zander, 1989, *op.cit.*, p.47

<sup>137</sup> Anderson, M.R., (1999), 'Access to Justice and Legal Process: Making legal institutions responsive to poor people in LDC's', Paper for Discussion at WDR Meeting, 16-17 August, p.20

<sup>138</sup> Coumarelos, *et al.*, 2003, *op.cit.*, p.81

country of Sudan and spent ten years in a refugee camp in Kenya will have different experiences of laws and government than a migrant coming from Spain. These pre-arrival experiences and differences in laws and governments mean that these groups will have additional needs when they arrive to Australia, as they may not be familiar with the common law system, democracy or even the use of electricity.

Pre-arrival experiences play a significant role in the ability of refugees to adapt to and access the legal system. For instance, humanitarian entrants:

... may arrive with a number of emotional and psychological difficulties as well as physical health issues. They may have undergone a variety of traumatic experiences before arriving in Australia... They may also have spent long periods of time in refugee camps and/or in transit countries. The ongoing impact of these experiences can significantly hamper their capacity to settle.<sup>139</sup>

This is especially true for South Sudanese refugees, as most have spent years in refugee camps around Africa. Living conditions in these camps are often quite poor, as will be demonstrated in the later chapters. Most refugees do not have access to clean water and food and rely on humanitarian aid to survive. These camps are also cramped, and health care is not readily available. Therefore, refugees coming from these camps are generally malnourished and in poor health, increasing their need when settling in Australia.

Most refugees who come to Australia were forced to flee their country due to the fighting and hard living conditions. Many refugees bring with them the psychological and physical traumas and experiences, such as ‘...torture, persecution, violent civil discord, arbitrary abductions, sexual abuse, the loss of loved ones, imprisonment, disease and starvation.’<sup>140</sup> This trauma often continues during and after displacements and settlement in Australia.<sup>141</sup> Therefore, after they arrive in Australia, they may need extra help and services to help them deal with their pre-arrival experiences and trauma and settle into the society. Refugees will

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<sup>139</sup> Department of Immigration and Citizenship, (2003), *Report of the Review of Settlement Services for Migrants and Humanitarian Entrants*, Commonwealth of Australia, p.62

<sup>140</sup> Ibid.

<sup>141</sup> Tempany, 2009, op.cit., p.302

also have had poor access to legal services in their country of origin, and often have neither the awareness nor the means of asserting their rights in their country of refuge.<sup>142</sup>

While Australian laws and the legal system may seem difficult to grasp for refugees who have been fleeing war, the Australian culture may also come as a great shock to some, causing additional barriers for these communities:

As well as dealing with the direct effects of the refugee experience (such as physical injury, post-traumatic stress and grief at the loss of family and friends) and the normal challenges of migration (such as language barriers) these entrants will experience culture shock due to unfamiliarity with the Australian way of life. These entrants may feel anxious or overwhelmed by the challenges they face.<sup>143</sup>

This is a confusing time for refugees, and it may take a long time for them to adjust. In the meantime, they are ignorant about Australian culture and rules and unaware of where to find the relevant information, placing them at a disadvantage when accessing justice.

Due to the conflict and instability in their country of origin, refugees may have limited education and employment opportunities.<sup>144</sup> It has been noted that due to the wars in most parts of Africa, a high number of refugees who are settling in Australia are illiterate or semi-illiterate.<sup>145</sup> This, Odongkara notes, makes the initial experience of settlement difficult, ‘as it limits access to information on available services, and increases the feeling of isolation.’<sup>146</sup> Therefore newly arrived refugees may need extra help and training in order to find employment and participate in our society. This also creates issues around access to justice, as ‘those who cannot read and write are at a huge disadvantage in modern legal systems, which are strongly based on written documents, in the form of laws, regulations, and legal

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<sup>142</sup> REDRESS, (2011), 'Victims of Torture and Access to Justice - A Primer', accessed 08/07/2011, from [http://www.irct.org/Files//Filer/IPIP/training/Victims\\_and\\_Access\\_to\\_Justice-Primer.pdf](http://www.irct.org/Files//Filer/IPIP/training/Victims_and_Access_to_Justice-Primer.pdf)

<sup>143</sup> Department of Immigration and Citizenship, 2007b, op.cit., p.3

<sup>144</sup> Ibid.

<sup>145</sup> Odongkara, J.A., (2005), 'Unique Vision, Shared Strengths: Collaborative approach to African humanitarian migrants' issues - Western Australian perspectives', Refugee Resettlement in Australia: Hopes Fulfilled or Dreams Shattered?, University of New South Wales, 23-28 November

<sup>146</sup> Ibid.

documents.’<sup>147</sup> This lack of education makes it difficult to educate refugees about the legal system and their rights and responsibilities, as simply providing information brochures or booklets will not suffice.

On top of that, experiences of the government and legal systems in their home country, which left them to be in the disadvantaged position of a refugee, may influence them to view the Australian legal system in a negative way.<sup>148</sup> Schetzer *et al* highlight that some refugees have been intimidated and mistreated by the legal system in their home country, and may not believe that the Australian legal system will protect their interests.<sup>149</sup> Some refugees have experienced the government, the armed forces and the police fighting against them. Some may have experienced the official armed forces burn their villages and kill their families, as is the case with Sudanese refugees. These experiences are very likely to transfer into negative views of all government officials, even after arriving in Australia. This negative view may transform into conflict with the police and government personnel in Australia and may lead to problems with the law. Therefore, there is an urgent need to address the negative views of the government and police, to educate the newly arrived refugees on the role of government officials and in turn establish confidence in the Australian legal system.<sup>150</sup>

## **2.6 RECENT DEVELOPMENTS**

In Australia, the most comprehensive study assessing the legal needs of disadvantaged people to date consists of the Law and Justice Foundation’s ‘Access to Justice and Legal Needs’ research. In 2002 the Law and Justice Foundation of NSW set out to ‘contribute to the development of a fair and equitable justice system which addresses the legal needs of the community, and to improve access to justice by the community.’<sup>151</sup> They conducted a large-

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<sup>147</sup> Barendrecht & de Langen, 2008, op.cit., p.255

<sup>148</sup> Deljo, A.K., (2000), ‘Refugees Encounter the Legal Justice System in Australia: A case study’, *Journal of Psychiatry, Psychology and Law*, Vol.7, No.2, p.244

<sup>149</sup> Schetzer, *et al.*, 2002, op.cit., p.26

<sup>150</sup> Ibid.

<sup>151</sup> Ibid., p.1

scale project investigating access to justice and legal needs of disadvantaged people in New South Wales, which was based on Genn's Paths to Justice research.<sup>152</sup> This project identified the legal needs of a number of different disadvantaged groups, conducted an in-depth literature review of existing studies on access to justice, and provided qualitative and quantitative data on the legal needs of some disadvantaged groups.

When referring to disadvantaged people, Schetzer *et al* include economic as well as social disadvantage, including but not limited to older people, people from diverse backgrounds, people from regional areas and people with low levels of education. The authors believe that disadvantaged people experience greater legal need and enjoy less access to justice than other citizens. The legal needs of people in six disadvantaged areas of New South Wales were investigated, with 2431 residents interviewed. Over two-thirds of the participants reported experiencing one or more legal problem in the previous two years, a figure identical to the Cass and Sackville study, but much higher than the before mentioned international studies.<sup>153</sup> It was also found that legal events are not randomly experienced in equal numbers, are dependant on socio-demographic factors and often happen in clusters.<sup>154</sup> These findings suggest that 'some individuals are particularly vulnerable to legal problem and that legal services are likely to be disproportionately needed by these individuals.'<sup>155</sup> In a third of the cases where a legal problem was experienced, no action was taken to resolve that problem. Similarly to Genn's study, the most common reasons for not taking any action were thinking the problem was not serious enough (29%) and that it would not make a difference or that nothing could be done (26%).<sup>156</sup> For over three-quarters of the cases where help was sought, only one adviser was used demonstrating the importance of each legal adviser providing adequate and complete advice.<sup>157</sup>

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<sup>152</sup> Ibid.

<sup>153</sup> Coumarelos, *et al.*, 2003, op.cit., p.161

<sup>154</sup> Ibid., p.161-77

<sup>155</sup> Ibid., p.161

<sup>156</sup> Ibid., p.94

<sup>157</sup> Ibid., p.102

This research is important as it places groups such as migrants and refugees into the disadvantaged category when accessing justice simply because they come from non-English speaking backgrounds. This study further found that migrants and refugees face difficulties participating in the Australian labour market and society due to their deficiency in English, that they are likely to be intimidated by the legal system as it may differ from that of that country of origin and that they are likely to have little information or knowledge about the law.<sup>158</sup> People from non-English speaking backgrounds had lower reporting rates to their counterparts, suggesting a failure to identify legal problems and a need for ‘specialised information strategies targeting this group’.<sup>159</sup> The report concluded that:

... a multidimensional approach to legal service provision, which includes a range of reactive, preventative and proactive strategies, would enable legal services to be more effectively tailored to meet the diverse needs and experiences of different individuals.<sup>160</sup>

These findings are supported by other studies, such as a study by the Senate Committee in 2004, which concludes that migrants and refugees are one of the most disadvantaged groups in terms of access to justice.<sup>161</sup> They report that there is a great deal of unmet need in the migrant and refugee community, and that more funding and services should be made available to meet this need.

In 2009 the Attorney General’s Department established the Access to Justice Taskforce to examine the federal civil justice system and develop a more strategic approach to access to justice. The Taskforce investigated the need for access to justice; that is the legal disputes people were experiencing as well as the supply of justice; the different avenues of justice available. They found that the justice system functions reasonably well and that there are a number of avenues available to people to access justice. However, these avenues are not always made clear to people and they do not always function well together. They conclude that access to justice needs to be viewed as more than solely legal assistance, and that

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<sup>158</sup> Schetzer, *et al.*, 2002, *op.cit.*, p.24-7

<sup>159</sup> Coumarelos, *et al.*, 2003, *op.cit.*, p.172

<sup>160</sup> *Ibid.*, p.xxvii

<sup>161</sup> Senate Legal and Constitutional References Committee, 2004, *op.cit.*, p.143

increases in the legal aid budget will not automatically translate to increases in access to justice.<sup>162</sup> They argue that:

To improve the quality of dispute resolution, justice must be maintained in individuals' daily activities, and dispute resolution mechanisms situated within a community and economic context. Reform should focus on everyday justice, not simply the mechanisms of legal institutions which people may not understand or be able to afford.<sup>163</sup>

What is needed, according to the Access to Justice Taskforce, is an overarching strategic framework, a whole of system approach that would guide all aspects of the justice system in one direction. The framework recommended focuses around five justice principles; accessibility of information, appropriateness of the resolution, and equity, efficiency and effectiveness in the system and all its elements. The Taskforce further designed a methodology to help policy-makers translate the principles into action. This consists of:

- providing the relevant information, 'enabling people to understand their position, the options they have and deciding what to do';<sup>164</sup>
- the provision of action where necessary, including intervening to prevent escalation of problems;
- triage capacity to direct matters to the most appropriate destination;
- providing fair and equitable outcomes in all disputes;
- ensuring the costs stay proportional to the issues experiences;
- building resilience and equipping people with skills necessary to resolve their disputes;
- directing attention to the actual and real issues people experience and finding ways to address them.<sup>165</sup>

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<sup>162</sup> Access to Justice Taskforce, (2009a), *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Attorney-General's Department, Commonwealth of Australia, p.52

<sup>163</sup> Ibid., p.3

<sup>164</sup> Access to Justice Taskforce, 2009b, op.cit., p.9

<sup>165</sup> Ibid., p.9-10

This framework has been developed as a guide for future direction in the civil justice system. It is intended to ‘encourage development of innovative policy solutions and increase the level of integration within the various elements of the justice system.’<sup>166</sup> A more integrated system focusing on providing early, cost-effective resolutions for the actual and real disputes experienced by people would go a long way in addressing the actual need and providing access to justice for everyone. Moving away from the simplistic notions of access to justice where access meant access to lawyers, legal advice or even self-help remedies, this framework would bring together all the different service methods and combine them to provide a more complete service. This would ensure that clients have access to all the available services and their needs are more likely to be met.

Curran and Noone argue that access to justice and to legal services is a critical part of democracy, and as such access to justice must be recognised as the most basic human right. They acknowledge the difficulty in the literature of defining legal needs and argue that legal needs and access to justice are closely connected to and should be measured in terms of human rights. Their trial study suggests that:

... without knowledge about human rights and legal rights, without the confidence to exercise these rights and without the capacity or capability to seek or find help it is unlikely that people will realise their rights and accordingly access to justice is placed in question.<sup>167</sup>

Their study explores the actual experiences of people about their human rights, reaching out to vulnerable and marginalised groups. The particular focus is on the current social security system, where participants were asked how they have been treated and how they expect to be treated if there was a human right to social security in Australia. They found that there was no knowledge of the fact that social security was a human right, and more importantly, participants did not view difficulties with Centrelink as a legal issue and did not think to use legal services for assistance.<sup>168</sup> This study highlights that when research about access to

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<sup>166</sup> Ibid., p.12

<sup>167</sup> Curran, L. & Noone, M.A., (2008), 'Access to Justice: A new approach using human rights standards', *International Journal of the Legal Profession*, Vol.15, No.3, p.196

<sup>168</sup> Ibid., p.215



justice is conducted with people with limited resources and education, it is highly likely that they will be unaware of their rights and avenues available to them. Therefore, it is crucial that people understand that access to justice is possible and available, and understand that this access is their human right.<sup>169</sup>

Rhode follows this line of argument, and highlights the inadequacy of the US legal system to address the need for access to justice. She reports that ‘an estimated four-fifths of the individual legal needs of the poor, and a majority of the needs of middle-income Americans, remain unmet.’<sup>170</sup> Rhode argues that lawyers should be focusing on long-term as well as short-term impact when addressing people’s problems, and that more funding to legal aid providers is crucial if they are to respond to the needs of all the people who need their services. Access to legal services is a crucial component of justice, as it not only helps ‘prevent erroneous decisions, but it also affirms a respect for human dignity and procedural fairness, which are core democratic ideals.’<sup>171</sup> Rhode concludes that access to justice must be effectively addressed and cannot go unnoticed anymore, arguing that ‘[a]dvocates need to put a human face on legal needs and to demonstrate the price for taxpayers when basic human rights go unaddressed.’<sup>172</sup>

## **2.7 CONCLUSION**

A number of conclusions can be drawn from this comprehensive analysis of access to justice. One, contrary to the research of the 1960s and 1970s, access to more lawyers does not automatically increase access to justice. The unique barriers to access to justice that migrants and refugees face illustrate this. Lawyers are only useful if people are aware that lawyers can or should be used, how to use them and can afford to use them. Providing more lawyers does not necessarily provide more access to justice if people are not aware of their benefits and do

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<sup>169</sup> Ibid., p.217

<sup>170</sup> Rhode, D.L., (2008-2009), 'Whatever Happened to Access to Justice?', *Loyola Of Los Angeles Law Review*, Vol.42, p.869

<sup>171</sup> Ibid., p.890

<sup>172</sup> Ibid., p.907

not benefit from their use themselves. The efficacy of lawyers has also been criticised by a number of authors. For example, Moorhead and Pleasence's work suggests that lawyers do not always provide good quality service, and that non-lawyers are often better service providers.<sup>173</sup> Melville and Laing highlight that lawyers often put their own interests ahead of their clients, focusing on very narrow legal issues and not addressing the underlying non-legal issues.<sup>174</sup>

Furthermore, legal education and advice can be useful and effective at providing access to justice, as they help overcome individualistic barriers such as ignorance and personal competence. However, simple advice and education will not help most people, as they require the *means* as well as the know how to pursue their claim. As illustrated earlier in the chapter, the effectiveness of legal advice and education has been used to justify cutbacks in legal aid funding. However, legal advice and education are most effective when coupled with access to lawyers, as providing both these factors equips people with the ability as well as the means to pursue their cases of acquiring justice. So while legal education and advice have been a step in the right direction, more needs to be done to provide people with the necessary help to overcome the structural barriers to access, such as cost and intimidation.

One could argue that self-help remedies have helped overcome this problem, by providing people with the necessary education as well as means to handle their legal cases on their own. However, self-help remedies have not benefited everyone. Much like court cases, self-help remedies favour the stronger parties – those with the power, knowledge and ability to help themselves. Self-help remedies have further disadvantaged vulnerable groups, as they have put the onus on those people to 'help themselves', rather than being able to seek advice and help elsewhere. It is clear that self-help remedies are more effective for people who are aware of the processes, able to navigate the system and capable of resolving their own problems. However, self-help remedies are less helpful to migrants and refugees, who do not understand the system, have no knowledge of the processes and lack the ability to communicate and

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<sup>173</sup> Moorhead & Pleasence, 2003, op.cit.

<sup>174</sup> Melville & Laing, 2008, op.cit.

present their cases. These people need education, advice and a representative to assist their quest for justice, and lawyers do not necessarily best deliver this service.

These conclusions suggest that access to justice needs to be looked at in a different way. Instead of focusing on providing services that counteract the individualistic barriers to access to justice, we need to look at the system that creates these barriers in the first place and abolish them before they are experienced. In other words, what is needed is a systematic change, rather than a series of service changes. While the research over the years has addressed the means of accessing justice and illustrated that different groups require different services in order to access justice, it has not addressed the meaning of the concept of justice itself. Does justice have the same meaning for everybody? The assumption has been that the law in itself is inherently just and therefore access to it delivers justice. However, as the above discussion has shown, different groups of people experience different needs and problems. More importantly, they have differing means and understanding of the law and of justice. Therefore, while access to the courts may mean access to justice for a person who knows how to navigate the system and can afford to do so, access to the courts for a person who does not speak English nor understand the system may not mean access to justice at all.

One way of overcoming this problem is by making the system itself more inclusive and equal. Sommerlad illustrates that social citizenship has long been a ‘patriarchal, able-bodied, and race-blinded ideology’, which has excluded many disadvantaged and minority groups.<sup>175</sup> In order to be a social participant in society, one needs to feel accepted and empowered to participate, and use of the civil justice system is a form of participation in one of the major institutions in society.<sup>176</sup> As Mayo-Anda notes, ‘[I]aws and government programs will have no meaning for them unless the people experience the benefits, witness their favourable impacts or participate in their implementation.’<sup>177</sup> Looking at access to justice in this light, the

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<sup>175</sup> Sommerlad, 2004, op.cit., p.355

<sup>176</sup> Sandefur, R.L., (2008), 'Access to Civil Justice and Race, Class and Gender Inequality', *Annual Review of Sociology*, Vol.34, p.340

<sup>177</sup> Mayo-Anda, G., (2000), 'Engaging and Empowering Communities', *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century Global Conference*, Washington DC, 5-7 June, The World Bank, p.87

disadvantaged groups in society are not likely to benefit from the services provided as they are excluded from these services from the beginning – excluded from the decision making and implementation processes. In order to eliminate the barriers disadvantaged groups face, we need to find ways to include these groups in the legal system processes and make the services relevant to their needs.

It is clear that a lot has been done since unmet needs came to the attention of service providers in the 1960s – the establishment of legal aid, of legal services centres, access to legal advice, self-help remedies and a number of quantitative studies highlighting the needs and the barriers experienced. However, despite these services and studies, the needs of some people still go unmet. The Australian legal system is difficult to understand and navigate, even for the enabled and educated. For people coming into the country, it is close to impossible. The studies situating migrants and refugees in a disadvantaged position simply because of where they come from illustrate this. There are too many barriers for these people to overcome. The system as it is, does not work for these groups of people, and has not worked for years. It needs to be adjusted to be more responsive to people's needs if it is to include disadvantaged groups such as refugees or the poor in its operation. In order to adequately meet the needs of and provide access to justice to all people, the Australian legal system needs to explore not only the different ways of providing access to justice, but also the different types of justice it can provide. Justice does not have the same meaning to all people, and access to justice does not simply mean access to law.

## CHAPTER 3

# SUDAN: A POLITICAL AND LEGAL HISTORY

In substance, the Sudanese legal system is a melting pot of remedial British legacy, Arab-dominated government, tribal-specific traditions, military-dependant power, and complex regional and international influence.<sup>178</sup>

### **3.1 INTRODUCTION**

This chapter presents a political and legal history of Sudan. It highlights the many years of unrest the country of Sudan has experienced since independence in 1956 through its two civil wars. The two wars have had a devastating impact on the lives of Sudanese people, resulting in more than two million deaths and the displacement of over four million Sudanese citizens.<sup>179</sup> They are the major reason for the large influx of Sudanese refugees into Australia and other countries. Exploring the political history is important not only because it explains why Sudanese refugees have left their country in the first place, but also illustrates their prior experiences with legal systems.

To that end, this chapter further explores the legal system of Sudan. It shows firstly that the legal system has been unstable and, during times of war, non-existent. As a result of the long-standing civil wars and military regimes, the rule of law in Sudan collapsed. Since the independence of Sudan, there has been a complete absence of rule of law, including the separation of powers and the protection of human rights. As such, the people of Sudan have been living in a somewhat lawless society led by soldiers and rebel groups, where they had no access to human rights, legal protection or justice. The customary law legal system of South Sudan is further analysed in detail, showing the many differences between customary and

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<sup>178</sup> Fournier, M., (2008), *A Comprehensive Overview of Sudan's Legal Framework in Light of the Darfur Crisis*, Pearson Peace Keeping Centre, Occasional Paper 3, p.4

<sup>179</sup> Marlowe, J.M., (2011), 'South Sudanese Diaspora in Australasia', *Australasian Review of African Studies*, Vol.32, No.2, p.5

statutory law systems. The chapter finally illustrates the complexity of legal pluralism present in Sudanese society, with multiple legal systems operating in the country.

This chapter is relevant to the current study for a number of reasons. It firstly demonstrates that Sudan is divided into numerous parts, and as such, Sudanese people are not one homogenous group. There is a clear divide in the country between North and South, with a long history of fighting between the two groups. Further, people from the South are especially diverse and are divided into tribal groups and differ greatly in their values and beliefs as well as norms and legal systems. Second, people from Sudan, especially people from South Sudan, have experienced political and legal instability. They have been persecuted by the very system that is supposed to enforce legal rights and protection. As a result, they are not likely to trust the system nor have any knowledge of their legal rights entitlement. Finally, people from South Sudan have most likely only ever accessed a customary law legal system, which is markedly different from the statutory system of Australia.

**3.2 SUDAN AND SUDANESE CULTURE**

Sudan is Africa’s largest country and is located in the northeast of the continent. Over the last five decades, it has suffered greatly from famine, drought and war. Due to the civil wars and violence in Sudan, large numbers of Sudan’s residents were forced to leave their country and seek refuge in other countries. Since the start of the second civil war in 1983, more than 80 per cent of South Sudan’s population have been displaced.<sup>180</sup>

As the largest country of Africa, Sudan measures more than 2,506,000 square kilometres.<sup>181</sup> At the census taken in



Figure 3.1: Map of Sudan

<sup>180</sup> Schweitzer, R., Greenslade, J.H. & Kagee, A., (2007), 'Coping and Resilience in Refugees from the Sudan: A narrative account', *Australian and New Zealand Journal of Psychiatry*, Vol.41, p.282

<sup>181</sup> O'Ballance, E., (2000), *Sudan: Civil war and terrorism, 1956-1999*, Macmillan, London, p.2

1956, Sudan had just over 10 million inhabitants, consisting of 7.5 million living in the North and 2.7 million living in the South of the country.<sup>182</sup> At the time, 70 per cent identified as being 'Arabised Northerners' and the other 30 per cent were primitive tribal Southerners.<sup>183</sup> By July 1990, the Sudanese population had grown to approximately 25 million<sup>184</sup>, reaching almost 35 million by 1999.<sup>185</sup> The latest figures indicate that the total population of Sudan is just over 39 million people, of which almost 31 million reside in the North and a little over 8 million in the South.<sup>186</sup> The sudden increase in Sudan's population in the 1990s can be attributed to the high fertility rate (average 6.9 children per woman), as well as the high influx of refugees and the return of millions of displaced people.<sup>187</sup>

There is a clear distinction between the Northern and the Southern residents of Sudan. The Northerners are, for the most part, educated people, striving for a united Arab Sudan.<sup>188</sup> The Southerners, mostly black Christians or Animists, reside in rural villages and depend on the land to provide crops and cattle for food and dowries.<sup>189</sup> South Sudan has an illiteracy rate of 80 per cent, its people are secluded from the modern world and have fought to be separated from the North in order to follow their own traditions and laws.<sup>190</sup>

The Sudanese culture is quite different from Australian culture, often making settlement in Australia difficult. Living conditions and quality of life is low in Sudan, and health care is very limited. It is common for Sudanese people to suffer from tuberculosis, poor eyesight, malnutrition and high blood pressure. They are also largely unfamiliar with a formal, western-

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<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Fardol, S., (2006), *Southern Sudan and its Fights for Freedom*, Authorhouse, Bloomington, p.1

<sup>185</sup> SudanNet, (2007), 'Republic of the Sudan', accessed 15/02/2009, from <http://www.sudan.net>

<sup>186</sup> City Population, (2008), 'Sudan', accessed 04/03/2010, from <http://www.citypopulation.de/Sudan.html>. The latest census was taken in Sudan in 2009 however the figures are not yet available.

<sup>187</sup> Metz, H.C., ed., (1991), *Sudan: A country study*, U.S. Library of Congress, Washington

<sup>188</sup> Hecht, J., (2005), *The Journey of the Lost Boys*, Allswell Press, Jacksonville FL, p.16

<sup>189</sup> Ibid.

<sup>190</sup> Williamson, B., (2007-2008), 'Democratic Institutions in Sudan: More than just a promise', *Wisconsin International Law Journal*, Vol.25, No.2, p.316

style health system and medicine, as well as being treated by opposite sex doctors.<sup>191</sup> Sudanese family life also differs from the Australian in a number of ways. For example, in some regions of Sudan, men can marry more than one wife, and the number of wives usually depends on the man's position in the community.<sup>192</sup> The man is considered the head of the household and as such is to be respected by his wife and children. In some parts of Sudan, women can marry as young as 12 years of age.<sup>193</sup> Generally, girls remain within the house and are segregated, eating separately and after men.<sup>194</sup> There is a clear gender divide, with men and women allocated specific roles. The Sudanese family includes the extended family, and a husband and wife will care not just for their children, but their nieces and nephews, as well as their aunts, uncles and cousins. The extended family have a significant influence in an individual's life in Sudan, including decisions about work, marriage and family issues.<sup>195</sup>

### **3.3 POLITICAL HISTORY OF SUDAN**

Sudan has been one of the highest refugee producing countries in the past five decades. There are large numbers of Sudanese refugees around the world, including Australia, the US, Sweden and a number of neighbouring countries such as Kenya, Ethiopia and Uganda. In 2008, the number of Sudanese refugees under UNHCR's responsibility was 523,000, only surpassed by refugees from Afghanistan, Iraq and Columbia.<sup>196</sup> The main contributing factor to this large number of refugees is Sudan's unstable political history. Until 1956, Sudan had been a dependent colonial state of Egypt and Great Britain.<sup>197</sup> Ever since independence in 1956, Sudan has been struggling to establish itself as a functioning, democratic, independent

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<sup>191</sup> Department of Immigration and Citizenship, 2007a, op.cit., p.11

<sup>192</sup> Dei Wal, N., (2004), *Southern Sudanese Culture*, Migrant Information Centre (Eastern Melbourne), p.2

<sup>193</sup> Ibid., p.4

<sup>194</sup> Ibid., p.3

<sup>195</sup> Centre for Victims of Torture, (2003), 'Culture Profile: Sudanese', accessed 25/09/2009, from <http://www.cvt.org/page/107>

<sup>196</sup> AsiaNews.it, (2008), 'Rising number of refugees in the world worrisome', accessed 15/02/2010, from <http://www.asianews.it/index.php?I=en&art=12551>

<sup>197</sup> Egypt occupied Sudan in 1874, and in 1882 Britain occupied Egypt and also took over Sudan. From 1882 to 1956 Sudan was known as Anglo-Egyptian Sudan.



country. This unstable history has resulted in two civil wars over the past fifty years. There is a clear divide on the country between the North and South, dividing the politics as well as the people into different ethnic groups. This thesis focuses only on the history of Sudan since independence on January 1956.<sup>198</sup>



Figure 3.2: Map of Sudan showing North and South divide

Sudan’s Northerners and Southerners had been in conflict long before independence from Egypt and Britain and long before the two civil wars between them. Although the largest distinction between these two groups is religion, with the North predominantly Islamic and the South Christian, the conflict goes further than that. Viorst argues that ‘[i]t is a clash of incompatible cultures, which historical mischance has placed under the same flag.’<sup>199</sup> The two sides have different views and beliefs, which call for different types of government. The North was set on spreading

Islam and unifying the whole country. The South favoured federalism rather than a unitary state, as the people wanted to keep their traditional culture and language.<sup>200</sup> However, the South was not seen as equal to the North, as they were largely rural, tribal people without much education or training. Northern political leaders did not see the South as an integral part of the country and have traditionally treated Southerners as second-class citizens.<sup>201</sup> This created a considerable amount of tension between the two groups, ultimately leading to a mutiny in 1955, sparking the beginning of Sudan’s first civil war between the Northern government and the Southern rebels.

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<sup>198</sup> For a more comprehensive history of Sudan before independence refer to Sidahmed, A.S. & Sidahmed, A., (2005), *Sudan*, The Contemporary Middle East Series, Ed. A. Ehteshami, RoutledgeCurzon, New York; Niblock, T., (1987), *Class and Power in Sudan: The dynamics of Sudanese politics, 1989-1985*, MacMillan Press, Hampshire; Woodward, P., (1990), *Sudan 1898-1989: The unstable state*, Lester Crook, London

<sup>199</sup> Viorst, M., (1995), 'Sudan's Islamic Experiment', *Foreign Affairs*, Vol.74, No.3, p.50

<sup>200</sup> Woodward, 1990, op.cit., p.97-8

<sup>201</sup> Dagne, T., (2003), *Sudan: Humanitarian Crisis, Peace Talks, Terrorism, and U.S. Policy*, Issue Brief for Congress, The Library for Congress, p.1

### 3.3.1 Sudan's first civil war – 1955-1972

On January 1 1956 all British and Egyptian armed forces had left Sudan and Sudan was proclaimed an independent country. Al-Azhari, leader of the Northern National Unionist Party (NUP) became the first Prime Minister of Sudan, but was defeated by Khalil, the leader of the People's Democratic Party six months later.<sup>202</sup> The South was not well represented in the government and their feelings of subordination under Northern domination were being realised by the formation of the new Muslim Northern government of Sudan. In the meantime, the government became involved in corruption, leading to uncertainty and distrust, as O'Ballance explains:

It had become not so much the case of bad government, but rather government by neglect, as ministers and members of the National Assembly became involved in corruption and other self-seeking pursuits.<sup>203</sup>

On 17 November 1958, the Sudanese army overthrew the Khalil government in order to end political corruption and chaos.<sup>204</sup> A state of emergency was declared and a new government and the Supreme Council were formed, headed by General Abboud.<sup>205</sup>

General Abboud had abolished all political parties and assumed the title of President of Sudan. Thinking of Southern rebels as the 'outlaws' who were working against him, President Abboud's army destroyed more than 700 village huts as a punishment for supporting rebels.<sup>206</sup> In retaliation, the rebels were known to burn down the houses left standing after these attacks, assuming that their owners must be collaborating with the Arabs.<sup>207</sup> As a result, the Southern villagers had reason to be afraid both of the military government who punished them for supporting the rebels, as well as the rebels who would threaten them for food and shelter and accuse them of collaborating with the government.

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<sup>202</sup> The spelling of the names of Sudan's political leaders is different throughout different sources. For the purposes of this thesis, I will adopt the spelling as found in O'Ballance, 2000, op.cit.

<sup>203</sup> Ibid., p.11

<sup>204</sup> Ibid., p.12

<sup>205</sup> Woodward, 1990, op.cit., p.103p.103, O'Ballance, 2000, op.cit., p.12

<sup>206</sup> O'Ballance, 2000, op.cit., p.15

<sup>207</sup> Albino, O., (1970), *The Sudan: A Southern viewpoint*, Oxford University Press, London, p.62

In 1963 a group of Southern leaders in exile in neighbouring countries, formed an organisation called the Sudan-African National Union (SANU). Their political objective was self-determination for the South.<sup>208</sup> Meanwhile, in Southern Sudan the tribes were getting frustrated with nothing being done to 'free' the South and formed a combined organisation called the Land Freedom Army (LFA), which soon changed to the Anya-Nya (meaning snake poison), whose soldiers would be called 'Freedom Fighters'.<sup>209</sup> The rise of the Anya-Nya worsened the situation for the Southern tribes, as they were now caught in the crossfire once more. This in turn created turmoil throughout the tribes with people having to flee their homes, resulting in large amounts of refugees who could not trust anyone to protect them from the constant fighting and killing. Most refugees would go to neighbouring countries, such as Uganda, Ethiopia and Kenya. In May 1964 it was reported that there were about 60,000 Southern refugees in Uganda.<sup>210</sup>

After a number of protests by the Northern population against the government known as the 'October Revolution',<sup>211</sup> and dozens of deaths as a result, Khalifa formed a new civilian government containing representatives from each political party.<sup>212</sup> This government did not last however, and in June 1965 the Khalifa government resigned and a new Umma Party-NUP coalition was formed under Mahgoub.<sup>213</sup> Mahgoub took a tough line in the South, stating that the outlaws ought to be subdued rather than negotiated with.<sup>214</sup> Under his government, soldiers were free to fire at any rebellion in the South, and even make the Southern civilian population their target by burning their villages and forcing them out of their homes. In 1968,

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<sup>208</sup> Johnson, D.H., (2003), *The Root Causes of Sudan's Civil Wars*, The International African Institute, James Currey, Oxford, p.31

<sup>209</sup> See Woodward, 1990, op.cit., p.107; O'Ballance, 2000, op.cit., p.19; and Metz, 1991, op.cit.

<sup>210</sup> O'Ballance, 2000, op.cit., p.21

<sup>211</sup> Woodward, 1990, op.cit., p.109

<sup>212</sup> O'Ballance, 2000, op.cit., p.24. The government was formed on 30 October 1964.

<sup>213</sup> Ibid., p.32

<sup>214</sup> Ibid., p.39

the name of the Anya-Nya changed to the Anya-Nya Armed Forces (ANAF), who by this time consisted of about 10,000 men, less than a fifth of who possessed firearms.<sup>215</sup>

On 25 May 1969, a second military junta led by Nimeiri overthrew the government in an organised and quick coup. Nimeiri formed a Revolutionary Council and proclaimed the establishment of the Democratic Republic of Sudan and himself as President, stating that the contemporary history of Sudan has been a series of catastrophes where too many political parties had selfish motives.<sup>216</sup> Nimeiri further abolished all councils and ordered the dissolution of all political parties, warning that all counter-revolutionists would face the death penalty.<sup>217</sup> Sudan was to stay a Nimeiri one party military led state until 1985.

In February 1972 the Addis Ababa agreement was reached between the Northern and Southern leaders, ending the civil war.<sup>218</sup> The situation in Sudan changed dramatically following this agreement – president Nimeiri changed his government policies and replaced his pro-Arab ministers with ones who took a softer line with Southerners and even some Southerners themselves.<sup>219</sup> 12,000 ANAF personnel were taken into the Sudanese army at their current rank, or taken into the police force or prison service with gradual integration with northern troops.<sup>220</sup> Sudanese refugees in other countries were taken back into Sudan and the country started the process of repair. Some 1,190,320 people had returned from exile either from the forests or neighbouring countries of refuge.<sup>221</sup> Thanks to Nimeiri and the Addis Ababa Agreement, Sudan saw peaceful times for the next decade to come.

After a referendum and elections, Sudan's first permanent constitution came into force in March 1973, authorising a president as head of state with one permitted political party (SSP).

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<sup>215</sup> Ibid., p.52

<sup>216</sup> Ibid., p.57

<sup>217</sup> Ibid.

<sup>218</sup> Ibid., p.86-7

<sup>219</sup> Ibid., p.88

<sup>220</sup> Ibid., p.89

<sup>221</sup> Ibid., p.93

The Constitution granted autonomy to the South, proclaiming Islam as the state religion, but allowing Christianity as it was the religion of a large number of citizens.<sup>222</sup>

### 3.3.2 Sudan's second civil war – 1983-2005

In 1983 however, a second civil war broke out. This was sparked by Nimeiri's decentralisation of the South into three separate provinces and the implementation of Sharia law throughout the country. The implementation of Sharia law changed the existing law dramatically, as offences became punishable according to Sharia law and alcohol and gambling were forbidden.<sup>223</sup> These laws required extremely harsh punishments for crimes such as theft and adultery, including flogging, stoning, public amputation and even decapitation.<sup>224</sup> Some 40 per cent of Sudanese were against this change because of its undemocratic method of introduction including most Southerners, although non-Muslims were supposed to be exempt from the laws.<sup>225</sup> Between September 1983 and August 1984, there were 58 sentences of public amputation in Khartoum alone.<sup>226</sup> This, combined with Nimeiri's attempt at claiming the oil rich land from the South a few years earlier<sup>227</sup> intensified the Southern people's deep distrust of the Arab government, and ultimately led to the start of the second civil war.<sup>228</sup>

On 6 April 1985 the army once again took control of the country in a military regime led by General Dahab, who declared that this was necessary to stem the flow of blood, asserting that the army would stand on the side of the people.<sup>229</sup> As a result, a state of emergency was once

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<sup>222</sup> Ibid., p.92

<sup>223</sup> Ibid., p.131

<sup>224</sup> Hecht, 2005, op.cit., p.19

<sup>225</sup> O'Ballance, 2000, op.cit., p.132

<sup>226</sup> Ibid., p.133

<sup>227</sup> In 1978 Chevron struck oil in the South. Due to the slow economic developments in Sudan at the time, Nimeiri wanted to keep the revenues and went as far as trying to redefine the boundaries separating the North and South. For further details see Hecht, 2005, op.cit., p.17-8; Johnson, 2003, op.cit., p.45

<sup>228</sup> Fluehr-Lobban, C., (1990), 'Islamization in Sudan: A critical assessment', *The Middle East Journal*, Vol.44, No.4, p.621

<sup>229</sup> O'Ballance, 2000, op.cit., p.143

again declared, the Constitution was suspended, the President and his staff were dismissed and the SSU was dissolved.<sup>230</sup> It was declared that civilian authority would be restored after one year. The Islamic courts were abolished (although Sharia law was still in place), all laws enacted in the Nimeiri regime were suspended and all the members of that regime were to be put on trial.<sup>231</sup>

Meanwhile, the situation for the people in South Sudan was becoming worse. The aid from international organisations was not getting through because of the constant fighting, and communities were once again forced to flee their homes in order to survive. In 1985, the UN estimated that two to three million Southerners were in danger of starvation.<sup>232</sup> Southerners fled to the North as well as neighbouring countries, with up to 2 million Southerners seeking refuge in the North and 250,000 in Ethiopia by 1987.<sup>233</sup> Throughout this time of chaos, between 1985 and 1987, the Southern people suffered significantly:

Southerners... were the main target for the Sudanese Army. They were shot down by soldiers who claimed that these civilians were from the SPLA or their families served in the movement. Young girls and women were raped; houses, hospitals, and public places were raided by soldiers.<sup>234</sup>

The Sudanese army was not the only worry Southerners had throughout these years though. During 1985 and 1986 the SPLA focused its attacks on civilian groups throughout the South who were deemed 'hostile'.<sup>235</sup> Once again, this meant that Southerners were being persecuted by both sides.

In addition, after the start of the second war in 1983 the capture and sale of Southern women and children into slavery to the North increased, with an estimated 10,000-15,000 of slaves

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<sup>230</sup> Ibid.

<sup>231</sup> Ibid., p.145

<sup>232</sup> Ibid., p.158

<sup>233</sup> Woodward, 1990, op.cit., p.217-9

<sup>234</sup> Fardol, 2006, op.cit., p.29

<sup>235</sup> Johnson, 2003, op.cit., p.83

being held captive in any given year.<sup>236</sup> This stems from an age-old perception of inferiority of Southerners who had historically suffered from the slave trade with the North. Slavery is a practice that is deeply embedded in the North and throughout history. Jok argues that the Sudanese Arabs have long held the notion that Southerners are people who are naturally slaves, as they are seen as the inferior, lower class race.<sup>237</sup> While slavery in contemporary society may seem somewhat farfetched and difficult to believe, the Southerners endured its effects throughout the 1980s. This was made possible by the fact that the Northern government did not take many measures to stop it.<sup>238</sup> So the Southern tribes, while being persecuted and forced out of their homes by the Northern government forces as well as their own rebel groups throughout the South, also faced the possibility of being sold into slavery to the North.

Bashir began another bloodless military coup in 1989, suspending the Constitution and the government.<sup>239</sup> This resulted in more fighting in the South. In 1990, the Africa Watch organisation claimed that Sudan was a human rights disaster, with reports that:

... over 500 000 people had been killed in the civil war and resulting famine, with both the government and the SPLA using starvation as a weapon and that thousands of women and children in the south had been sold into slavery. It noted that civil rights violations in the north had also increased dramatically since the June 1989 coup, that there had been purges in the judiciary, civil service and military, that trade unions were banned and that hundreds of political detainees had been tortured.<sup>240</sup>

This situation worsened in 1991 with the fall of the Ethiopian government, as over 400,000 Sudanese refugees were forced to return to Sudan from Ethiopia.<sup>241</sup> Further, in 1995 Bashir called for a jihad against all unbelievers in Sudan, calling all youth to enlist in his army and

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<sup>236</sup> Jok, M.J., (2001), *War and Slavery in Sudan*, The Ethnography of Political Violence, Ed. C.K. Mahmood, University of Pennsylvania Press, Philadelphia, p.3

<sup>237</sup> Ibid., p.9

<sup>238</sup> Ibid., p.2

<sup>239</sup> Metz, 1991, op.cit.

<sup>240</sup> O'Ballance, 2000, op.cit., p.167

<sup>241</sup> Johnson, 2003, op.cit., p.88-9

fight against the Southerners.<sup>242</sup> This caused further tension between the government and the South, mainly with the Christian SPLA.

In 1991, the SPLA had formally split in half, into the Dinka tribe (the Torit group) and the Nuer tribe (Nasir group).<sup>243</sup> Garang, now leader of the Dinka Torit group always fought for equal status with the North, 'fighting for the freedom of all Sudan', while the Nuer Nasir group favoured a black independent state.<sup>244</sup> The Nasir group teamed up with other factions of the SPLA to form the SPLA-United, led by Riek Machar. Fighting between these two groups escalated and thousands of lives, including those of civilians, were lost. For the people of the South, the present condition meant that the people who were responsible for protecting and fighting for their freedoms were now fighting against each other as well as against the government.

This split highlights the fact that the South is not one homogenous group. There are over 50 different tribes in South Sudan, all of whom have different values and beliefs. Due to these differences, even when it came to fighting for a common goal, the independence of the South, they did not agree on the means. This disagreement stemmed from the 'Dinka Domination' of the 1970s and 1980.<sup>245</sup> Since the Dinka are the biggest tribe in the South, making up about a third of the population, the other tribes felt they were not being represented and their voices were not being heard. This was especially the case since the leader of the SPLA, Garang, was a Dinka himself, and the SPLA was a movement initiated by the Dinka.<sup>246</sup> This aggravated some Southerners, because the Dinka are split into a number of factions and are seen to have no political centre.<sup>247</sup> As a result, anti-Dinka politics were starting to form, especially in the Equatorial region, ultimately leading to the SPLA split and the formation of other SPLA factions, such as the SPLA United. Therefore, it is important to note that while in general

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<sup>242</sup> O'Ballance, 2000, op.cit., p.184

<sup>243</sup> Ibid., p.172

<sup>244</sup> Ibid.

<sup>245</sup> Johnson, 2003, op.cit., p.51-67

<sup>246</sup> Duffield, M., (1990), 'Sudan at the Crossroads: From emergency preparedness to social security', *Institute of Development Studies*, Vol.275, p.23

<sup>247</sup> Johnson, 2003, op.cit., p.51



terms the civil wars were about the Southern fight against the Northern government for independence, the Southern tribes differ in their beliefs and values and these differences have been the cause of the fighting and killing between them.

Finally, a Comprehensive Peace Agreement (CPA) was reached in January 2005.<sup>248</sup> The agreement set out the following provisions:

- 1.5.1. Establish a democratic system of governance taking into account the cultural, ethnic, racial, religious and linguistic diversity and gender equality of the people of Sudan.
- 1.5.3. Negotiate and implement a comprehensive ceasefire to end the suffering and killing of Sudanese people.<sup>249</sup>

The CPA established an Interim Period, in which North and South Sudan would coexist peacefully under their new constitutions, after which elections would be held and a referendum was to be called to decide whether the South shall be an independent country or whether Sudan should unite under one rule. This agreement ended the second civil war and has brought some peace between the North and the South of Sudan since 2005. A new Interim Constitution was established in 2005, uniting the North and South and respecting the beliefs and values of both. The government of Southern Sudan was also established, governed by the Interim Constitution of Southern Sudan 2005. The two interim governments have been working together since 2005 to bring peace between the North and South until national elections, which guided the country into a referendum to decide the future of the South. Although democratic elections have never produced stability in Sudan,<sup>250</sup> in February 2011 over 95 per cent of the people of Southern Sudan voted for an independent South, creating the new country of South Sudan.

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<sup>248</sup> Flint, J. & de Waal, A., (2008), *Darfur: A new history of a long war*, Zed Books, New York, p.31

<sup>249</sup> The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Army, 2005, Sudan

<sup>250</sup> de Waal, A., (2007), *Sudan: What kind of state? What kind of crisis?*, Crisis States Research Centre, Occasional Papers April 2007, p.20

### 3.3.3 Darfur 2003 – current

Although a peace agreement was reached between the North and South, all is not well in Sudan and refugees are still fleeing the country on a daily basis. In early 2003, rebellion in the Darfur region began. Darfur is a Muslim region in Northern Sudan and home to some six million people. These people largely live simple rural lives on dry remote lands. Similar to the Southerners, by the 1980s the Darfurians felt that the government in Khartoum was not treating them as full citizens, as they were struggling to keep land and provide food for their families in dry, remote areas without any assistance.<sup>251</sup>



Figure 3.3: Map of Darfur

Consequently, conflict arose between the government forces and the militia Janjaweed against the rebel groups of the Sudan Liberation Army/Movement (SLA) and Justice and Equality Movement (JEM). The fighting between the two sides is now receiving worldwide attention, with the US referring to the Sudanese government response as genocide. Human Rights Watch argues that if the fighting is to stop, worldwide pressure is needed on the Sudanese Government to reverse its 'abusive policies and practices'.<sup>252</sup> Since 2003, civilians have been subject to ethnic cleansing, bombing and burning of their villages, murder, sexual and physical violence and torture.<sup>253</sup> Ethnic cleansing by the military junta led by the Governor of Darfur, an Islamic hardliner, included murder of all non-Muslims, rape of non-Muslim women and forced conversion to Islam.<sup>254</sup> This has led to more than 200,000 civilian deaths

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<sup>251</sup> Flint & de Waal, 2008, op.cit., p.14

<sup>252</sup> Human Rights Watch, (2007), 'Darfur 2007: Chaos by Design - Peacekeeping challenges for AMIS and UNAMID', Vol.19, No.15(A), p.6

<sup>253</sup> Genocide Intervention Network, (2008), 'Darfur', accessed 24/05/2008, from <http://www.genocideintervention.net>

<sup>254</sup> Australian Refugee Association, (2007), 'Refugee Stories', accessed 17/09/2007, from <http://www.ausref.net/content.php?ID=39&sub1=4>

due to violence, malnutrition, disease<sup>255</sup> and the displacement of more than 2.4 million people.<sup>256</sup>

Even though the civil war between the North and the South has settled, Sudan continues to experience internal conflict that is still producing large numbers of refugees. However, although the Darfur situation is serious and still produces large amounts of refugees, it does not form part of this thesis for a number of reasons. First, most Sudanese refugees in Australia come from South Sudan. In fact, all of my participants have come from South Sudan. Further, the unrest in Darfur began in 2003. Most Sudanese refugees who participated in my study had either fled Sudan by that stage and found refuge in other countries of asylum, or they had already settled in Australia. Therefore, no one in my study and few Sudanese refugees who have settled in Australia have experienced the unrest in Darfur. While the Darfur situation may not be relevant in analysing the experiences of Sudanese refugees for this study, it is still an important event in Sudan as it demonstrates the instability and insecurity of the country.

As illustrated throughout this section, Sudan has had a very unstable political history. Its ever-changing leaders, ranging from elected political party leaders to generals of military coups, have tried numerous strategies to make the country function as a democratic state. Civilian rule did not work, military rule did not work and even now after a peace agreement between the North and South, war still rages in Sudan. These wars have resulted in more than two million deaths and over six million displacements of Sudanese people. It is clear that the people of Sudan have experienced considerable change, instability and turmoil throughout their lives. Sudan's second civil war has been the longest ongoing civil war in the world, which in combination with the first civil war has produced more displaced people than any other country and resulted in at least one out of every five South Sudanese person dying because of it.<sup>257</sup> This history of Sudan and the experience of its people must be acknowledged if we are to understand why there are so many Sudanese refugees in Australia, and try to provide the necessary services to meet their individual needs in Australia.

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<sup>255</sup> Genocide Intervention Network, 2008, op.cit.

<sup>256</sup> Human Rights Watch, 2007, op.cit., p.5

<sup>257</sup> AsiaNews.it, 2008, op.cit.

### **3.4 SOUTH SUDAN'S CUSTOMARY LAW LEGAL SYSTEM**

As can be seen from the summary above, Sudan political as well as legal systems have undergone numerous changes and have been very unstable. This instability has resulted in the collapse of the rule of law and the absence of any legal rights or protections for its citizens. Human rights are still not adequately protected under legislation, and military decrees and emergency laws have undermined any existing protections.<sup>258</sup> Laws, rules and procedures were also not followed nor enforced when people were trying to escape the fighting, especially in the South. As Parmar states, '[t]he rule of law is but one of many casualties resulting from the permanent presence of conflict (or threat thereof) in the South'.<sup>259</sup> People from the South especially have experienced considerable unrest and many human rights violations.

While there is now peace in Sudan and the two sides are trying to create a system where they can live alongside each other, creating a legal system that encompasses the two very different cultures is difficult. If the South is to govern itself without the influence of the North, they must first establish a functioning legal system. At the moment, the South does have a formal legal system established by the Interim National Constitution of South Sudan 2005 (ICSS). The Constitution created a hierarchy of courts and a judicial system of county magistrates, county judges, regional judges and a court of appeals.<sup>260</sup> There are High Courts located in each of the ten Southern states, while the Supreme Court is located in the capital of South Sudan, Juba.<sup>261</sup> The ICSS outlines the functions of the government, including the separation of powers between the legislature, executive and judiciary<sup>262</sup> and establishes the hierarchy and jurisdiction of the Southern courts. The ICSS is based on the common law system of

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<sup>258</sup> Sherif, Y., (2005), 'Promoting the Rule of Law in Post-Conflict Sudan', *Forced Migration Review*, No.24, p.29

<sup>259</sup> Parmar, S., (2007), 'An Overview of the Sudanese Legal System and Legal Research', GlobaLex, accessed 06/08/2009, from <http://www.nyulawglobal.org/Globalex/Sudan.htm>

<sup>260</sup> U.S. Department of State, (2004), 'Country Reports on Human Rights Practices - Sudan', accessed 28/09/2008, from <http://www.state.gov/g/drl/rls/hrrpt/2004/41628.htm>

<sup>261</sup> Parmar, 2007, op.cit.

<sup>262</sup> The Interim Constitution of Southern Sudan, 2005, Southern SudanArticle 54

government, and is written in English. This system was only established in 2005 though, and would not have been experienced by most the Sudanese refugees in Australia.

However, this is not to say that there has been no system of dispute resolution in place in South Sudan during the time of war. There are large numbers of different tribes living in the South, which have been ruling and governing themselves and functioning as unique and separate societies for hundreds of years. These tribes have adopted their own customary laws over years, and they have established their own ‘mini legal systems’, which have guided them even when the formal legal system had been failing the rest of the country. Customary laws have been in place before the introduction of a formal, western legal system. For generations, they have been applied throughout the tribes, reflecting the values and beliefs of each different tribe. Customary laws have traditionally been the glue that has held the separate parts together, and guided their normative behaviour. Fadlalla defined customary law as ‘common rule that reflects the common understanding of valid, compulsory rights and obligations, those underlying social norms that have become the recognised law of a society.’<sup>263</sup> These laws are an integral part of a society, and they form a very important part of South Sudan’s legal system and culture, as Mennen explains:

In Southern Sudan, customary law and legal pluralism have additional meaning as being representative of the cultural identity that framed the past fifty years of civil war. Southern Sudan’s cultural heritage is of specific importance given the struggles and freedom from religious persecution and genocide. The right to practice the cultural heritage enshrined in customary law was an integral part of that struggle. As a result, it is virtually impossible to discuss a legal system for Southern Sudan that does not include major contributions from customary law.<sup>264</sup>

Customary law not only encompasses the South’s cultural heritage but also demonstrates the diversity of the different cultures and their values. Chief Justice Ambrose Thiik looks at the concept in the following way:

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<sup>263</sup> Fadlalla, M., (2009), *Customary Laws in Southern Sudan: Customary laws of Dinka and Nuer*, iUniverse, New York, p.3

<sup>264</sup> Mennen, T., (2007), ‘Legal Pluralism in Southern Sudan: Can the rest of Africa show the way?’, *Africa Policy Journal*, Vol.3, p.50

Customary Law is a manifestation of our customs, social norms, beliefs and practices. It embodies much of what we have fought for for these past twenty years. It is self-evident that Customary Law will underpin our society, its legal institutions and the laws in the future.<sup>265</sup>

Not only is customary law important because it reflects the values and traditions of the people, but because during the years of war and instability, customary law was the only mechanism of bringing justice.

One of the few benefits gained during the civil war by the southern Sudanese was the application of their own customary law. The southern Sudanese could make decisions relevant to their own identity – this paved the way for social and legal solidarity within a tribal group.<sup>266</sup>

Customary law was the one factor that stayed the same during years of conflict and war, and it was the one factor which they had control of that also brought some justice and peace to the people.

Customary law in the South differs from tribe to tribe, and different tribes follow different rules and laws. There are generally two types of customary law applied throughout the South – centralised and decentralised systems. Centralised systems are mainly based around powerful, centralised hierarchical structures with the most powerful person at the top.<sup>267</sup> Decentralised systems are usually comprised of tribal units where nominated local individual or committees exercise core legal and social powers.<sup>268</sup> While the systems of power balances differ within these tribes, the basic function of customary law is the same throughout South Sudan. What customary laws means for Southerners is that before a matter reaches the formal legal system (if it ever gets to that stage), it has passed through several stages first.<sup>269</sup> So for most Southern people, any disputes or problems that they have are dealt with within their

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<sup>265</sup> Justice Ambrose Thiik quoted in Akechar, *et al.*, 2004, *op.cit.*, p.7

<sup>266</sup> Fadlalla, 2009, *op.cit.*, p.xix

<sup>267</sup> Akechar, *et al.*, 2004, *op.cit.*, p.13

<sup>268</sup> *Ibid.*

<sup>269</sup> Parmar, 2007, *op.cit.*

community rather than through the formal legal system. In fact, 95 per cent of all legal cases in Southern Sudan are dealt with through customary law.<sup>270</sup>

While the tribes differ in a number of ways, the differences are mostly between styles of customary law rather than its substance. For example, there are different value systems on the basis of wealth – in communities of cattle herders the currency of the courts is cattle, while in agricultural communities the currency may be tools, weapons, beads or money.<sup>271</sup> All tribal groups hold in common ‘the need to achieve reconciliation and to ensure inter-community harmony rather than to punish.’<sup>272</sup> There are also some other commonalities that relate to marriage and divorce, custody and raising of children and laws of obligation. For example, in all tribes marriage is recognised as a union between a man and a woman for life, and its purpose is the creation of a family.<sup>273</sup> Although polygamy is a legally accepted practice in all tribes, it is not commonly practiced. All customary law codes include a dowry payment in marriage, where the husband is to pay a sum of wealth to the bride’s family. The sum and the type of wealth differ from tribe to tribe, from cattle to beads and money.

Norms and values of societies in South Sudan are negotiated and enforced through family and community arenas of mediation, moral teaching, decision-making and social contract.<sup>274</sup> The customary law of South Sudan follows a guide and a hierarchy. At the very basic level, the man is seen as the head of the household and the father or oldest male either within the household or the extended family resolves most trivial problems.<sup>275</sup> If the matter cannot be

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<sup>270</sup> Akechar, *et al.*, 2004, *op.cit.*, p.30

<sup>271</sup> *Ibid.*, p.21

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*

<sup>274</sup> Leondardi, C., Moro, L.N., Santschi, M. & Isser, D.H., (2010), *Local Justice in Southern Sudan*, Peaceworks No.66, United States Institute of Peace, p.28

<sup>275</sup> Parmar, 2007, *op.cit.*, p.5; Woul, G., (2010), 'Are We Really Integrating?', *Focus*, No.4

resolved within the household or the extended family, it will go to the local community where the chief applies the local customary law,<sup>276</sup>

As customary law is recognised in law and in the Constitution, there are a number of customary courts established throughout the country, presided by the local chiefs or leaders who act as judges. These form part of the court hierarchy, and are seen as part of the legal system. If the matter cannot be resolved after consultation with community, it will then progress to the local chiefs' courts.<sup>277</sup> Due to the lack of infrastructure and the informality of the proceedings, the courts are often held outside under large trees rather than court buildings.<sup>278</sup> Lawyers are not permitted at these proceedings, and up to seven chiefs can form a panel, which acts as advocate and arbiter, with the community acting as public opinion.<sup>279</sup> It is a very communal system based on the preservation of social order and relations. As a result, 'most people are generally reluctant to take relatives or other close relations to the police or even to court, as a retributive outcome could harm or destroy social relations.'<sup>280</sup> Instead, they will always try to resolve the matter within the family or community and keep it from escalating.

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<sup>276</sup> Tonnessen, L., (2007), *Gendered Citizenship in Sudan: Competing perceptions of women's civil rights within the family law among Northern and Southern elites in Khartoum*, CMI Working Paper No.4, p.6

<sup>277</sup> Salam, A.A.H. & De Waal, A., eds., (2001), *The Phoenix State: Civil society and future of Sudan*, The Red Sea Press, Lawrenceville NJ, p.180

<sup>278</sup> Leondardi, *et al.*, 2010, *op.cit.*, p.32; Salam & De Waal, 2001, *op.cit.*, p.180

<sup>279</sup> Mennen, 2007, *op.cit.*, p.55; Allott, A.N., (1984), 'What is to be Done with African Customary Law? The experience of problems and reforms in Anglophone Africa from 1950', *Journal of African Studies*, Vol.28, No.1, p.60-61

<sup>280</sup> Leondardi, *et al.*, 2010, *op.cit.*, p.50





Figure 3.4: A South Sudanese Customary Court proceeding

Further, in cases where the issue is not covered under the tribe's existing customary law, the chiefs or judges will often adapt 'customary norms of fairness' based on public opinion to the dispute at hand.<sup>281</sup> In other words, chiefs or judges have the power to make customary law if such law does not exist, according to public opinion and fairness. As part of the court hierarchy, there are grounds for appeal for customary law cases to the formal courts. The matter can be taken further to the local courts for appeal if there is dissatisfaction with the chief's decision. However the decision of the chief is highly respected both within the community as well as in the local courts due to their 'sound knowledge and practice of local customary law.'<sup>282</sup> Furthermore, when the matter is taken to the courts and the courts rule on appeal, that decision sets a precedent that becomes binding – in effect it becomes law.<sup>283</sup>

While the tribes are seen as separate groups, they do interact and collaborate with one another. For example, a number of tribes (such as the Dinka tribe, the largest Southern tribe) are obligated to marry outside their clan to promote more cohesion across the broader Dinka group.<sup>284</sup> The customary courts also cooperate with one another quite often. For example,

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<sup>281</sup> Mennen, 2007, op.cit., p.55

<sup>282</sup> Parmar, 2007, op.cit.

<sup>283</sup> Akechar, *et al.*, 2004, op.cit., p.17

<sup>284</sup> *Ibid.*, p.18

when inter-tribal conflicts arise, chiefs and judges from different tribes convene to adjudicate the case. In fact, if the defendant in inter-tribal conflicts does not have representation from his/her own tribe on the panel of judges, the case is suspended until a chief from his/her tribe is available to adjudicate.<sup>285</sup> So while customary law differs from tribe to tribe, the courts do work together to get fair representation and a fair outcome for all members.

However, this system does not come without problems. There is a lack of enforcement of customary law, and a lack of crime prevention within the communities.<sup>286</sup> Throughout rural areas of South Sudan, jurisdiction generally rests in hands of local chiefs.<sup>287</sup> While the chiefs are generally trusted individuals who make their rulings based on community consensus, being able to adjudicate how they see fit can be a dangerous power that can potentially be abused. The customary law that they apply is also full of procedural inconsistencies and harmful practices, especially towards women. Corporal punishment such as lashings and beatings are common under customary law, again, especially for women, which further reinforces the acceptance of violence against women for misbehaviour discussed below.<sup>288</sup>

#### 3.4.1 Human rights under customary law

Customary law, because it reflects the values of a patriarchal society, is weak when it comes to human rights protections of women and children.<sup>289</sup> The basis of South Sudanese society is strength of the family and social cohesion. The role of women in South Sudanese culture is that of cementing family ties through dowries and producing children.<sup>290</sup> Women are thus seen as a means to an end – they strengthen the society and the bonds between families by producing children and dowries. As such, however, they are valued for this role they play in society but for this role only. Domestic violence is a family issue in South Sudan, where

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<sup>285</sup> Mennen, 2007, op.cit.

<sup>286</sup> Fadlalla, 2009, op.cit., p.24

<sup>287</sup> Mennen, T., (2010), 'Lessons from Yambio: Legal pluralism and customary justice reform in Southern Sudan', *Hague Journal of the Rule of Law*, Vol.2, p.220

<sup>288</sup> Ibid., p.226

<sup>289</sup> Parmar, 2007, op.cit., Akechar, *et al.*, 2004, op.cit.

<sup>290</sup> Akechar, *et al.*, 2004, op.cit., p.7

women accept violence as a cultural norm and are encouraged by their families and leaders to stay in the marriage for the sake of the family.<sup>291</sup> Women are not permitted to talk about domestic violence, and no one is allowed to interfere unless they are invited to do so.<sup>292</sup> In serious cases of domestic violence where interference is needed, women are encouraged to resolve the matter within their husband's family.

Women are also known to be captured by men of other tribes. In a Dinka-Nuer inter-tribal conference where the two tribes attempted to overcome their differences and decide on appropriate punishment for offences against one another, it was decided that 'a fine would apply against any man who abducted a married woman and made her his own wife.'<sup>293</sup> In this situation, with the abductor being obliged to pay a fine upon the return of the wife, the woman is worth more to him dead than she is alive, and 'he might choose instead simply to get rid of the evidence'.<sup>294</sup> This illustrates the failure of the Southern Sudanese customary law to protect its women.

Further, because the Southern Sudanese culture is patriarchal, all the chiefs and leaders are male. There are no female judges in customary law,<sup>295</sup> and women's voices are poorly represented throughout the South. Women are also often not considered legal subjects, and as such cannot own property.<sup>296</sup> They are largely unaware of the legal processes, do not understand court procedures and lack the skills and means to defend themselves.<sup>297</sup> Violence against women in the South is also quite common. Generally, when an unmarried girl gets raped, she is to be married to the man who raped her.<sup>298</sup> Tonnessen concludes that these

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<sup>291</sup> Hebbani, A., Obijiofor, L. & Bristed, H., (2010), 'Intercultural Communication Challenges Confronting Female Sudanese Former Refugees in Australia', *Australasian Review of African Studies*, Vol.31, No.1, p.49

<sup>292</sup> Dei Wal, N., (2004), *Southern Sudanese Culture*, Migrant Information Centre Eastern Melbourne, p.7

<sup>293</sup> Vick, K., (1999), 'Sudanese Tribes Confront Modern War', Washington Post, accessed 13/12/2008, from <http://www.washingtonpost.com/wp-srv/inatl/daily/july99/sudan7.htm>

<sup>294</sup> Ibid.

<sup>295</sup> Tonnessen, 2007, op.cit., p.9

<sup>296</sup> Sherif, 2005, op.cit., p.29

<sup>297</sup> Ibid., p.30

<sup>298</sup> Tonnessen, 2007, op.cit., p.7

traditions of customary law prevent Southern women from bringing about change, and that Northern women have more rights than women from the South.<sup>299</sup>

South Sudan is in the process of building a modern judicial system.<sup>300</sup> However, while customary law is somewhat different to statutory law and does not form a country wide legal system, it is a very important part of South Sudan and its culture, as well as the justice system. Mennen argues that ‘judicial and legal policy continues to undermine and ignore the pre-existing, organic judiciaries while neglecting to consider the role customary law and courts are already playing.’<sup>301</sup> Customary law in South Sudan survived decades of war, countless changes in government and the statutory law legal system, as well as hundreds of years of culture. It is a system that is deeply embedded into the country and its people, and a system that must be recognised and accepted as part of the legal system. However, it is also a system that is not formally recorded nor collectively adopted by all tribes, and a system that favours men as head of household and families.

#### 3.4.2 Differences between Statutory and Customary law

Customary law differs from the statutory law<sup>302</sup> in South Sudan in a number of ways. First, it is the law that is seen as below the statutory law in the hierarchy – that is, it is basic law that is applied in a functioning society. There are a number of issues that customary law covers, including; family matters such as marriage payments and ceremonies, adultery and penalties involved, divorce and relevant payments and child custody. Property matters are also covered under customary laws including inheritance and land law, as well as procedural laws and laws of obligation such as contracts and liability.<sup>303</sup>

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<sup>299</sup> Ibid., p.9

<sup>300</sup> Aid is going towards training judges, building new courtrooms and developing electronic databases to create a formal legal system for the country. For more information see Mennen, 2007, op.cit.

<sup>301</sup> Ibid., p.57

<sup>302</sup> Statutory law meaning written law established and enacted by legislation, such as in Australia.

<sup>303</sup> Akechar, *et al.*, 2004, op.cit., p.13

Furthermore, South Sudanese customary law is inquisitorial in nature, where chiefs or judges often actively engage in the investigation during the decision making process, rather than simply hearing the facts and applying the law.<sup>304</sup> Judges are the leaders of the community, who are widely known and respected, and in some instances chosen by the people to be their leaders.<sup>305</sup> Therefore, the expectation is that a known leader who personally investigates the case and takes into account public opinion and culture rather than written law will make a decision. This is not so in a statutory law legal system however, where the judge (and the lawyer in some cases) is not necessarily known to the parties, and will not investigate the case, but hear the facts and arguments and apply a decision based on legal rules.

Since the judges investigate each case individually, customary law reacts to an event and problem and treats every case separately.<sup>306</sup> That is to say, there are no general punishments for particular crimes, such as a \$500-\$2,000 fine, as there may be in formal courts. Rather, the details and circumstances of the case are taken into account to decide on the appropriate outcome for that particular case.

The South Sudanese customary law system differs from statutory law in that it often adopts a 'conciliatory approach' to dispute resolution.<sup>307</sup> The objectives of South Sudanese customary law are not punitive but restitutive, and can be summarised as 'the maintenance of peace or equilibrium and the restoration of the status through the payment of damages.'<sup>308</sup> This differs from the goal of western statutory law systems, which is to ascertain the truth, regardless of whether the truth brings satisfaction or resolution to the parties. Danne explains that 'African dispute resolution has been described as placing a premium on improving relations on the basis of equity, good conscience and fair play, rather than the strict legality often associated

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<sup>304</sup> Danne, A.P., (2004), 'Customary and Indigenous Law in Transitional Post-Conflict States: A South Sudanese study', *Monash University Law Review*, Vol.30, No.2, p.209; Leondardi, *et al.*, 2010, *op.cit.*, p.33

<sup>305</sup> Leondardi, *et al.*, 2010, *op.cit.*, p.24

<sup>306</sup> Fadlalla, 2009, *op.cit.*, p.5

<sup>307</sup> Danne, 2004, *op.cit.*, p.209

<sup>308</sup> Makec, J.W., (1988), *The Customary Law of the Dinka People of Sudan: In comparison with aspects of Western and Islamic laws*, Afroworld Publishing, London, p.36, 46

with Western justice.’<sup>309</sup> Therefore, when a crime is committed, it is common that the court orders the criminal to pay compensation to the victim’s family to restore equilibrium. This is seen as more effective than applying penal sanctions, as it is said to induce obedience and enable society to maintain a strong sense of discipline.<sup>310</sup>

Furthermore, customary law does not distinguish between criminal and civil law.<sup>311</sup> Criminal and civil cases are grouped together and both dealt with in the same way using customary law. The rationale for this approach is the desire to restore social equilibrium through the payment of damages.<sup>312</sup> What this means is that in criminal law cases as well as civil, payments of fines are used as punishments, where the wrongdoer can repay the victim by financial means. This type of payment is referred to as *Dia*, and the currency may include ‘multiples of cows, young girls or money’ depending on the customs and values of the particular community.<sup>313</sup> This is a major difference in the process and the understanding of law and legal disputes. What this means is that, since most disputes in the South are resolved through customary law and courts, most Southerners only understand the law to work in this way – if they have not gone through the formal legal process, they will not know the distinction between criminal and civil law. This is a key factor to consider when analysing their prior understanding of law and the legal system and establishing their legal needs in Australia.

Prison sentences are generally not preferred in South Sudanese culture, as they are seen to exacerbate a breach in social relations.<sup>314</sup> In cases where prison sentences are considered, compensation is usually directly commensurable often resulting in the prisons containing poor people who cannot pay their fines.<sup>315</sup> Flogging is also considered a suitable punishment as it serves as an example to others and inflicts humiliation, but is ‘largely reserved for thieves,

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<sup>309</sup> Danne, 2004, op.cit., p.210

<sup>310</sup> Makec, 1988, op.cit., p.45

<sup>311</sup> Fadlalla, 2009, op.cit., p.24

<sup>312</sup> Akechar, *et al.*, 2004, op.cit., p.16

<sup>313</sup> *Ibid.*, p.22

<sup>314</sup> Leondardi, *et al.*, 2010, op.cit., p.38

<sup>315</sup> *Ibid.*, p.37

teenagers, or particularly drunk or abusive defendants.’<sup>316</sup> In cases of murder, it is common for compensation to be provided to the victim’s family to replace and reproduce life.<sup>317</sup> Leonardi *et al* highlight that this is not so that relatives benefit from the death, but rather that the loss of life is mitigated by the productive use of compensation.<sup>318</sup> In some cases, the victim’s family is consulted and chooses what kind of punishment will be most suitable; ranging from monetary payments, imprisonment or execution.

When a legal case is raised under customary law by or against somebody, it is not raised by or against an individual, but rather their whole family or group of families.<sup>319</sup> As the family is seen as a unit, when one person in the family does something wrong, it affects the whole family. Therefore, under customary law the whole family is seen as the legal party, and thus is entitled to attend court hearings and contest the case.

There is a culture of admitting guilt in South Sudanese customary law, especially for sexual offences and murder.<sup>320</sup> Due to the communal nature of the customary law system in South Sudan, the community works together to resolve and prevent crime, and to restore order and equilibrium to society as quickly as possible. This is usually assisted by the wrongdoers reporting their crimes and accepting their punishment. Statutory law legal systems do not work in this way however, and confessing to a crime before knowing one’s rights or the consequences can be a serious vulnerability.

Customary law is also not written or documented, and this reflects the values and customs of a community that is constantly changing and growing, so therefore the law must be flexible enough to keep up with this change.<sup>321</sup> This creates some problems in itself, however, as it means that legal cases are not recorded and the decision and precedents are not noted – instead they become oral traditions. It is believed that the chiefs and leaders, that is the judges

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<sup>316</sup> Ibid., p.38

<sup>317</sup> Ibid., p.63

<sup>318</sup> Ibid., p.65

<sup>319</sup> Akechar, *et al.*, 2004, op.cit., p.43

<sup>320</sup> Leonardi, *et al.*, 2010, op.cit., p.33

<sup>321</sup> Akechar, *et al.*, 2004, op.cit., p.22

presiding over the customary law courts, will pass these decisions on and that the public will accept and enforce them as new laws and customs.

### 3.4.3 Legal pluralism

Legal pluralism can be defined as the ‘state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs.’<sup>322</sup> In this way, legal pluralism refers to ‘the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping ‘semi-autonomous social fields’, which, it may be added, is in practice a dynamic condition.’<sup>323</sup> In other words, legal pluralism exists in societies where legal disputes are governed by more than just one formal legal system. This is not to say that for legal pluralism to exist, there need to be two formal legal systems – multiple legal mechanisms are enough.<sup>324</sup> So when a society has a formal legal system as well as other legal rules or obligations which are widely applied, it is said to be legally pluralistic, as more than one legal mechanism governs its society.

Legal pluralism in this way can be seen to stem from the implications of colonisation. European colonisation that commenced in the 15<sup>th</sup> century and continued until well into the last century produced a large number of legally pluralistic societies throughout the world.<sup>325</sup> Through colonisation, a new set of laws and rules and a new system of governance emerged. However, the customs and traditions of the colonised country were still present. Therefore, generally speaking, indigenous people were left to apply their own traditional laws while colonial law was applicable to the colonisers.<sup>326</sup> What this resulted in was ‘a hodgepodge of coexisting legal institutions and norms operating side by side, with various points of overlap, conflict and mutual influence.’<sup>327</sup> Often the two sets of legal mechanisms applied, that is the

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<sup>322</sup> Griffiths, J., (1986), ‘What is Legal Pluralism?’, *Journal of Legal Pluralism*, No.24, p.2

<sup>323</sup> *Ibid.*, p.38

<sup>324</sup> *Ibid.*, p.12

<sup>325</sup> Tamanaha, B.Z., (2008), ‘Understanding Legal Pluralism: Past to present, local to global’, *Sydney Law Review*, Vol.30, p.381

<sup>326</sup> *Ibid.*, p.282

<sup>327</sup> *Ibid.*



colonial and the traditional or customary law, were markedly different, and further separated by the language barriers and the effective reach of the legal system, which was limited to urban areas.<sup>328</sup>

South Sudan is such a legally pluralistic state, as there are at least two legal systems present at any given time – the formal statutory system and the customary system. The ICSS states that the sources of law for Southern Sudan are:

- a) the Interim National Constitution;
- b) the Interim Constitution of Southern Sudan;
- c) customs and traditions of the people of Southern Sudan;
- d) popular consensus of the people of Southern Sudan; and any other sources.<sup>329</sup>

The statutory and customary law systems therefore, are not two distinct systems, but a loosely governed unitary system that incorporates legal rules and practices from different sources.<sup>330</sup> They form part of the court hierarchy, and cases from customary courts can be appealed in statutory courts. This is a difficult process however, as the acceptable rules and practices can conflict in the two systems. For example, particular types of murder are accepted under customary law, but illegal under statutory law. The judiciary, therefore, are faced with the difficult task of incorporating the many uncodified customary codes into the statutory legal system.

Customary courts and their presiding judges are generally more trusted and preferred over statutory courts in Southern Sudan, despite their limitations with human rights protections. One important reason for this, as highlighted in Mennen's study, is the importance of traditions and customs on family issues.<sup>331</sup> There is a strong sense of family and tradition within the communities, and the community chiefs play a significant role in upholding those

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<sup>328</sup> Ibid., p.284

<sup>329</sup> The Interim Constitution of Southern Sudan, 2005, op.cit., p.Article 5, Article 5

<sup>330</sup> Leonardi, C., (2007), 'Violence, Sacrifice and Chiefship in Central Equatoria, Southern Sudan', *Africa*, Vol.77, No.4, p.27

<sup>331</sup> Mennen, 2010, op.cit., p.229

values. The statutory courts are seen to be more punitive and objective, while the customary courts are restorative and responsive to the individual situation.<sup>332</sup>

Furthermore, procedural and structural barriers to the statutory system also exist. Most statutory courts are situated in urban areas for example, making them difficult to access for people living in rural areas. The statutory courts are also more complicated and confusing, more expensive and require the use of lawyers. People are often not familiar with the statutory legal system or ways of hiring a lawyer, in turn preferring to rely on a system that is close to home, is familiar and easily accessible. Cases take a considerably longer amount of time to proceed through the statutory courts, often deterring people from accessing it. Furthermore, the statutory judiciary are said to be corrupt, often delaying court cases when bribed.<sup>333</sup> Mennen concludes that the preference for customary courts is not only a product of geographical access, but ‘a reflection of deeper cultural and structural characteristics.’<sup>334</sup>

### **3.5 CONCLUSION**

This chapter has provided a detailed account of Sudan’s political history and legal system. It has explained why Sudanese refugees had to flee their homes and find refuge in countries such as Australia. It has also provided a detailed account of their experiences before fleeing the country. The constant fighting between the government and the rebels, the many military coups and changes in government and laws meant that Sudan’s citizens were being persecuted and forced out of their homes. They endured human rights violations bestowed upon them by the very people who were supposed to protect those rights. These experiences of persecution stay with the refugees after resettlement, and are likely to translate into distrust in governments, legal systems and government officials and difficulties settling into a new country.

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<sup>332</sup> Danne, 2004, op.cit.

<sup>333</sup> Leonardi, 2007, op.cit., p.39

<sup>334</sup> Mennen, 2010, op.cit., p.230

This chapter has also demonstrated the complexity of legal pluralism present in Sudan. Due to the lack of functioning legal system and absence of rule of law, most people in South Sudan have never had any positive dealings with the formal legal system of the country. Instead, they have been relying on their customary laws and practices, which were the only form of adjudication that have made any sense during a time of turmoil. The presence of a constantly changing, corrupt formal legal system as well as a customary law system can be confusing and difficult for people to navigate.

Finally, this chapter has demonstrated that Sudanese people are not one homogenous group. There is a clear divide between people from the North and the South of Sudan, with a long history of violence between the two groups. However, people from the South Sudan are also not a homogenous group in themselves, as they consist of many tribal groups with different values and norms. Therefore, when we discuss Sudanese refugee communities in Australia, we are referring to numerous groups of people with individual sets of laws and languages. These differences need to be acknowledged if the individual needs of the groups are to be met.

# CHAPTER 4

## RESETTLEMENT AND ITS CHALLENGES

### 4.1 INTRODUCTION

This chapter looks at the published research on the resettlement experiences of African refugees. It explores their pre-migration experiences, illustrating the many violations of human rights endured during times of uncertainty. The chapter follows specific South Sudanese refugees from their homes to refugee camps throughout Africa, highlighting the difficulties experienced during the transit period. The story of the Lost Boys and the experiences of refugees in Kakuma Refugee Camp are given particular attention, because these stories represent common experiences of people fleeing South Sudan looking for refuge. The exploration of life in such a refugee camp highlights the lack of rule of law and legal protections available, as well as the violence and hardship present in the camp.

After examining life before and during the migration period, the process of arrival to Australia and its many challenges is explored. Over 20,000 Sudan born people have resettled in Australia over the past ten years.<sup>335</sup> However, this final stage of resettlement does not come without its challenges. A number of studies have been published over the past ten years exploring the many settlement difficulties of African refugees, both in Australia and internationally. This chapter draws on literature covering issues such as acculturation difficulties, employment and education barriers as well as difficulties navigating the legal system.

The chapter concludes with some reflections on the way research into the settlement needs of African refugees is conducted. Researchers tend to apply labels to their participants in order to allow for common experiences to be recognised. However, these labels are not always beneficial to the group. Grouping African refugees together, for example, is a label that does not take into consideration the unique pre-migration experiences of some refugee groups.

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<sup>335</sup> Lucas, D., Jamali, M. & Edgar, B., (2011), 'The Sudan-born in Australia: A Statistical Profile', *Australasian Review of African Studies*, Vol.32, No.2, p.11

Furthermore, the label of refugee tends to stick long after resettlement, which can serve to reinforce traumatic and victimising perceptions. My research deliberately departs from this homogenising practice in order to value the diversity of South Sudanese experiences. Importantly, I recognise the refugee *background* rather than *status* of South Sudanese people in this study. As a result, rather than treating participants as traumatised refugees, this study identifies South Sudanese communities as refugee background Australian residents who access the same justice system as any other Australians. The study aims to contribute new, in-depth knowledge on the lived experiences of participants with the Australian legal system.

#### **4.2 PRE-MIGRATION EXPERIENCES**

Due to their unique pre-arrival experiences, there has been strong interest in the migration process of Sudanese displaced people over the past decade. As a result, a number of studies have been published, both in Australia and internationally, exploring the experiences of resettlement of Sudanese refugees and their coping and adaptation strategies.<sup>336</sup> The previous chapter has provided an extensive summary of the political events and their devastating effects on the people of South Sudan. Together with the previous chapter, this section highlights some of the difficulties and experiences of Sudanese humanitarian entrants before leaving Sudan as reported in recent Australian qualitative studies.

Khawaja *et al* conducted a qualitative study identifying the difficulties that emerged during the pre-migration, transit and post-migration periods, and explored the coping strategies adopted during these stages.<sup>337</sup> They found that participants experienced a number of difficulties in the pre-migration stage, such as inability to fulfil basic physical needs and conduct daily life activities such as employment or education, the loss or separation from

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<sup>336</sup> McMichael, C., Gifford, S.M. & Correa-Velez, I., (2011), 'Negotiating Family, Navigating Resettlement: family connectedness amongst resettled youth with refugee background living in Melbourne, Australia', *Journal of Youth Studies*, Vol.14, No.2; Khawaja, N.G., White, K.M., Schweitzer, R. & Greenslade, J.H., (2008), 'Difficulties and Coping Strategies of Sudanese Refugees: A qualitative approach', *Transcultural Psychiatry*, Vol.45, No.3 For further discussion see Tempany, 2009, *op.cit.*

<sup>337</sup> Khawaja, *et al.*, 2008, *op.cit.*, p.505. The study involved 23 Sudanese refugees living in Brisbane for an average of 2.5 years.

loved ones and the physical and psychological trauma suffered.<sup>338</sup> Participants reported experiencing a number of different types of physical trauma, ‘including torture, beatings, gunshots, and brutal interrogations, experienced either during a period of imprisonment or during the course of everyday life.’<sup>339</sup>

In a similar study, Shakespeare-Finch and Wickham found that participants experienced adverse conditions during their life in Sudan, which created negative effects for all of them.<sup>340</sup> For example, they report that ‘almost all participants had experienced first-hand the terror of open warfare, including bombing, shelling, and shooting in the streets.’<sup>341</sup> Participants also witnessed human rights violations perpetrated by both government officials and the rebels, such as ‘arbitrary arrest, interrogation, imprisonment, beatings, starvation, rape, torture, executions, and forced military service.’<sup>342</sup>

The experiences of war and unrest are common experiences amongst all refugees. However, the long, unstable political history and multiple legal orders create additional and unique pre-migration experiences for South Sudanese refugees. These conditions made it unsafe to stay in Sudan due to fear of being tortured or killed, forcing South Sudanese residents to flee their country.

### **4.3 IN-TRANSIT EXPERIENCES**

Once South Sudanese residents left Sudan and found refuge in other countries or camps, the above mentioned difficulties did not vanish. Similar difficulties were reported in the transit period, with the addition of instability and fear for the future, reflecting participants’ fears that

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<sup>338</sup> Ibid., p.496-8

<sup>339</sup> Ibid., p.497-8

<sup>340</sup> Shakespeare-Finch & Wickham, 2010, op.cit. This was a qualitative study interviewing 12 Sudanese refugees in Tasmania, focusing on the experiences of Sudanese refugees in Sudan before leaving the country, en route and at their Australian destination.

<sup>341</sup> Ibid., p.29

<sup>342</sup> Ibid., p.30

they may always feel unsafe in their transit country or be sent back to Sudan.<sup>343</sup> Large numbers of Southern Sudanese displaced people fled Sudan during the military coups and the ethnic cleansing of the 1980s. As the villages were raided and people killed or taken away, those who could, fled. The ones who got away were mainly young children displaced from their parents.<sup>344</sup> They left in large groups and walked down the river Nile to get to refugee camps in Kenya or Ethiopia. Many of these young people died in the some 600 kilometre journey, either from exhaustion, being killed by the Islamic front or from hunger, thirst or wild animals.<sup>345</sup> The journey was a long and daunting one and only the fittest survived.

This journey claimed a lot of lives, and the majority of displaced people who made it to Kakuma were young boys and men.<sup>346</sup> When aid workers discovered the large numbers of unaccompanied minors in 1992, they named them the 'Lost Boys of Sudan'.<sup>347</sup> Joan Hecht, a volunteer working with the Lost Boys in the US and the founder of the Alliance for the Lost Boys of Sudan, collected the stories of the Lost Boys and published them in the book 'The Journey of the Lost Boys' in 2005. This book is based on extensive literature review and research of the political and historical events surrounding the Sudanese war, as well as personal stories of some of the surviving Lost Boys residing in the US. This section focuses on the Lost Boys in order to illustrate the experiences of displaced people fleeing Sudan. The story of the Lost Boys told in this section is representative of the experiences of most displaced persons fleeing South Sudan. While some left with their families and some fled to other countries of asylum instead, the common link is the forced migration and difficult journeys to find safety.

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<sup>343</sup> Khawaja, *et al.*, 2008, op.cit., p.506

<sup>344</sup> Luster, T., Qin, D.B., Bates, L., Johnson, D.J. & Rana, M., (2008), 'The Lost Boys of Sudan: Ambiguous loss, search for family, and re-establishing relationships with family members', *Family Relations*, Vol.57, No.4, p.444

<sup>345</sup> Hecht, 2005, op.cit.

<sup>346</sup> There are reports that the surviving girls who made it to these camps 'disappeared' from the official statistics for numerous reasons. It is not accepted in Sudanese culture that girls stay on their own, so they were placed in foster care. However, it has been suggested that girls were often kept from the officials by community members due to prospects of bride wealth, and sometimes kept as servants or sex slaves. For more information refer to Harris, A., (2009), 'Twice Forgotten: The 'Lost Girls' of Sudan and performative integration into Australia', AARE Conference Melbourne, 29 November - 3 December

<sup>347</sup> Hecht, 2005, op.cit., p.21

### 4.3.1 The Story of the Lost Boys

In the late 1980s, the Lost Boys, in a group of 40,000, walked on foot without shoes or shelter for approximately three months until they reached camps in Ethiopia. Their diet consisted mainly of 'leaves, bark, bugs and mud, save the occasional feast of dead and decaying animals that they found along the way.'<sup>348</sup> For some of these young men, this devastation became too much, ultimately leading them to suicide in order to end the hardship. Hecht reports that some hung themselves from trees, ate poisonous berries or threw themselves into the currents of passing rivers.<sup>349</sup>

There were three main camps in Ethiopia which took in the Lost Boys and other Sudanese displaced persons: Dimma; Itang; and Pugnido. However, in 1991 rebels overthrew the Ethiopian government and Sudanese refugees were no longer welcome.<sup>350</sup> They were given only a few days to leave Ethiopia and go back to Sudan. The Ethiopian rebels were on a mission to destroy the SPLA soldiers, including anyone suspected of being future soldiers to the SPLA.<sup>351</sup> As these camps were full of fit young men now returning to Sudan and at a high risk of joining the SPLA, the rebels randomly shot at the boys to eliminate any future enemies. The ones who survived this attack ran once more in order to escape and began another long, deadly journey into the wilderness back to Sudan. As the boys crossed the desert to get out of Ethiopia, the rebels chased and hunted them down. On their journey, while trying to escape the Ethiopian rebels, the boys were forced to cross the river Gilo during the rainy season. They were faced with a choice of jumping into the river and becoming pray to the crocodiles, hippos and high currents, or staying on the banks and being killed by the rebels. One man describes his journey:

I was swimming across the water when I heard a young boy beside me screaming for help. It was a really bad scream and I knew something terrible had happened to him. Another boy reached him first and grabbed him by the arm to help him. But when he pulled on his body, it rose to the top of the water and

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<sup>348</sup> Ibid.

<sup>349</sup> Ibid.

<sup>350</sup> Luster, *et al.*, 2008, *op.cit.*, p.444

<sup>351</sup> Hecht, 2005, *op.cit.*, p.59



we could see that his bottom half was missing. He was only half a person and yet he continued to scream.<sup>352</sup>

It is estimated that several thousand Lost Boys died in the Gilo river that day.<sup>353</sup> The remaining boys were forced to walk back towards Sudan and settle in various temporary refugee camps until 1992 when they were taken into Kakuma. The following section explores life in Kakuma Refugee Camp.

#### 4.3.2 Kakuma Refugee Camp

In August 1992, the Kenyan government together with the UNHCR established the Kakuma Refugee Camp to accommodate the large number of Sudanese refugees in temporary camps. It is one of the biggest refugee camps in Africa, covering an area 15 kilometres long and one



Figure 4.1: Map of Kakuma refugee camp

kilometre wide.<sup>354</sup> Although Sudanese people comprised up to 70 per cent of the camp, Kakuma has also become home to refugees from other countries, such as Somalia, Ethiopia and Liberia, amongst others.<sup>355</sup> It is located in the northwest of Kenya in the Turkana district and rests on dry and barren stretch of land.<sup>356</sup> The conditions in this land are extreme, with 40 degree plus heat, fierce winds and land that is useless to Kenyans.

Many Kenyans refer to Kakuma as ‘no-man’s land’, as it is a remote forsaken land filled with the forgotten people of Africa.<sup>357</sup> The local people living in the Kakuma camp

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<sup>352</sup> Ibid., p.66. A Lost Boy telling his story of survival.

<sup>353</sup> Ibid., p.65

<sup>354</sup> Nyabera, E., (2005), 'Sudanese Refugees Sharpen Their Skills as They Prepare to Return Home', UNHCR, accessed 22/05/08, from <http://www.unhcr.org/cgi-bin/texis/vtx/southsudan?page=news&id=435fa3c34>

<sup>355</sup> Browne, P., (2003b), 'Surviving Africa', *Eureka Street*, Vol.13, No.3, p.37

<sup>356</sup> Hecht, 2005, op.cit., p.89

<sup>357</sup> Ibid.

area are called the 'Turkanas'. Living in the harsh, dry remote lands, the Turkanas endure much hardship, especially through the continuous cycles of drought and famine. This has led the locals to be envious of the refugees at Kakuma, as they are getting the help from the governments and other organisations they themselves never receive.<sup>358</sup> The locals have been known to be violent towards the refugees at Kakuma, especially to the women and children collecting firewood outside the camp.<sup>359</sup> Participants in Khawaja's study reported that during this transition period, 'rebels would attack the camps and kill large numbers of their inhabitants. They also told of witnessing rapes and abductions by rebels who had broken into the camp to steal food.'<sup>360</sup>

There is also ethnic and tribal tension, with rebel groups often using the camp for recruitment purposes, exercising violence and force against young boys in order to do so.<sup>361</sup> Violence between internal communities is also predominant in the camp. For example, in 1997 a large clash between the South Sudanese Dinka and Nuer resulted in numerous deaths and more than 100 injuries.<sup>362</sup> Sudanese girls and women are the most vulnerable in Kakuma, not only because they are likely to be attacked by the locals when collecting firewood, but they are also at risk of being abducted for the purposes of forced marriage back in Sudan.<sup>363</sup>

Although away from most of the violence of war, life in Kakuma for the refugees is challenging. Freedom of movement is restricted, as Kenyan Government policy requires those living in camps to remain in Kakuma or Dadaab.<sup>364</sup> Kakuma refugee camp is cramped, housing nearly 90,000 refugees, and the supplies are low. Each refugee would typically receive 'two cups of lentils, approximately five pounds each of corn and wheat flour, one cup

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<sup>358</sup> Ibid., p.90

<sup>359</sup> Browne, P., (2003a), 'Where Refugee Camps are Becoming a Way of Life', Sudanese Online Research Association (SORA), accessed 17/05/2008, from <http://www.sora.akm.net.au>;

<sup>360</sup> Khawaja, *et al.*, 2008, *op.cit.*, p.500-1

<sup>361</sup> Browne, 2003b, *op.cit.*, p.38; Crisp, J., (2000), 'A State of Insecurity: The political economy of violence in Kenya's refugee camps', *African Affairs*, Vol.99, No.397, p.623

<sup>362</sup> Crisp, 2000, *op.cit.*, p.155

<sup>363</sup> Ibid., p.604

<sup>364</sup> Eidelson, R.J. & Horn, R., (2008), 'Who Wants to Return Home? A survey of Sudanese refugees in Kakuma, Kenya', *Refuge*, Vol.25, No.1, p.16

of salt and one cup of oil'.<sup>365</sup> This ration has to last 15 to 30 days, depending on availability, and the residents often run out of food before their next ration.

Some refugees who fled Sudan in the 1980s after the start of the second civil war have spent over twenty years in refugee camps. Some have even been born in refugee camps and have never been to Sudan.<sup>366</sup> Refugee camps are generally not governed by the country's laws, but rather are regulated by the officials running the camps. This often results in a lack of human rights protections and miscarriages in justice. Crisp highlights that the rule of law in the camps is weak, and the perpetrators of violence are hardly ever held accountable for their actions.<sup>367</sup> He further explains that the community leaders take on a very powerful role within the camp:

The 'traditional judges' and 'bench courts' which characterize the Sudanese community in Kakuma, for example, are said to wield immense (and sometimes arbitrary) power – including the power of corporal punishment and detention in prison facilities constructed with the assistance of an international NGO.<sup>368</sup>

Therefore, refugee camps are often corrupt institutions where the most powerful people in the community hold the power and rule the community. Once again, this means that even away from the war in Sudan, South Sudanese refugees in camps across Africa still do not have access to justice or human rights protections.

The Lost Boys living in Kakuma had no family and after living through the hard journey there was one thing that kept them going, that kept them searching and fighting for a better life – education. The Alliance for the Lost Boys explains that they developed a slogan while they were in camp, 'Education is my only mother and father'.<sup>369</sup> There was a drive in the group to

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<sup>365</sup> Hecht, 2005, op.cit., p.99

<sup>366</sup> Eidelson & Horn, 2008, op.cit., p.16

<sup>367</sup> Crisp, 2000, op.cit., p.619

<sup>368</sup> Ibid., p.603-4

<sup>369</sup> Alliance for the Lost Boys of Sudan, (2008), accessed 21/05/2008, from <http://www.allianceforthelostboys.com>

learn and that can be seen by the amount of Lost Boys and other young South Sudanese refugees who have resettled in countries like Australia and undertaken University degrees.

In 2001, the US government granted the Lost Boys refugee status and took in 3,800 refugees, who have since formed organisations, like the 'Alliance for the Lost Boys of Sudan'.<sup>370</sup> The Lost Boys in the US have received considerable positive attention, and have been recognised as one of the most successful refugee resettlement groups.<sup>371</sup> The Australian government has also taken in a large number of the Lost Boys throughout the years, who have also formed alliances and groups within Australia such as the 'Sudanese Lost Boys Association of Australia'.<sup>372</sup> The boys have experienced great hardship throughout their journey, and had their childhood stolen by violent and stressful circumstances.<sup>373</sup> However, they are a very resilient group and have adjusted to their new lives, with most of the boys finding successful employment and education.<sup>374</sup>

#### **4.4 IMMIGRATING TO AUSTRALIA**

It is clear that South Sudanese refugees have had a long and hard journey throughout their lives. From having to flee their homes in South Sudan, to walking long distances to reach refugee camps, to facing hardship and violence in the camps. It is also apparent that refugee camps were only a temporary refuge place, and in order to find a better life they needed to be resettled somewhere safe, somewhere where they could get adequate shelter and food, pursue their education and provide a better life for their children. For this reason, countries like Australia have established Humanitarian Programs, allowing some refugees to migrate to

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<sup>370</sup> See <http://allianceforthelostboys.com>

<sup>371</sup> McKinnon, S.L., (2008), 'Unsettling Resettlement: Problematizing "Lost Boys of Sudan" Resettlement and Identity', *Western Journal of Communication*, Vol.72, No.4, p.398

<sup>372</sup> See <http://lostboys.org.au>

<sup>373</sup> For more information on their journey and their specific settlement problems refer to McKinnon, 2008, op.cit.; Luster, *et al.*, 2008, op.cit. and da Tarczynski, S., (2007), 'Sudan Survivors Lost in Their New Home', Sudanese Lost Boys Association of Australia, accessed 22/05/2008, from <http://www.lostboys.org.au>

<sup>374</sup> McKinnon, 2008, op.cit., p.398

Australia and build a better future.<sup>375</sup> This section provides an overview of the resettlement of Sudanese refugees in Australia and highlights some difficulties they face on arrival.

The Sudanese community is one of the fastest growing groups in Australia, with the number of entrants rising by 34 per cent each year.<sup>376</sup> More than 98 per cent of all Sudanese arrive in Australia through the Humanitarian Program, either through the Refugee or the Special Humanitarian Program (SHP) components.<sup>377</sup> An Australian resident, usually a family member, initiates the SHP while the Refugee visa may be granted based on humanitarian criteria.<sup>378</sup> Seventy-four per cent of all humanitarian entrants between 2002 and 2007 have come to Australia as SHP entrants, meaning that most have family members or friends in Australia willing to help them.<sup>379</sup> The SHP 'targets people who are outside their home country and are subject to substantial persecution and/or discrimination in their home country amounting to a gross violation of their human rights'.<sup>380</sup>

Often, the displaced people who make it to the camps find out that their family in Sudan has been killed. They may look outside of Africa to find a family member, most likely a cousin or uncle who lives in Australia. This family member then applies for a Visa subclass 202 under the SHP program and helps the refugee to migrate to Australia. This is long process, often taking several years, and involves a number of steps. For example, the refugee must undergo a pre-departure health screen to ensure they are fit enough to travel and immigrate to Australia, and attend an interview with an International Organisation for Migration (IOM) worker.<sup>381</sup>

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<sup>375</sup> A range of different approaches is taken to refugees in Australia, where some are provided with the necessary assistance and others are detained in camps or detention centres. As most South Sudanese refugees arrive under the Special Humanitarian Program, this is the approach I am focusing on throughout the thesis.

<sup>376</sup> Department of Immigration and Citizenship, 2007a, op.cit., p.4

<sup>377</sup> Ibid., p.5

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

<sup>380</sup> Refugee Council of Australia, (2007), 'Australia's Refugee Program', accessed 08/09/2007, from <http://www.refugeecouncil.org.au/arp/overview.html>

<sup>381</sup> Department of Immigration and Citizenship, (2012), 'Humanitarian Entrants - Moving to Australia', accessed 23/01/2012, from <http://www.immi.gov.au/living-in-australia/choose-australia/moving-to-australia/hum-ent.htm>

The refugee and their support person in Australia also bear all costs involved in the examinations and interviews, as well as travel costs to Australia.

After the refugee arrives, the family member is responsible for caring for the refugee, including finding housing, providing help settling in and finding employment. Robinson highlights that the underlying assumption of the Humanitarian Program, especially the SHP, is that community services as well as the existing community of immigrants from their home country will support the humanitarian entrants.<sup>382</sup> This sometimes amounts to over ten people in a three-bedroom house. When they arrive, refugees are not aware of the living styles and conditions in Australia and often keep living in cramped, poorly furnished housing.

#### 4.4.1 Sudanese Profile in Australia

The following is an estimate of the number of Sudanese refugees arriving in Australia over the years.

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<sup>382</sup> Robinson, J., (2011), 'Sudanese Heritage and Living in Australia: Implications of demography by individual and community resilience', *Australasian Review of African Studies*, Vol.32, No.2, p.37

Table 4.1: Number of Sudan born entrants to Australia 2000-2011<sup>383</sup>

<b>Year</b>	<b>Approximate Number</b>
2000-2001	1,145
2001-2002	1,046
2002-2003	2,711
2003-2004	4,530
2004-2005	5,572
2005-2006	3,660
2006-2007	2,333
2007-2008	799
2008-2009	657
2009-2010	346
2010-2011	229
<b>Total</b>	<b>23,028</b>

Before 2000, the number of Sudanese refugees migrating to Australia was fairly low, ranging from 300 to 600 a year. After 2000, Australia opened its doors to more Sudanese refugees and the number started increasing. This table is based on numbers of people who were born in Sudan, and does not take into account children born to Sudanese families outside of Sudan or people with a Sudanese heritage. Robinson's research suggests that once these factors are taken into account, the total population of people with Sudanese heritage in Australia at 1 July 2011 is 30,629.<sup>384</sup>

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<sup>383</sup> Department of Immigration and Citizenship, (2009), *Immigration Update 2008-2009*, Commonwealth of Australia, p.26; Department of Immigration and Citizenship, (2011b), *Immigration Update 2010-11*, Commonwealth of Australia, p.26; Department of Immigration and Citizenship, (2006), *Immigration Update 2005-2006*, Commonwealth of Australia, p.22; Department of Immigration and Citizenship, (2005), *Immigration Update 2003-2004*, Commonwealth of Australia, p.22; Department of Immigration and Citizenship, (2004), *Settler Arrivals 1993-94 to 2003-04 Australia: States and Territories*, Commonwealth of Australia, p.5

<sup>384</sup> Robinson, 2011, op.cit., p.36

Most Sudanese entrants reside in the capital cities of Australia, with Victoria being home to 36 per cent and New South Wales 24 per cent.<sup>385</sup> This maybe an added resettlement challenge for South Sudanese entrants, as they are largely unfamiliar with urban life.<sup>386</sup> Between 2001 and 2007, 83 per cent of Sudanese entrants have identified themselves as Christian, while 12 per cent were Muslim.<sup>387</sup> This suggests that most Sudanese refugees come from the war-torn South, and as a result may experience a number of problems upon arrival, such as non-familiarity with western culture and processes. Most Sudanese refugees arriving in Australia are 24 years or younger (62 per cent), while males outnumber females by five per cent.<sup>388</sup> The majority, that is 78 per cent, described their English as ‘nil’ or ‘poor’.<sup>389</sup> This suggests that they may need extra services such as specialised education or translation services when they arrive.

The 2006 ABS Census reports that there were 1478 Sudan born people residing in South Australia in 2006.<sup>390</sup> Again, this figure does not take into account Sudanese people who were born outside of Sudan or in refugee camps however. The following table highlights the numbers of Sudan born people in South Australia between 2000 and 2011.

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<sup>385</sup> Department of Immigration and Citizenship, 2007a, op.cit., p.5

<sup>386</sup> Robinson, 2011, op.cit., p.40

<sup>387</sup> Department of Immigration and Citizenship, 2007a, op.cit., p.6

<sup>388</sup> Ibid., p.7

<sup>389</sup> Ibid.

<sup>390</sup> Australian Bureau of Statistics, (2006), *National Census*



**Table 4.2: Number of Sudan born entrants to South Australia 2000-2011**<sup>391</sup>

<b>Year</b>	<b>Number</b>
2000-2001	74
2001-2002	89
2002-2003	188
2003-2004	363
2004-2005	407
2005-2006	248
2006-2007	143
2007-2008	79
2008-2009	87
2009-2010	31
2010-2011	41
<b>Total</b>	<b>1,750</b>

#### **4.5 POST-MIGRATION EXPERIENCES**

A number of studies have been published in Australia over the past decade exploring the issues Sudanese entrants face once they settle in Australia. Numerous studies have also been undertaken internationally, the US and Canada especially, dealing with the settlement difficulties of Sudanese refugees,<sup>392</sup> and the specific challenges for men<sup>393</sup> and women.<sup>394</sup> A study by Hancock found that settlement service provisions have not coped well with the

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<sup>391</sup> Department of Immigration and Citizenship, (2008), *Settler Arrivals 1997-98 to 2007-08 Australia: States and Territories*, Commonwealth of Australia, p.39; Department of Immigration and Citizenship, (2011c), *Settler Arrivals 2010-2011*, Commonwealth of Australia, p.40

<sup>392</sup> Currie, L., (2007), "'Who Can Be Added': The effects of refugee status determination and third country resettlement processes on the marriage strategies, rites, and customs of the Southern Sudanese in Cairo', *Refuge*, Vol.24, No.1; Lim, S.L., (2009), "'Loss of Connections Is Death": Transnational family ties among Sudanese refugee families resettling in the United States', *Journal of Cross-Cultural Psychology*, Vol.40, No.6

<sup>393</sup> Johnson, P.J. & Stoll, K., (2008), 'Remittance Patterns of Southern Sudanese Refugee Men: Enacting the global breadwinner role', *Family Relations*, Vol.51; Este, D.C. & Tachble, A., (2008), 'Fatherhood in the Canadian Context: Perceptions and experiences of Sudanese refugee men', *Sex Roles*, Vol.60; Stoll & Johnson, 2007, op.cit.

<sup>394</sup> Brownfield Baird, M., 2009, 'Resettlement Transition Experiences Among Sudanese Refugee Women', PhD Thesis, University of Arizona, Tucson

sudden influx of African refugees, as they do not adequately address the unique needs of African refugees, such as ‘trauma, cultural needs, racism and longer settlement adjustment periods - compared to other groups.’<sup>395</sup> Hancock argues that the time African refugees have spent in refugee camps and other places of asylum places them in a different category to other refugees, as they may have limited knowledge of the English language or awareness of life in a developed country like Australia.<sup>396</sup> This section examines studies exploring the experiences and needs of African refugees during settlement in Australia as well as internationally in order to highlight the many difficulties African refugees face after coming to Australia, and to point to the need for more specific studies and tailored services.

Resettlement can be a difficult period for South Sudanese entrants. Some of these difficulties may include simple things such as the use of electricity. In a television program on the life of Sudanese humanitarian entrants in Australia, one South Sudanese man told the story of the first time he used a stove:

Because we have a different way of cooking in our country and we collect firewood but when I came here someone took me inside a house and said this is where you can cook. And I said, ‘Where is the fire?’ and they said, look, you can just switch on and you get heat. So... the person showed me around and how to cook and forget to show me the alarm... So that smoke alarm make me feel scared after a while... When I cooked I burned the onions and then smoke alarm went off and I was like running around, wondering why my house was crying.<sup>397</sup>

Furthermore, the way people dress is different in Australia and sometimes they may be required to dress in specific attire for job interviews or school uniforms. Other things like using public transport, bankcards or even keeping time can be new things which refugees have to learn. Akoch further stated ‘It’s really the beginning of life when you come and I feel that is a very big turning point of life in Australia.’<sup>398</sup> As Marlowe has pointed out, ‘[r]esettlement from Africa to Australia is often a journey between two worlds where one must

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<sup>395</sup> Hancock, 2009, op.cit., p.10

<sup>396</sup> Ibid., p.14

<sup>397</sup> Akoch Akuei Maniem, as cited in , 2007, Television Program, SBS, 30th October

<sup>398</sup> Ibid.

forge a workable synthesis of the past with the present.’<sup>399</sup> It is the beginning of a new, different life for African entrants, and the adjustment period can often be a long and difficult one.

One of the most obvious difficulties during the settlement process is the lack of English proficiency. Although some may have learned basic English in refugee camps, most African humanitarian entrants are not proficient in English. Pittaway and Muli, in a study on the settlement needs of the Horn of African refugees in Australia, identified a difficulty in acquiring English language skills, which often created other issues such as gaining employment and education.<sup>400</sup> Khawaja *et al* further report that adaptational demands such as learning a new language and a new set of cultural values and practices creates a lack of environmental mastery within the African community, preventing them from successfully settling into the new community.<sup>401</sup>

Another significant settlement barrier is the worry about family left behind and the separation from loved ones. Participants in Pittaway and Muli’s study identified concern and worry about family left behind as one of the major factors affecting settlement. One participant expressed their concern by saying ‘How can I sleep on foam here when they sleep on rocks there? If I had known they could not join me I would have not left Kenya.’<sup>402</sup> Participants in other studies also noted homesickness and separation from family as important settlement difficulties.<sup>403</sup> Furthermore, Westoby highlights that most participants noted the importance of having people from their own tribe around, especially in the early stages of settlement.<sup>404</sup>

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<sup>399</sup> Marlowe, J.M., (2009), 'Accessing 'Authentic' Knowledge: *Being and doing* with the Sudanese Community', *Australian Community Psychologist*, Vol.21, No.1, p.46

<sup>400</sup> Pittaway & Muli, 2009, *op.cit.*, p.503. Community consultation and semi-structured interviews were conducted with 83 people – 37 men and 46 women from all Horn of Africa countries except Djibouti, comprising community leaders, professionals, students and unemployed people.

<sup>401</sup> Khawaja, *et al.*, 2008, *op.cit.*, p.503

<sup>402</sup> Pittaway & Muli, 2009, *op.cit.*, p.10

<sup>403</sup> Shakespeare-Finch & Wickham, 2010, *op.cit.*

<sup>404</sup> Westoby, P., (2007), 'Sudanese Refugee Narratives of Social Distress - Brisbane and Logan', University of Queensland, pp.1-49, accessed 19/09/2010, from <http://espace.library.uq.edu.au/view/UQ:34513>, p.9, 26

The lack of interaction and acceptance by the Australian community was noted as a settlement barrier in a number of studies. Pittaway and Muli highlight the importance of encouraging the Australian community to open doors and break down the barriers so that the African community can feel welcome.<sup>405</sup> The African community often feels isolated, and have noted a lack of social support especially during the early stages of settlement.<sup>406</sup> Experiences of racism and poor treatment were also identified as issues affecting the settlement process.<sup>407</sup> These experiences often prevent the African community from participating in the Australian society, and cause a divide between the two communities.<sup>408</sup>

Acculturation difficulties such as changing gender and family dynamics were reported as a major cause of distress and family disintegration, as families struggle to adapt to the new rights and responsibilities of men, women and children.<sup>409</sup> For example, children do not leave home until they are married in South Sudan and the roles in the family are clearly stated and defined, with the man as the head.<sup>410</sup> However, these roles change after resettlement in Australia and the existing family life may become disrupted, with children and women adopting the western freedoms. The newly arrived Sudanese entrants are constantly working out how to translate and adapt tribal identities and relationships to an Australian environment and fit in successfully.<sup>411</sup> Health issues specific to the African Australian community are also identified within the literature, including changes in food and diet and lack of culturally appropriate health services.<sup>412</sup>

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<sup>405</sup> Pittaway & Muli, 2009, op.cit., p.11-15

<sup>406</sup> Khawaja, *et al.*, 2008, op.cit., p.503

<sup>407</sup> Pittaway & Muli, 2009, op.cit., p.45-6; Khawaja, *et al.*, 2008, op.cit., p.503

<sup>408</sup> Shakespeare-Finch & Wickham, 2010, op.cit.

<sup>409</sup> Westoby, 2007, op.cit., p.11-2

<sup>410</sup> Puoch, G., (2006), 'Intergenerational Conflict, Changes and Resolutions within Community: Parents vs young people', Sudanese Online Research Association, accessed 21/05/2007, from <http://www.sora.akm.net.au>

<sup>411</sup> Coffey, M., (2007), 'Life in Transit: The experiences of Sudanese refugees arriving in Australia', Sudanese Online Research Association, accessed 21/05/2007, from <http://sora.akm.net.au>

<sup>412</sup> Australian Human Rights Commission, 2010a, op.cit., p.18

Finding appropriate housing in Australia can be problematic for newly arrived African entrants. Pittaway and Muli report that participants found it difficult to find affordable and appropriate housing to accommodate for their large families. Once they did find accommodation, participants often lived in fear of the landlord finding out about the number of people living in the house.<sup>413</sup> A project by the Australian Human Rights Commission launched in 2007 to identify the settlement and integration experiences of African Australians suggests practical solutions to inform the development of appropriate policy and address some of the stereotypes about African Australians.<sup>414</sup> The report found that African Australians face a range of unique experiences and challenges in the settlement and integration process, and identified a lack of information on tenant rights and obligations and the housing system.<sup>415</sup>

Significant research has been undertaken in the area of education, suggesting that Sudanese learners are culturally and linguistically diverse, come from a highly oral culture and may find it difficult to learn to read and write in English and adapt to the Australian education system.<sup>416</sup> A number of studies focus on the learning experiences and difficulties of school aged children and young people in particular, highlighting the need for specifically tailored services at the school level.<sup>417</sup> Other studies revealed particular difficulties for Sudanese women both in the education sector<sup>418</sup> and in the settlement process in general.<sup>419</sup> The

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<sup>413</sup> Pittaway & Muli, 2009, op.cit., p.51; Shakespeare-Finch & Wickham, 2010, op.cit.

<sup>414</sup> Australian Human Rights Commission, 2010a, op.cit., p.3. The report was based on 50 community meetings with over 2,500 African Australians, over 150 government and non-government stakeholders and service providers and over 100 submissions

<sup>415</sup> Ibid., p.24

<sup>416</sup> Burgoyne, U. & Hull, O., (2007), *Classroom Management Strategies to Address the Needs of Sudanese Refugee Learners*, Department of Education Science and Training, National Centre for Vocational Education Research; Turner, M., 2008, 'Adult South Sudanese students in Australia: A systemic approach to the investigation of participation in cross-cultural learning', PhD Thesis, Murdoch University, Perth

<sup>417</sup> Cassity, E. & Gow, G., (2005), 'Making up for Lost Time: The experiences of Southern Sudanese young refugees in high schools', *Youth Studies Australia*, Vol.24, No.3; Hatoss, A. & Sheely, T., (2009), 'Language Maintenance and Identity Among Sudanese-Australian Refugee Background Youth', *Journal of Multilingual and Multicultural Development*, Vol.30, No.2; ; Foundation House, (2005), *Education and Refugee Students from Southern Sudan*, Victorian Foundation for Survivors of Torture; Tadesse, S., Hoot, J. & Watson-Thompson, O., (2009), *Exploring the Special Needs of African Refugee Children in U.S. Schools*, Childhood Education Report, U.S.

<sup>418</sup> Hatoss, A. & Huijser, H., (2010), 'Gendered Barriers to Educational Opportunities: Resettlement of Sudanese refugees in Australia', *Gender and Education*, Vol.22, No.2; Macdougall, N., 2008, 'Getting to Know You: The

Australian Human Rights Commission report highlights students' difficulties adjusting to the system, as well as a lack of knowledge and understanding of the education pathways and opportunities available to them.<sup>420</sup> As discussed earlier in the chapter, education is of high importance to South Sudanese humanitarian entrants, and these barriers in the education system prevent them from reaching their full potential.

The need for employment was identified as one of the key factors in the successful integration and settlement of Horn of Africa refugees.<sup>421</sup> This was a difficult issue for participants, as in most cases their prior experience and qualifications were not recognised and most employment programs were not suitable to their particular needs as victims of trauma and torture.<sup>422</sup> The Australian Human Rights Commission further reported that African Australians experience a number of issues with training and employment, such as lack of information about particular programs available and a lack of knowledge and experience of Australian workplace and employment conditions. They further found that a number of African entrants experienced discrimination during the job application process.<sup>423</sup>

In a study focusing on the causes of distress in the South Sudanese community, Westoby found that Southern Sudanese refugees experienced a number of problems with employment.<sup>424</sup> For example, they struggled to survive on the minimal financial support provided by the government, and women especially found it difficult to gain employment due to the lack of English language knowledge.<sup>425</sup> Participants further expressed distress about the

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journey from African refugee to African-Australian - Insights into the life and times of African refugee women settling in Perth', Honours Thesis, Murdoch University, Perth; Harris, A., 2010, 'Cross Marked - Sudanese Australian Young Women Talk Education', PhD Thesis, Victoria University, Melbourne

<sup>419</sup> Harris, 2009, op.cit.,

<sup>420</sup> Australian Human Rights Commission, 2010a, op.cit., p.14-7

<sup>421</sup> Pittaway & Muli, 2009, op.cit., p.11

<sup>422</sup> Ibid., p.16

<sup>423</sup> Australian Human Rights Commission, 2010a, op.cit., p.10

<sup>424</sup> Westoby, 2007, op.cit.. The study was based on data from 30 in-depth interviews with the Southern Sudanese community and community workers in Brisbane and Logan. It focused on themes of distress, healing, culture, community and systems.

<sup>425</sup> Ibid., p.5

process of applying for and gaining employment, such as addressing selection criteria and providing references.<sup>426</sup> The lack of recognition of past experience and qualification also contributed to the distress of participants when looking for employment'.<sup>427</sup>

#### 4.5.1 Negative perceptions

Sudanese refugee background communities in Australia have received negative media attention. In September 2007, the Federal Government publicly announced that the African refugee intake quota would be cut. The Minister of Immigration at the time, Kevin Andrews, justified the cut in Sudanese refugee numbers by addressing the need to allow other refugees who are most at risk to enter Australia. Andrews further stated that African refugees, particularly refugees from Sudan, experience serious problems settling and integrating into Australia. He said 'they tend to have more problems and challenges associated with them. Their level of education, for example, is a lot lower than any other group of refugees.'<sup>428</sup> These justifications for reducing the intake of African refugees were printed throughout the media, and reports started to emerge suggesting that Sudanese refugees cause problems and have a higher crime rate than other refugees.<sup>429</sup>

Hanson-Easey and Augoustinos in their 2010 study examined 'how political language weaves various descriptive patterns that achieve the situated demands of policy justification and legitimisation in media interviews.'<sup>430</sup> They found that Andrews, in particular, in his media interviews justifying the cut of African refugees, was discriminating and 'dishonestly and cynically profiling Sudanese refugees' by stating that they have problems integrating into the

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<sup>426</sup> Ibid., p.6

<sup>427</sup> Ibid., p.7

<sup>428</sup> Kevin Andrews, as cited in Packham & Jean, 2007, op.cit.

<sup>429</sup> Black, S., (2007), 'Kevin Andrews Prods the Sudanese in the Woodpile', *Crikey*, October 3

<sup>430</sup> Hanson-Easey & Augoustinos, 2010, op.cit., p.p.296

Australian community.<sup>431</sup> Nunn argues that as a result, more distance was placed between Sudanese refugees and the Australian community, creating a feeling of 'us' and 'them'.<sup>432</sup>

What made matters worse was that Minister Andrew's announcement closely followed a fatal beating of a young Sudanese man in Melbourne, and because of the timing, appeared to be linked. In September 2007, 19-year-old Liep Gony was beaten to death at a Melbourne train station. Media reports quickly suggested that the perpetrators were a gang of Sudanese youth who had been causing trouble around the area (it was later found that the attacker was a white Australian man). This incident was used by the media to illustrate the high crime rate and failure of Sudanese refugees to integrate, and soon most media coverage on Sudanese refugees focused on integration problems.<sup>433</sup> A year later, in November 2008, another incident involving the fatal stabbing of a fourteen-year-old Sudanese boy by a group of young Sudanese men in Adelaide sparked further discussion of violence within the Sudanese community.<sup>434</sup> The media soon started labelling groups of Sudanese youths socialising in streets as gangs.<sup>435</sup> Reports focused on the few Sudanese community members who did cause some problems, reporting that 'we indeed have a problem with some Sudanese youths that might be getting worse than we'd hoped.'<sup>436</sup>

Hancock suggests that the media have been a driving force behind the negative perception of Sudanese refugees as problematic and difficult to settle. He reports that '[s]weeping, unverified claims and stereotyping impacts on community perceptions and treatment of

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<sup>431</sup> Ibid., p.300

<sup>432</sup> Nunn, C., (2010), 'Spaces to Speak: Challenging representations of Sudanese-Australians', *Journal of Intercultural Studies*, Vol.31, No.2, p.195

<sup>433</sup> Bolt, 2007, op.cit; Black, S., (2007), 'The Latest Hot Button Issue: Scary Sudanese people', *Crikey*, February 21; Wright, L., (2007), 'Lock out these Refugee Thugs', *Sunday Herald Sun*, February 4

<sup>434</sup> Todd, A., (2008), 'Adelaide Urged to Resist Racial Stereotyping in Wake of City Stabbing Death', *City Messenger*, 13 November ; Robertson, D., McGuire, M. & McGregor, K., (2008), 'Charges Soon Over Murder of Sudanese Schoolboy Daniel Awak', *The Advertiser*, 14 November

<sup>435</sup> Department of Immigration and Citizenship, (2011a), *Empowering Refugees - A Good Practice Guide to Humanitarian Settlement*, Commonwealth of Australia, p.112, p.112; Pittaway & Muli, 2009, op.cit., p.48. For a more detailed discussion on the racialisation of African youth, refer to Windle, J., (2008), 'Racialisation of African youth', *Social Identities*, Vol.14, No.5

<sup>436</sup> Bolt, 2007, op.cit.



African people, creating fear and suspicion.’<sup>437</sup> Nolan *et al*, in a study of Melbourne newspaper articles relating to Sudanese refugees around the time of the Minister’s comments, further found that media discourses ‘contribute to integrationist agendas that situate Sudanese Australians as outsiders to the Australian mainstream.’<sup>438</sup>

Some media reports supported the Sudanese community, expressing their concern over the racist behaviour created as a result, such as staring and throwing rubbish.<sup>439</sup> A few opinion pieces expressed concern over these consequences, stating that ‘African-Australians have done absolutely nothing to deserve to be singled out for having apparently failed to integrate in their new home, Australia.’<sup>440</sup> Reports started to emerge demonstrating that Sudanese refugees were not over-represented in crime and therefore should not be labelled as such.<sup>441</sup> Nonetheless, Australians were starting to become aware of Sudanese refugee communities in Australia, and the problems they were experiencing.

The negative media attention and reported inability of Sudanese refugees to integrate into Australian society has resulted in negative public perceptions. Cases of over-policing and police targeting have been reported in certain areas. For example, a study of policing of African youth in three suburbs of Melbourne found that all of the young people interviewed had some form of negative experience with policing.<sup>442</sup> African young people gathering in public areas, for example, were assumed to be participating in illegal or antisocial activities and seen as a threat by the police.<sup>443</sup> Most young people reported being asked to move on by the police, questioned or asked for identification without a reason given by police. All

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<sup>437</sup> Hancock, 2009, *op.cit.*, p.11

<sup>438</sup> Nolan, *et al.*, 2011, *op.cit.*, p.655

<sup>439</sup> Still, J., (2007), 'Sudanese Refugees Need Support, Not Judgement', Anglicans in Melbourne and Geelong, accessed 25/09/2009, from [http://www.melbourne.anglican.com.au/main.php?news\\_id=10226&pg=news](http://www.melbourne.anglican.com.au/main.php?news_id=10226&pg=news)

<sup>440</sup> Hewett, A., (2007), 'Integration is a Two Way Street', *On Line Opinion*, 23 October

<sup>441</sup> *Ibid.*; Crawshaw, 2007, *op.cit.*; Still, 2007, *op.cit.*; Department of Immigration and Citizenship, 2011a, *op.cit.*

<sup>442</sup> Smith, B. & Reside, S., (2010), '*Boys, You Wanna Give Me Some Action?*' *Interventions into policing and racialised communities in Melbourne*, Melbourne, Legal Services Board. The qualitative study was based on interviews with eight community workers, 30 young people and one police officer from Braybrook, Flemington and the City of Greater Dandenong areas.

<sup>443</sup> *Ibid.*, p.9

participants reported experiencing acts of violence at the hands of police officers, or knowing a family member or friend who had. Threats, intimidation and racist name calling from police were also reported by almost all young people, with comments such as ‘go back to your own country’ and ‘you are the problem in this country’.<sup>444</sup>

Policing issues can be significant barriers to access to justice and to successful integration for some African refugees due to their unique pre-arrival experiences. The pre-arrival refugee experience of torture, loss and trauma can have a strong impact on resettlement and integration.<sup>445</sup> For example, a study on the settlement needs of Horn of Africa refugees found that ‘[f]ear and mistrust of police, who in their countries of origin had often been the perpetrators of torture, was a key factor in their willingness to seek help when they felt unsafe in Australia.’<sup>446</sup> A lot of time was required for participants to trust the police and to seek their help, resulting in a significant barrier to access to justice for this group.

#### 4.5.2 Family Issues

A qualitative study by Habbani *et al.* examined the challenges that confront Sudanese former refugee mothers as they navigate through resettlement into a different host culture.<sup>447</sup> The study found that many women experienced a number of interpersonal and intercultural communication difficulties settling into life in Australia. These included family problems, such as parent-child relationships resulting from their children rejecting the traditional Sudanese norms of appropriate behaviour and not respecting their culture.<sup>448</sup> Issues also arose around physical punishment of children, as the children would often demand that their parents

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<sup>444</sup> Ibid., p.14

<sup>445</sup> Pittaway & Muli, 2009, op.cit., p.31

<sup>446</sup> Ibid., p.13

<sup>447</sup> Habbani, *et al.*, 2010, op.cit., p.44. The study consisted of focus groups with 28 Sudanese women in Southeast Queensland during September and November 2008.

<sup>448</sup> Ibid., p.47

adopt Australian methods of discipline.<sup>449</sup> Some women expressed that their children had too much freedom, contributing to a lack of respect for elders and tradition.<sup>450</sup>

Another issue raised by the women was that of marital problems. Participants highlighted the difficulties of dealing with domestic violence and family issues in a society that supports and encourages women to leave a marriage when problems such as these arise. They reported that divorce is seen as 'misbehaviour' in their society, and that it should not be encouraged but that families should work through their problems at home with the help of their community.<sup>451</sup>

Pittaway and Muli also identified family problems of concern to the participants, with intergenerational conflict and lack of understanding from family services expressed as key issues.<sup>452</sup> The changing family and gender roles were identified as problematic, as the 'notion of women's and children's rights are not always seen as positive and can be very confronting for people who have come from very patriarchal societies.'<sup>453</sup> A lack of understanding of the family dynamics and family law was expressed by participants, who felt they were not provided with adequate information about the social and legal implications of these differences and about the Australian law and customs.<sup>454</sup>

Family violence and lack of support structures and understanding of the issues people faced were also reported as causes of distress within the Sudanese refugee community.<sup>455</sup> Westoby reports that 'one of the key causes of this distress about family, gender and generational violence is a lack of understanding of the law.'<sup>456</sup> Participants reported that there is a lack of listening and learning about their culture when it comes to the law and service providers, and

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<sup>449</sup> Ibid.

<sup>450</sup> Ibid., p.48

<sup>451</sup> Ibid., p.49-50

<sup>452</sup> Pittaway & Muli, 2009, op.cit., p.10-8

<sup>453</sup> Ibid., p.34

<sup>454</sup> Ibid., p.39-40

<sup>455</sup> Westoby, 2007, op.cit., p.66-7

<sup>456</sup> Ibid., p.25

they stressed the importance of being listened to and able to determine their own needs.<sup>457</sup> This highlights the importance of working closely with the communities on family law issues in order to tailor services to address their unique needs.

Pittaway and Muli concluded that more education needs to be provided to Horn of Africa refugees on their rights and responsibilities when they arrive in Australia, especially with regards to women's and children rights.<sup>458</sup> One participant from Sudan explains the importance of knowing his rights:

I did not know human rights, we did not know human rights, the only person with rights in my country is the government who you must support or you die. I only know anything about rights when I came to Australia, this is a good country – it told me about my rights.<sup>459</sup>

Further, voices of the communities should be included in the decision-making processes, and community members consulted wherever possible.<sup>460</sup> While this study did not focus specifically on the needs of South Sudanese refugees but the Horn of Africa refugees as a whole, it included views from South Sudanese communities and represents some of the common family issues.

#### 4.5.3 Coping Strategies

While the resettlement process is difficult for the African community, a number of coping strategies are identified in the literature. For example, Khawaja *et al* show that the use of religion, social support networks, reframing their situation and looking at it from a different perspective and focusing on the future were coping strategies adopted across all three stages of life.<sup>461</sup> These findings were consistent with Schweitzer *et al*, who highlighted the 'the role of family and community in enabling people who have been exposed to significant traumatic

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<sup>457</sup> Ibid., p.36

<sup>458</sup> Pittaway & Muli, 2009, op.cit., p.14

<sup>459</sup> Ibid., p.33

<sup>460</sup> Ibid., p.15

<sup>461</sup> Khawaja, *et al.*, 2008, op.cit., p.504

events to make meaning of those events’, as well as the importance of spirituality and personal belief in promoting emotional adjustment.<sup>462</sup> Participants further identified support from the Australian government as a new factor assisting in their post-migration stage.<sup>463</sup>

The participants in Shakespeare-Finch and Wickham’s study were asked to make recommendations on the ways in which their settlement can be made easier. They report a need for programs that actively promote refugees’ adaptation to life in Tasmania, such as community or social events.<sup>464</sup> They further report a need for positive discrimination such as special assistance for students and refugees seeking housing or employment. Finally, they recommend more education for the wider community on the experience and needs of refugees. The results of these studies, while highlighting the difficulties African humanitarian entrants face on their journey to successful settlement, also illustrate the ability and will of the African community to adapt to change and adjust to a new society.

#### 4.5.4 Navigating the legal system

While all the above mentioned studies do explore the needs of South Sudanese entrants after arriving in Australia, they do not explore the specific issues the Sudanese community might face when dealing with or navigating the Australian legal system. Most studies focus on the settlement and adaptation needs of Sudanese/African refugees, and also explore the coping strategies adopted. However, there have been very few studies specifically looking into the legal needs and issues of Sudanese/African refugees in Australia.

The Human Rights Commission report discussed above identifies a number of difficulties for the African Australian community engaging with the justice system. The report highlights that the Australian legal system is often too complex, confusing and overwhelming for African Australians, as they lack awareness and knowledge of the law and processes involved. It reports that this ‘lack of knowledge means that African Australians can quickly find

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<sup>462</sup> Schweitzer, *et al.*, 2007, op.cit., p.287. This study was based on interviews with 13 resettled Sudanese refugees, exploring their experiences during the three periods; pre-migration, transit and post-migration.

<sup>463</sup> Khawaja, *et al.*, 2008, op.cit., p.504

<sup>464</sup> Shakespeare-Finch & Wickham, 2010, op.cit., p.42

themselves involved in a legal issue, leaving them feeling shocked, anxious and confused.’<sup>465</sup> Young people who took part in the consultations said they had ‘limited awareness of their rights and responsibilities and the role of courts, police and legal services.’<sup>466</sup> Non-reporting of crime was identified as an issue, due to fear of authorities and of being seen as making trouble.<sup>467</sup> Further, access to the legal system and to legal advice and representation was seen as problematic, with barriers such as cost, language difficulties and lack of knowledge identified.<sup>468</sup> Family violence and child protection issues were also problematic, due to confusion on the definition of what constitutes ‘child abuse’ and the changing roles and dynamics of the family.<sup>469</sup>

A study by Aplin explores the unique characteristics and legal needs of Horn of Africa refugees, and the ways they can be met and reconciled with the Australian legal system. She also investigates strategies of how Horn of Africa refugees can be better informed about their legal rights and responsibilities and legal services available. The study focuses primarily on good practice in legal services by Community Legal Centres in Melbourne.<sup>470</sup>

Aplin identifies a number of barriers to accessing legal services for Horn of Africa refugees. First, the importance of respecting confidentiality is highlighted, where participants feel that information shared with interpreters could be overheard or passed on to the wider community, resulting in shame and embarrassment.<sup>471</sup> Further, because of their negative experiences of the legal system in their country of origin, Horn of Africa refugees are likely not to trust the Australian legal system and not use it. The need to tailor services to the specific needs of the

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<sup>465</sup> Australian Human Rights Commission, 2010a, op.cit., p.28

<sup>466</sup> Ibid.

<sup>467</sup> Ibid., p.31

<sup>468</sup> Ibid., p.32

<sup>469</sup> Ibid., p.32-3

<sup>470</sup> Aplin, S., (2002), *Analysis of the Legal Needs of Horn or Africa People in Melbourne*, Melbourne, Pro Bono Fellowship Report, p.17-8. This study is based on reviewed literature relating to culturally appropriate legal services and interviews with workers in the field – eight workers from seven different Community Legal Centres, one Migrant Resource Centre worker, seven social workers, two barristers and Horn of Africa community leaders.

<sup>471</sup> Ibid., p.23

community was also identified, as well as cross-cultural training for the communities and service providers. Aplin also suggests that system changes may be necessary if the particular needs of these groups are to be met. For example, service delivery needs to be flexible as Horn of African refugees are likely to miss appointments, as they may not be used to the concept of keeping time.<sup>472</sup> Outreach services and co-location services are seen as effective ways of bringing the legal services to the community in an environment where they feel comfortable.<sup>473</sup> Community networks need to be built where the community is involved in the delivery of services, and community legal education is important, empowering the community and teaching them about their rights and responsibilities.<sup>474</sup>

Aplin further argues that community opinion is of great importance. There is scepticism in the community towards researchers, due to feelings that the research undertaken may not benefit the community.<sup>475</sup> Therefore research needs to be done with the community leaders on board and needs to empower the community. Aplin concludes that:

A combination of cultural awareness training, exposure to the target community through networks of professionals and community leaders, and the willingness to trial outreach and co-location programs has the potential to result in demonstrable increases in Horn of Africa clients accessing Community Legal Centres.<sup>476</sup>

Jensen and Westoby's study exploring restorative justice for Sudanese youth also highlights a number of issues with navigating the legal system for the community. They explore the restorative justice model applied with Sudanese youth in Toowoomba, focusing on 'the socio-psychological and the socio-structural dimensions of protection and risk for young people from a Sudanese background.'<sup>477</sup> The purpose of this model is to assist with cultural transitioning and youth crime and to build capacity of the community leaders to manage

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<sup>472</sup> Ibid., p.32

<sup>473</sup> Ibid., p.34-5

<sup>474</sup> Ibid., p.36-38

<sup>475</sup> Ibid., p.41

<sup>476</sup> Ibid., p.46

<sup>477</sup> Jensen, P. & Westoby, P., (2008), 'Restorative Justice: An integrated model for resettling young Sudanese', *New Community Quarterly*, Vol.6, No.3, p.13

criminal offences within the community.<sup>478</sup> The study found a number of issues specific to Sudanese youth, including inter-generational strain – young people try to adapt to the new culture while older people see this as a rejection of their old culture and customs. As a consequence, family and community disputes within the Sudanese community arise and ‘Southern Sudanese community often feel disrespected in their conversations with youth, experience shame in the increasing level of youth criminal avidity and domestic violence and are somewhat unsure about how to respond.’<sup>479</sup>

Furthermore, the Sudanese community often do not access counselling or mediation services when they experience legal problems, but rather try to resolve their problems ‘in-house’ wherever possible as these services are often not culturally tailored.<sup>480</sup> The authors believe that in order to deal with these issues and empower the Sudanese community, the community needs to be involved in the legal processes. They argue that ‘both the formal judicial processes and the traditional alternative dispute resolution processes are required to serve the interests of justice and community stability within both re-settled refugee communities and the broader community.’<sup>481</sup> While the Sudanese elders do not have the power to mediate offences, Jensen and Westoby argue that they need to reconstruct their role as community leaders and work together with authorities and their communities to develop a ‘restorative justice plan for cultural change and based on ‘informal’ restorative justice principles and practices.’<sup>482</sup>

In order to deal with some of the challenges facing Sudanese refugees and the law, the bad press and especially to foster an understanding and promote trusting relationships between the community and the police, Victoria police developed a cross-cultural training package. Consultations with the Sudanese community, community leaders and the police were held in

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<sup>478</sup> Ibid., p.14

<sup>479</sup> Ibid.

<sup>480</sup> Ibid.

<sup>481</sup> Ibid., p.15

<sup>482</sup> Ibid., p.16



the initial design phase of the training package to raise awareness of the issues experienced by the Sudanese community.<sup>483</sup> The training package included the following information:

- Africa generally, and Sudan in particular;
- the pre-migration experience of refugees;
- predominant religions and some history;
- cultural groups and tribes and their languages and physical appearance;
- other cultural aspects, such as gender issues
- the police in Sudan
- statistics relating to African migration to Dandenong
- issues facing young Sudanese men
- working with domestic violence cases
- how refugees' experiences can affect their perceptions of police and their behaviour in Australia more generally.<sup>484</sup>

This training package is intended to help in promoting an understanding between the police and the Sudanese community. It has equipped police officers to respond to and deal with issues involving the Sudanese community by educating them on the specific needs and background of the Sudanese community in Australia.

Furthermore, Westoby concludes that in order to engage the South Sudanese community and provide services which will be of benefit to them, one needs to 'understand how refugees have experienced the loss of their social world, practitioners need to critically evaluate their own assumptions and listen carefully.'<sup>485</sup> Further, he argues a dialogical methodology of intervention must be applied, creating a safe space for dialogue and foster understanding.<sup>486</sup>

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<sup>483</sup> Department of Immigration and Citizenship, 2011a, op.cit., p.112

<sup>484</sup> Ibid., p.113

<sup>485</sup> Westoby, P., (2008), 'Developing a Community-Development Approach through Engaging Resettling Southern Sudanese Refugees within Australia', *Community Development Journal*, Vol.43, No.4, p.490. This study was based on interviews with 20 South Sudanese refugees and nine policy makers and practitioners in the field.

<sup>486</sup> Ibid., p.491

Finally, Westoby argues that there should be a 'journey of discovery' between the community development officer and the refugee community.<sup>487</sup> This approach empowers the refugee community and helps 'rebuild a new social world that optimises refugee recovery within a resettlement context.'<sup>488</sup>

Mitchell *et al* undertook a pilot project in 2004 to evaluate the contribution of a community-driven recovery approach as a strategy of supporting the settlement of South Sudanese refugees in Australia.<sup>489</sup> The project concluded that a developmental approach, valuing the culture and experiences of South Sudanese people, allowed them to successfully integrate into Australia culture. While a number of settlement problems were highlighted throughout the project, such as employment, education and family issues, these issues were addressed in workshops within the community. Subcommittees were formed to address the specific problems highlighted by the community, and issues were explored in detail by the community and their leaders, starting from how things used to be in Sudan, to how they are now and meeting in the middle. The project concluded that a community-orientated life in Australia strengthened the relationships of the South Sudanese community members and helped them develop a strong and supportive community in Australia.

#### **4.6 CRITICISMS OF PREVIOUS STUDIES**

Marlowe warns that the concept of 'refugeehood' often defines a person above and beyond any other form of identity within a resettlement setting.<sup>490</sup> The story of the Lost Boys, for example, presents the refugees as traumatised, lost and somewhat broken individuals who need assistance in the country of resettlement. However, Marlowe's research on 24 South Sudanese men and their responses to trauma demonstrates that these men have an identity other than being victims of trauma. Marlowe argues that the *ordinary* stories of refugees, such

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<sup>487</sup> Ibid., p.492

<sup>488</sup> Ibid., p.494

<sup>489</sup> Mitchell, J., Kaplan, I. & Crowe, L., (2007), 'Two Cultures: One Life', *Community Development Journal*, Vol.42, No.3, p.284

<sup>490</sup> Marlowe, J.M., (2010), 'Beyond the Discourse of Trauma: Shifting the focus on Sudanese refugees', *Journal of Refugee Studies*, Vol.23, No.2, p.183

as their culture, parental teachings and spirituality are just as important in understanding their experiences as their *extraordinary* experiences of trauma and torture. Their ordinary stories form part of their identity and make them ‘agents in their own lives who are capable of making meaningful contributions to society.’<sup>491</sup> While it is important to acknowledge the hardship and traumatic experiences groups such as the Lost Boys have been through before resettling in Australia, they should not be automatically labelled according to these experiences. Refugees also have many stories and experiences of survival, tradition and faith, which do not always get heard.

Following this reasoning, Phillips argues that the label of a refugee is not helpful in the settlement process. She shows that ‘once applied the refugee label seems to adhere hard and fast, long after refugees have been displaced and resettled.’<sup>492</sup> Much like Marlowe, Phillips believes that this label has been disempowering and inaccurate, providing little meaning to personal experiences. Therefore, while it is important to acknowledge the pre-arrival experiences and forced migration of refugee background entrants, once they have resettled in Australia this label is no longer useful. As Marlowe states ‘[w]e would do well to participate and listen; otherwise, refugee voices and their associated stories can be further marginalised or worse – silenced all together.’<sup>493</sup>

Phillips further argues that the blanket label application of ‘African-Australians’ or ‘African refugees’ homogenises experiences and must be unpacked. As the previous chapter has shown, Sudanese people are not one homogenous group, and Phillips warns that generalising about people from one country to a whole continent is a dangerous methodology.<sup>494</sup> While some of the studies examined in this chapter specifically analyse the experiences of Sudanese refugees, some even South Sudanese refugees, most are more general focusing in African refugees. In doing so, they generalise their experiences and do not take into account cultural and geographical differences. Some of the studies mentioned focus on the experiences of

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<sup>491</sup> Ibid., p.195

<sup>492</sup> Phillips, M., (2011), ‘Convenient Labels, Inaccurate Representations: Turning Southern Sudanese refugees into ‘African-Australians’’, *Australasian Review of African Studies*, Vol.32, No.1, p.73

<sup>493</sup> Marlowe, 2009, op.cit., p.46

<sup>494</sup> Phillips, 2011, op.cit., p.66

Horn of Africa refugees, focusing on one geographical part of Africa. However, Phillips further warns that even this grouping is too general, as few clear boundaries exist in this region, and the experiences of the people of the countries included is vastly different.<sup>495</sup> Furthermore, Sudan has traditionally not been included in the Horn of Africa countries, although most studies today focusing on Horn of Africa refugees primarily deal with Sudanese refugees. Therefore labels such as ‘African Australians’ or ‘Horn of Africa refugees’ are not representative of the specific pre-migration experiences of South Sudanese humanitarian entrants, and are not helpful at describing their unique needs.

Taking into consideration the criticisms of the label attached to African refugees and reflecting on the studies analysed in this chapters, it becomes apparent the studies were also generalising and homogenising the experiences of African entrants. Most of the studies explored the experiences of African Australians, Horn of Africa refugees, Sudanese refugees or South Sudanese refugees. In doing so, most of the studies had labelled their target group. While labelling is necessary in research to reach a target group, ‘[m]is-representing and mis-labelling new entrants also denies their specific pre-arrival experiences which can lead to costly mistakes post-arrival.’<sup>496</sup>

Having explored the previous research studies and their criticisms and downfalls, my study aims to contribute in-depth new information in a way that recognises the differences and unique pre-migration experiences of South Sudanese entrants. It does this in a number of ways. First, it does not homogenise African or Sudanese people, but explores the unique experiences of the many South Sudanese communities residing in Australia. Second, it does not label the communities as refugees, nor focus on their forced migration experiences of trauma and distress. While this study recognises their refugee background in the literature review, it does not focus on the participants’ refugee experience or stories of survival. Instead, it explores the difficulties they face accessing and understanding the legal system after they resettle in Australia as South Sudanese Australians or former refugees.

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<sup>495</sup> Ibid., p.67

<sup>496</sup> Ibid., p.74

Finally, rather than summarising these difficulties based on prior knowledge of the legal system itself, I collect qualitative in-depth stories from participants based on their actual dealings and experiences of the legal system in Australia. This data includes any legal problems they have experienced, whether they recognised them as legal problems or not, and their personal recommendation on how the Australian legal system can change to help address their needs. Therefore, while there has been prior research into the difficulties navigating the legal system, my study takes this research further and contributes new in-depth knowledge into the lived experiences of South Sudanese communities with the Australian legal system.

#### **4.7 CONCLUSION**

South Sudanese refugee background communities have unique pre-migration experiences that need to be taken into consideration when providing services in Australia. For example, they experienced vast human rights violations while in Sudan, where the rule of law was non-existent. They also have a number of unique in-transit experiences affecting their ability to resettle successfully. The journey of the Lost Boys illustrates the difficulties South Sudanese refugees experienced during displacement, from fleeing Sudan, then Ethiopia, to finding semi-permanent refuge in refugee camps. Life in refugee camps was also problematic for the refugees, as they did not have access to basic necessities nor human rights protections. Therefore, while they were able to flee the oppression and war in Sudan, the camps they spent significant amounts of time in were also places of violence and oppression.

Furthermore, this chapter has shown that the difficulties do not end once the refugees are resettled in Australia. Due to their pre-migration and in-transit experiences and lack of familiarity with western, urban life, South Sudanese entrants as well as other African entrants experience a number of difficulties settling into their new lives. These include simple tasks such as the use of electricity and public transport, as well as access to housing, education and employment. However, the literature highlights a number of coping strategies adopted throughout this process, suggesting that the African community is a resilient group, able to focus on the positive experiences in their lives. Unfortunately, due to a combination of violence within the community, some bad press and government generalisations, Sudanese refugees have received some negative attention in Australia. They have also been victims of discrimination, and the Sudanese youth especially have been perceived as causing problems.

Different laws governing family life and differing gender roles have also created problems within the Sudanese families. The lack of understanding of Australian laws has also produced issues around navigating the legal system. A number of studies have explored this relationship between the Sudanese community and Australian law, highlighting the need for more cooperation and interaction between the two in order to develop culturally appropriate services. However, while some of this research has focused specifically on the Australian legal system and South Sudanese communities,<sup>497</sup> most research is about the operational difficulties with the system, rather than specific problems experienced.

While this research into the resettlement challenges of African refugees has been more than helpful in identifying and meeting their needs, there are a number of issues with it. First, only a few studies explore the experiences of South Sudanese communities. Most studies focus on African refugees, generalising their experiences and in turn not taking into consideration the unique pre-migration and in-transit experiences of South Sudanese refugees. Further, most settlement studies focus on African or Sudanese *refugees*. While the South Sudanese community in Australia have a refugee background and their forced migration experiences have certainly shaped who they are today, they are now also South Sudanese Australians. As Marlowe and Phillips point out, there comes a time when a refugee stops being a refugee and the label is no longer representative.

My research is different in that it provides new, in-depth knowledge of the specific legal problems South Sudanese communities experience in Australia, and the actions they take to resolve those problems. This in-depth analysis allows participants to share their experiences and understandings of the law, and make personal recommendations on how the Australian system can help them access justice. Furthermore, my research avoids the labels specified above, exploring the unique needs of the South Sudanese communities residing in Australia. It does not ask questions about the refugee experiences of trauma and distress, but treats participants as Australians with a unique refugee background. The research questions analyse

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<sup>497</sup> Such as Jensen & Westoby, 2008, op.cit; Migrant Information Centre Eastern Melbourne, (2008), *Family Violence within the Southern Sudanese Community - Project Evaluation Report* and Westoby, 2008, op.cit.

the experiences of participants with the Australian legal system after resettlement, thereby not treating participants as victims but citizens.

# **CHAPTER 5**

## **RESEARCH DESIGN AND METHODOLOGY**

### **5.1 INTRODUCTION**

This chapter presents the methodology and design of the research study. The aim of this study is to explore the legal problems South Sudanese communities experience in Australia, and the ways they utilise the legal system to resolve those problems. In order to gather this information, a qualitative method was chosen. Twenty-two face-to-face, semi-structured interviews with members of the South Sudanese community in Adelaide were conducted, allowing an in depth analysis of their experiences.

The sensitive nature of the research presented a number of limitations and barriers. These included participants potentially being fearful of researchers, cultural and language barriers as well as the difficulty recruiting participants. This chapter explores the strategies for overcoming these barriers, incorporating Liamputtong's strategies for working with vulnerable groups. A 'Community Orientation Strategy' was adopted in response to these barriers, conducting volunteer work and meetings with stakeholders in order to build rapport and trust with the South Sudanese community.

This chapter further outlines the data collection and analysis process. A number of steps were taken in order to design and prepare the interview topics, including literature reviews and meetings with stakeholders and service providers. Once the interview schedule was designed, participants were informed of the process through an 'Information Pack' and were presented with the opportunity to provide consent to the study before attending the interview. The participant profile is presented in this chapter, outlining characteristics such as gender, age and education level. Finally, the chapter describes thematic analysis, a form of grounded theory used in the process of analysing the data.



## 5.2 METHODOLOGY

This study investigates the legal needs South Sudanese communities experience in Adelaide, South Australia. The overarching question of this study was how do South Sudanese communities in Adelaide resolve their legal problems. The study is not representative of all South Sudanese communities in Australia, but explores the experiences of a small sample in depth. The experiences of other South Sudanese may differ. This study is significant because it explores the unique difficulties South Sudanese communities face when accessing the Australian legal system. Particular aspects of this relationship have been explored in other studies, such as policing and family violence for example. However, this thesis explores legal needs of participants in detail, allowing participants to express their concerns and recommend strategies for overcoming them. It further critically analyses the access to justice framework, arguing that in order to respond to the legal needs of South Sudanese communities, the framework and service delivery model need to change.

A qualitative approach was adopted in order to allow data to emerge and provide an in-depth exploration of participants' experiences of accessing the legal system. Qualitative research 'aims to address questions concerned with developing an understanding of the meaning and experience dimensions of humans' lives and social worlds.'<sup>498</sup> It is a preferable approach when researching vulnerable groups of people such as South Sudanese communities.<sup>499</sup> According to Walter, qualitative research is a 'subjective approach whereby the researcher aims to understand and interpret experiences by viewing the world through the eyes of the individuals being studied.'<sup>500</sup> The task of the qualitative researcher, therefore, is to listen to the participants' stories, and draw out the meaning and understandings that individuals attach to behaviours and experiences.<sup>501</sup> In this way, the researcher is an integral part of making sense of the data, as their job is to make sense and attribute meaning to the information

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<sup>498</sup> Fossey, E., Harvey, C., McDermott, F. & Davidson, L., (2002), 'Understanding and Evaluating Qualitative Research', *Australian and New Zealand Journal of Psychiatry*, Vol.36, No.6, p.717

<sup>499</sup> Liamputtong, 2007, op.cit.

<sup>500</sup> Walter, M., (2010), 'The Nature of Social Science Research', in *Social Research Methods*, M. Walter, 2nd ed, Oxford University Press, Melbourne, p.26

<sup>501</sup> Ibid.

presented by the participants.<sup>502</sup> As Richards suggests '[a]ny fool with a tape recorder can record what people say about something. But a skilled interviewer makes data *relevant* for the *purposes* of the object.'<sup>503</sup> This approach also complements grounded theory, my chosen method of data analysis.

In-depth interviews reflect the needs of vulnerable groups, as they allow the participants to take an active role in the research and to tell their stories. The researcher and participant work together to reach an understanding and an account of the experiences and knowledge of the participants. This helps build a trusting relationship between researcher and participant, which is an essential part of conducting research with vulnerable groups. Liamputtong states that in-depth interviews assume that participants have essential knowledge obtainable only through verbal messages. Thus, it constitutes a meaning-making partnership between the researcher and participant which necessitates 'active asking and listening' to elicit information from the perspective of the participant.<sup>504</sup>

While allowing for individual stories to be heard, qualitative research also recognises the importance of the researcher's role in the process. As the researcher plays an integral role in the qualitative research process, there is a need for reflexivity in social research; that is 'a self conscious awareness by the researcher of his or her position in the research process'.<sup>505</sup> This requires the researcher to first recognise their own standpoint – that is their own position, who they are and how they see themselves in relation to others in society.<sup>506</sup> How researchers see the world is not neutral but is influenced by their social, economic, cultural and personal identity location.<sup>507</sup> As discussed in Chapter One, I had preconceptions of the Sudanese community in Australia coming into the research process. Most of these came from the media

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<sup>502</sup> See also Willis, K., (2010), 'Analysing Qualitative Data', in *Social Research Methods*, M. Walter, 2nd ed, Oxford University Press, Melbourne, p.140 who states that the researcher is 'integrally bound up in the data collected, the way they are collected and the ways data are analysed. The researcher is the research instrument, the conduit through which the data are collected'

<sup>503</sup> Richards, L., (2005), *Handling Qualitative Data: A practical guide*, Sage, London, p.41 (original emphasis)

<sup>504</sup> Liamputtong, 2007, op.cit., p.103

<sup>505</sup> Willis, 2010, op.cit., p.409

<sup>506</sup> Walter, 2010, op.cit., p.13

<sup>507</sup> Ibid.

articles surrounding the issues Sudanese refugees were experiencing integrating into Australian society, which encouraged me to explore the validity of the claims. Being from a refugee background myself, I had some understanding of the experiences of South Sudanese refugees. All these factors contributed to creating values and biases on the research topic, which formed an important part of the research and interview schedule.

There are no rules in social research on the number of interviews needed to complete a successful qualitative study.<sup>508</sup> According to Richards, 'well-designed qualitative research projects are usually small, the data detailed and the techniques are designed to discover meaning through fine attention to the content'.<sup>509</sup> Glaser and Strauss argue the only safe answer as to when to stop interviewing is when *saturation* has been reached.<sup>510</sup> In other words, data replicates itself and confirms the previously collected data, in turn answering the research questions and any subsequent questions.<sup>511</sup> The total number of participants formally interviewed was twenty-two. At that stage, new research themes stopped emerging, signifying that an adequate number of interviews had been reached. The in-depth data collected provided enough material to answer the research questions set.

While standards such as generalisability and reliability are used to judge the quality of quantitative research, qualitative researchers judge their work based on a deeper notion of validity. Onwuegbuzie and Leech argue that qualitative research should include prolonged engagement in the study, including understanding the culture and building rapport with participants; weighing the evidence, giving more weight to the stronger data; recognising and clarifying researcher bias; checking for representativeness across the sample; and following up and exploring surprising findings in the research.<sup>512</sup> Therefore, while the data in this

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<sup>508</sup> Travers, M., (2010), 'Qualitative Interviewing Methods', in *Social Research Methods*, M. Walter, 2nd ed, Oxford University Press, Melbourne, p.294

<sup>509</sup> Richards, 2005, op.cit., p.20

<sup>510</sup> Glaser, B.G. & Strauss, A.L., (1967), *The Discovery of Grounded Theory: Strategies for qualitative research*, Aldine Publishing Company, Chicago

<sup>511</sup> Richards, 2005, op.cit., p.20

<sup>512</sup> Onwuegbuzie, A., J. & Leech, N.L., (2007), 'Validity and Qualitative Research: An oxymoron?', *Quality and Quantity*, Vol.41, No.1, p.239-46

research study cannot be re-tested thus ensuring reliability, I have ensured its validity by following these strategies and conducting research with respect and integrity.

### **5.3 METHOD**

Interviews were conducted in person rather than using a written questionnaire for a number of reasons. Most participants interviewed did not have an extensive understanding of English legal language, and more clarity was likely to be reached through direct conversation. This also allowed any questions to be answered and unclear terms to be explained. Some of the questions were personal and sensitive and it was crucial that the participants felt comfortable. Therefore, meeting the participants beforehand and personally asking the questions at the interviews was the most appropriate method of data collection.

All of the data was collected through semi-structured face-to-face interviews. Research suggests that semi-structured, open-ended interviews are able to gather the largest amount of relevant information in a qualitative study. For example, Wisker explains:

Semi-structured, open-ended interviews manage to both address the need for comparable responses – that is, there are the same questions being asked of each interviewee – and the need for the interview to be developed by the conversation between the interviewer and interviewee – which is often very rich and rewarding. With a semi-structured, open-ended interview there are a series of set questions to be asked and space for more divergence, with the interviewer then returning to the structured interview questions.<sup>513</sup>

While the interview process adopted in this study did contain some closed questions,<sup>514</sup> most questions allowed for further elaboration and the sharing of additional information when needed. It also meant that I, as the interviewer, could deviate from the questions and ask additional questions, express my opinion and explore other issues when needed.<sup>515</sup> In this

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<sup>513</sup> Wisker, G., (2001), *The Postgraduate Research Handbook*, Palgrave, New York, p.168

<sup>514</sup> These included gender, age, time spent in refugee camps, year of arrival and level of education amongst other factors. For a copy of the Interview Schedule, refer to *Appendix B*.

<sup>515</sup> Travers, 2010, op.cit., p.290

way, the interview was more like an ‘open-ended conversation’, creating a relatively relaxed and trusting atmosphere where the issues could be explored in depth.<sup>516</sup> The dialogue style interview process was important as participants came from a traditionally oral culture and were likely to be most at ease sharing their stories through conversation.

## **5.4 LIMITATIONS AND BARRIERS**

### **5.4.1 Reaching potential participants**

A major barrier in conducting research with vulnerable groups is recruiting participants, as ‘these groups of people are often hard to reach; they are the silent, the hidden, the deviant, the tabooed, the marginalised.’<sup>517</sup> Accessing participants is even more difficult when the research issue is sensitive or threatening, as participants have a greater need to hide their involvement and identities.<sup>518</sup> This was particularly true for the current study, as it focused on legal problems, access to and use of courts and dealings with police, all of which are sensitive and threatening issues.

Research with vulnerable groups suggests that gatekeepers are the key to getting access to the group as well as having an in-depth understanding of participants.<sup>519</sup> I personally did not know any South Sudanese people who could participate, nor did I know of any people I could contact to help me. Data protection legislation and Flinders University ethics approval limited direct contact with participants, meaning that I needed to contact organisations and departments who provide services to South Sudanese communities and seek their assistance. Therefore, I made links with service providers and people in authority who had access to this group and established myself as a credible and ethical researcher.

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<sup>516</sup> Ibid.

<sup>517</sup> Liamputtong, 2007, op.cit., p.4

<sup>518</sup> Ibid., p.48

<sup>519</sup> Ibid., p.51

In addition, it has been noted that there is a well-founded fear in refugee background communities of participating in research.<sup>520</sup> This may be due to a number of reasons, such as fear of seeming ungrateful and being represented negatively, and fear of prosecution as a result of prior experiences with corrupt government systems. For example, participants may be reluctant to answer questions about the legal system in Australia in case they give the wrong answer or in case their answers are taken as representative of their community. This may affect how the questions are perceived and answered by members of a refugee background community, leading to answers that may only reflect their perception of what the interviewer wants to hear.<sup>521</sup> Further, as Liamputtong states, ‘people from ethnic minorities tend to perceive outsiders with suspicion’.<sup>522</sup>

As anticipated by the literature and stakeholders at initial meetings, potential participants were wary of the study and at times did not wish to participate because they thought the research might represent their community as creating legal problems. Furthermore, while most participants expressed an interest in the topic and believed that the research would benefit their community, some believed that they would not be able to contribute, while others did not wish to participate because they did not believe it would benefit them. I tried to overcome both these problems by meeting with potential participants before the interview and explaining my research in detail. However, I did not get the opportunity to do this individually with everyone. As a result, some potential participants were lost.

A further problem experienced when recruiting participants was the loss of contacts previously made. These contacts were willing to help recruit participants, often invited me to events and introduced me to potential participants. However, on at least five occasions, arrangements with these contacts were cancelled and they could no longer help due to work commitments, time restraints, change of employment or residence. Four contacts seemed to disappear and did not answer or return my calls. These circumstances made me rethink my method and establish other contacts in alternative places.

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<sup>520</sup> Burley, J.A., 1996, 'Equal Before the Law?': The case of Vietnamese refugees in South Australia', PhD Thesis, University of Adelaide, Adelaide, p.142

<sup>521</sup> Ibid.

<sup>522</sup> Liamputtong, 2007, op.cit., p.73

Another difficulty experienced when recruiting participants was the concept of 'African time'. While Western cultures believe in time keeping and setting appointments, this is not the case in most African cultures. Mwenda suggests that '[t]ime tends to be emotionally associated with everything else that is going on, the weather, the family, the chores, the means of transport and other prioritised activities.'<sup>523</sup> As a result, many African people do not comply with strict deadlines and it takes a while to adjust to western concepts of time and keeping appointments. This was an issue as some participants did not attend the scheduled interview, were very late or quite early and had left by the time I got there. As a result, a number of potential participants were lost to 'African time'. While after a follow up I was able to reschedule and eventually meet with some of them, two were unable or unwilling to meet again.

I intended to use networks or the 'snowball' technique as a method of recruiting participants. This technique is particularly appropriate in research on difficult to reach minority and oppressed populations.<sup>524</sup> It involves collecting data on few members of the difficult to reach population, and asking those individuals to provide details of their family members or friends who might also be interested in participating in the study. However, this was not a successful strategy, as most participants did not have many family members in Australia or their family members did not speak or understand English and therefore could not contribute. Five participants were difficult to contact after the interview and some moved interstate or changed their telephone number. Further, more than half of potential participants who were recommended to me by the participants did not wish to participate. This was mainly because they either believed that the research was too complex and they could not contribute effectively, or because they were not properly advised of my research or the fact that I would contact them. Therefore, the network method of participant recruitment was not as effective as anticipated.

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<sup>523</sup> Mwenda, A., (2010), 'A Journey Through Africa: The concept of time', accessed 01/01/2011, from <http://simplyabesi.blogspot.com/2010/03/concept-of-time.html>

<sup>524</sup> Rubin, A. & Babbie, E., (2010), *Essential Research Methods for Social Work*, 2nd edn, Brooks/Cole, Belmont CA, p.149

#### 5.4.2 Language and cultural barriers

When interviewing participants from other cultures with different values and beliefs, a number of difficulties may arise. First, language barriers were likely to cause difficulties in understanding and responding to questions. The use of interpreters was not a viable option, as participants came from many different communities who spoke different languages. Therefore, a number of different interpreters would have been needed to cope with the number of different communities and languages. Interpreters are also not always available, especially when dealing with a number of languages and late notice appointments. Further, I did not have access to free interpreters nor access to funds to pay for them.

In order to deal with the language barrier, I focused on participants who had been in Australia for longer than six months, because people who have been in Australia for less than six months were not likely to be proficient in English.<sup>525</sup> Through my consultations with stakeholders and young people, I further discovered that young people were the best to speak to about legal problems. Not only are young people likely to be more proficient in English, but often take action to deal with problems on behalf of their parents. Young people often speak and act on behalf of their families, and therefore have to deal with their family's problems on top of the problems they themselves face, such as issues with policing. Consequently, I targeted sporting and social events for recruitment purposes, where young people would be present.

Furthermore, I was aware that some cultural barriers and difficulties may arise in the interview process. Wisker warns that behaviour and wording are culturally inflected.<sup>526</sup> Therefore, when interviewing groups from a different background, it is important to observe and follow norms of behaviours to avoid cultural confusion, misunderstandings or conflict.<sup>527</sup> Cultural differences in relation to gender are an example of such norms. It has been suggested that '[g]endered differences between the researcher and the researched play an important role

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<sup>525</sup> I did however interview one participant who had only been in Australia for three months. He spoke good English and his wife and children had been living in Australia for a number of years prior to his arrival.

<sup>526</sup> Wisker, 2001, *op.cit.*, p.166

<sup>527</sup> *Ibid.*, p.166-7



in conducting sensitive research with vulnerable groups or where research revolves around sensitive gendered experiences.’<sup>528</sup> I familiarised myself with the cultural gender differences, and avoided difficult situations by not asking direct questions about gender roles and violence.

### 5.4.3 Overcoming barriers

A number of strategies exist to assist in researching vulnerable groups. First, as Liamputtong states, it is important the researcher take time to get to know the participants and build rapport.<sup>529</sup> This means that rather than assuming that the community poses ‘social problems’ or ‘deviant identities’, researchers need to be aware that participants possess specialised knowledge that the researcher does not have.<sup>530</sup> Researcher should represent participants’ views while also maintaining integrity throughout the research process.<sup>531</sup> In this way, research can also be useful in empowering vulnerable communities.

Another way of showing respect towards participants and building rapport is by providing something in return, either to the participants or the community.<sup>532</sup> Liamputtong suggests that giving something back to the community or ‘reciprocity’ is important in gaining the trust of vulnerable participants.<sup>533</sup> This can include useful information for the participants or some

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<sup>528</sup> Liamputtong, 2007, op.cit., p.75

<sup>529</sup> Ibid., p.57

<sup>530</sup> Ibid., p.59

<sup>531</sup> National Health and Medical Research Council, (2007), *National Statement on Ethical Conduct in Human Research*, Commonwealth of Australia, p.12 states that research with integrity is committed to:

- a) searching for knowledge and understanding;
- b) following recognised principles of research conduct;
- c) conducting research honestly; and
- d) disseminating and communicating results, whether favourable or unfavourable, in ways that permit scrutiny and contribute to public knowledge and understanding

<sup>532</sup> By this, I do not mean monetary payments for participation or any other methods intended to influence participation, but useful information for the participants or their community which is seen to be beneficial or empowering.

<sup>533</sup> Liamputtong, 2007, op.cit., p.61

form of social change as part of the project.<sup>534</sup> Providing feedback to the participants during and after the research has finished is also of great importance.

## **5.5 COMMUNITY ORIENTATION STRATEGY**

With these strategies of dealing with the barriers in mind, I adopted what I refer to as a ‘Community Orientation Strategy’. This involved meeting with stakeholders, such as refugee association workers and community leaders, to educate myself about the South Sudanese community in Adelaide and establish a relationship. This was important for a number of reasons. First, I needed to develop a greater understanding of the community and the problems they face in order to establish rapport. Further, as I was not able to recruit participants on my own, I required assistance from service providers and organisations. Throughout the research, the Community Orientation Strategy was incorporated in order to engage with the South Sudanese community in a number of ways.

### **5.5.1 Volunteer work and partnerships**

Literature suggests that ‘hanging out at services or sites commonly used by the hidden people for a period of time is a useful way of gaining access to these populations.’<sup>535</sup> I therefore volunteered at the Australian Refugee Association (ARA) which allowed me to get closer to the South Sudanese community, gain knowledge and understanding of their culture as well as establish myself within the community and gain contacts and study participants. The volunteer work also allowed me to give something back to the community. My work at ARA included providing advice, information and referrals to other services.

Working closely with ARA also allowed me to conduct a number of informal interviews with workers, some of who are South Sudanese, where I presented my research plans and received useful feedback. Meeting with representatives who actually work with and help refugee background communities provided a greater insight into the South Sudanese community,

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<sup>534</sup> Ibid.

<sup>535</sup> Ibid., p.50

helping me understand the problems they face. Further, by discussing the research with the stakeholders in the field, I expanded my knowledge of the community.

I also participated in community-based projects aimed at helping Adelaide's refugee and migrant communities. From October to December 2008, I took part in an Office for Youth project called the A-Team. The A-Team consisted of 25 young people aged 16-25 from different tiers of government, non-government organisations, students and young migrants and refugees. We worked on a project to promote cultural diversity and help young people from new and emerging communities to meet their full potential by engaging in learning, training and work.<sup>536</sup>

The A-Team provided opportunity to meet with other young people dedicated to helping the refugee and migrant community in Adelaide as well as a number of young people from the new and emerging communities. I was able to speak to several experts and workers in government and non-government sectors who deal with African refugees and migrants, as well as a number of young African people. As a result, I made a number of contacts and I shifted my focus to recruiting more young people as participants.

In late 2008, I also formed a partnership with The Legal Services Commission, who conducted a Legal Education and Awareness Project (LEAP) for young African youth.<sup>537</sup> Adopting the Community Orientation Strategy, I participated in the LEAP sessions administered during 2008 and 2009. This provided the opportunity to meet with and present

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<sup>536</sup> The aim of the A-Team was to create ten policy recommendations, which were then presented to the Director of the Office for Youth at a formal presentation where members of different government departments and organisations were present. The A-Team also produced a report to the Office for Youth with all the findings and policy recommendations which was disseminated to a number of government departments and organisations entitled A-Team, (2008), *Report of Recommendations: New and Emerging Communities - Ensuring that young people from new and emerging communities are supported to reach their full potential and actively engage in learning, training and work*, Office for Youth, Government of South Australia

<sup>537</sup> LEAP is an early intervention, crime prevention project for newly arrived African youth aimed at empowering young African people to make positive choices. LEAP provided free legal education to African youth, focusing on issues such as rights and responsibilities, the role of the legal system and police and laws relating to criminal offences and discrimination. This project was funded by the State Attorney-General's Crime Prevention and Community Safety Grants Program. For more information refer to Irving, C., (2008), 'Assimilate! Integrate! Tolerate! Accept?', *Alternative Law Journal*, Vol.33, No.3

my research to the African youth and gain a number of contacts, four of whom became participants.

### 5.5.2 Meeting with stakeholders

Keeping in mind that stakeholders can play a crucial role in accessing vulnerable participants, I also attended a number of meetings with different stakeholders. Informal interviews with stakeholders were conducted, including refugee organisation workers and people working with the South Sudanese community. This process also helped formulate interview questions. I met with the former Assistant Director of ARA, who provided useful information and contacts. She helped organise meetings with relevant groups, such as the African Workers Network. I also attended a Sudanese Leaders Meeting, where I presented my research to a number of Sudanese leaders in Adelaide. At this meeting, I gained a deeper insight into Sudanese history, culture and some issues that Sudanese communities are facing in Australia.

I also met with numerous important people within the Sudanese community, such as community leaders and elders as well as the Chair of the Sudanese Community Association. At these meetings, I learned that the roles of community elders and leaders are still important in Australia, as dispute resolution within the South Sudanese community in Adelaide usually happens with the help and guidance of leaders. Being aware of some of the benefits and failures of South Sudanese customary dispute resolution, this finding instigated further research into the role of community leaders.

By invitation of the Chair of the Sudanese community, I attended a presentation of a fellow PhD student conducting research involving trauma in South Sudanese men, who presented his almost complete thesis to Sudanese community leaders, elders and academics. Members of the Sudanese community were invited to ask questions and suggest any further development or changes. This was a useful process, providing an opportunity to converse with the most powerful men in the Sudanese community and seeing the way that the community receives research. I also learned about the values the men wanted to uphold and the ways they wanted the Sudanese community to be portrayed. For example, they were apprehensive about research on the Sudanese community, and wanted to make sure that the research would not be detrimental but would benefit the community in some way.

### 5.5.3 Community events

A further way of overcoming the barriers and involving myself in the South Sudanese community was attending community events and meetings. This is a very important step in qualitative research, as it is crucial to gain acceptance and become familiar with the behaviour and language of the proposed research contacts.<sup>538</sup> One example of this included an invitation from a community leader to attend a community event he had organised. This was a community gathering with a speaker from Relationships Australia with food, music and dancing, where I was able to meet some members of the South Sudanese community as well as briefly present my research and seek their assistance. This event helped me to make links within the South Sudanese community, spread the news of my research and recruit two more participants.

I also attended a graduation party for a South Sudanese PhD graduate. The party was held at his home where over 100 members of the Sudanese community celebrated this joyous occasion. Here, I was able to meet briefly with community leaders and academics, and discuss my research project. In South Sudanese culture women and men are generally segregated at gatherings, and as woman I was expected to sit and talk to the women inside while the men conversed outside. This event provided a number of contacts, as well as further insights into Sudanese culture. While sitting with the women, I learned much about their roles in the community and the family. I also realised that the experiences and needs of men and women are different because of their roles and responsibilities. While most women I spoke to expressed an interest in my research, they felt they would not be able to contribute due to their lack of English language skills, family commitments or lack of experience with law. Consequently, I was only able to recruit one participant at this event.

In summary, it needs to be noted that while the process of participant recruitment was quite challenging, this is common in qualitative research. As outlined in the introduction, South Sudanese communities are vulnerable groups and, as such, are difficult to access and often perceive outsiders with suspicion. By adopting the Community Orientation Strategy, I was able to immerse myself into the South Sudanese community through my engagement with the

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<sup>538</sup> Richards, 2005, op.cit., p.25

different organisations. This provided knowledge and understanding of the South Sudanese community in Adelaide, resulting acceptance by the community. Further, I was able to build rapport and trust, forming meaningful, productive relationships with some members. This resulted in the successful recruitment of 22 participants who believed they could contribute to the research and bring about positive change by sharing their experiences.

## **5.6 INTERVIEW DESIGN AND PREPARATION**

The research aims were formulated by drawing on two factors; first, the available literature and second, my personal dealings with the stakeholders and the community. Two prior studies focusing on similar issues and research methods were used to draw up a draft of topics.<sup>539</sup> Adopting the Community Orientation Strategy and working together with the stakeholders assisted in further refining the topics. Stakeholders' knowledge and understanding of the Sudanese community helped to ensure that the topics were sensitive to particular cultural or religious needs.

After a first draft of the topics was developed, stakeholders were contacted once more to make sure that it was appropriate. Staff meetings at ARA were organised to present the interview topics to all the workers. These meetings proved to be valuable, as they gave me a chance to discuss the topics with people who were either a part of or worked very closely with the community. All stakeholders were presented with a copy of the first draft and asked to comment. At these meetings, suggestions were made that changed the topic design significantly. For example, it was suggested that the target group may be resistant to participating in the study, as they may see it as a means for the researcher to prove that they cause or experience legal problems. To overcome this, it was suggested I start the interviews with an outline of participants' rights rather than responsibilities, so that they can feel more comfortable talking about problems. Also, recommendations were made to explain the aims

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<sup>539</sup> The two main studies I focused on included a thesis on Vietnamese refugees in Australia (Burley, 1996, op.cit.op cit) and an extensive study of legal needs and access to justice in the UK by Genn (Genn, 1999, op.cit.). Both these studies were helpful, as one outlined the main problems refugees in Australia may face, while the other focused on how readily people in general can access the justice system.

of the research to participants before the interview, even though this was already done through an Information Sheet.

It was also suggested that participants be provided with some useful information so they could feel like they had gained something from the interview and recommend the study to their friends and family. Therefore, at the interview a list of legal rights and places participants could go for help was provided. This was considered to be important, as the stakeholders suggested that there was a feeling within the South Sudanese community that their responsibilities were made clear from the beginning, but that no-one was telling them their rights.

The final interview topics, consisting of three parts were designed in July 2008. The Interview Schedule is reproduced in *Appendix B*. The first part focused on participant demographics, including questions about where the participants came from, when they arrived and so on. These closed questions helped categorise the participants. The second part of the interview questions focused on specific legal problems experienced. Participants were provided with a list of possible problems from which to choose. When they answered yes to a particular problem, further questions were asked about how that problem was resolved, whether they took any action to resolve the problem, whether they accessed any services and whether they were satisfied with the result.

The final section consisted of open-ended questions, allowing participants to provide their perceptions of the Australian legal system. This section helped establish how confident participants felt about accessing the legal system and whether they thought the legal system was a useful and important way for people to enforce their rights. This section also helped establish whether participants understood the law and legal system and whether they would use it if they had a problem. The final section of the questionnaire was also essential to let the participants have a voice and suggest recommendations for the future.

Before participant recruitment and data collection could commence, I sought and obtained approval from the Social and Behavioural Research Ethics Committee of Flinders

University.<sup>540</sup> In accordance with their guidelines, I devised an ‘Information Sheet’ (see *Appendix C*), which briefly introduced me and my research to potential participants. This assisted potential participants as well as the organisations and service providers to understand the purpose of the study and explained the research process and benefits for the participants. It further informed potential participants of the ability to withdraw from the study at any stage, the ability to refuse to answer questions, and how confidentiality and privacy would be protected.

The ‘Information Pack’ also included an Introduction Letter (see *Appendix D*) from my supervisor introducing me and my research. A Consent Form (see *Appendix F*) was also included, which was signed by participants at the time of the interview, confirming that they understood and agreed to the interview being recorded. This process is important not only because the Ethics Committee required it, but also for the participants to know exactly what they are agreeing to and authorise the collection of information without coercion or manipulation.<sup>541</sup> I further developed a ‘Things to know before the interview’ Sheet (see *Appendix E*), which defined and explained some of the legal terms which I was to use in the interviews, such as ‘legal problems’, ‘legal rights and responsibilities’ and ‘legal system’.

## **5.7 THE INTERVIEW PROCESS**

Most interviews were conducted at the offices of ARA because it was convenient and familiar. In addition, the ARA provided me with office space, the necessary equipment and a professional and safe environment. However, not all interviews could be held at ARA, as the office was closed on weekends and the location was not suitable for some participants. I approached each interview individually and responded to the participants’ needs as they arose. At times this meant meeting participants in their homes, at their workplace over lunch or an alternative location in the city.

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<sup>540</sup> Social and Behavioural Research Ethics Committee, (2008), *Project 4091: Meeting the Legal Needs of Sudanese Refugees*, 7 March, Flinders University

<sup>541</sup> Kent, G., (2000), ‘Informed Consent’, in *Research Training for Social Scientists* D. Burton, Sage Publications, London, p.83



The interviews lasted between 30 minutes and 120 minutes, depending on the problems experienced and the depth of the answers. All interviews (except one)<sup>542</sup> were recorded and later transcribed. Before every interview, I explained the Information Pack and its contents one more time, making sure the participant understood every component of it. Participants also completed the Consent Form and kept a copy of both the Information Sheet and the Consent Form. After everything was explained and signed, we started the interview and the recording. If at any stage the participant did not understand a question, I explained it to them. If the participant did not want to answer a particular question, we skipped that question and moved on. Each participant was provided with a copy of all the questions asked, so that they could see the questions, making them easier to understand and follow. At the end of every interview, the participants were provided with information about their legal rights and responsibilities, as well as more copies of the Information Sheet to give to friends or relatives they thought might want to take part in the research.

The interviews were recorded on a digital recorder in their entirety. This allowed me to capture the entire conversation, including comments made that were not related to the questions. Throughout the interviews a dialogue model was adopted, engaging in discussion rather than simply asking the questions. This allowed for personal stories and experiences to be freely expressed and thoroughly investigated. As Liamputtong advocates, life stories and experiences 'function as ideal vehicles for understanding how people perceive their lived experiences, and how they connect with others in society.'<sup>543</sup> Most participants were forthcoming and eager to tell their story, thus providing valuable information.

## **5.8 PARTICIPANT PROFILE**

There were 22 participants included in the study. Participants were assigned pseudonyms to ensure anonymity. A participant profile is included in *Appendix A*. Of the 22 participants, six were female and 16 were male. This imbalance between male and female is due to a number

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<sup>542</sup> One participant could not read not write, and could not legally consent to being recorded. Therefore instead of recording the interview, I took notes that were incorporated in the data.

<sup>543</sup> Liamputtong, 2007, op.cit., p.112

of factors. First, my method of participant recruitment included attending social events and sporting clubs. The sporting clubs consisted exclusively of men. Further, since the first few participants were male, they recommended their friends, all of whom were male. As the previous chapters have shown, South Sudanese men and women are socially segregated, where women mainly stay and socialise at home, while men go out to the workplace or social clubs. This made it difficult to meet women to interview.

Since women are traditionally not educated and do not have a very strong voice in the South Sudanese community, not many contacts referred women. There seemed to be a perception that if I want to know what is happening within the Sudanese community, I needed to speak to the men, the community leaders and academics rather than the women. I tried to overcome this by asking participants if I could interview their mothers, sisters or wives. However, since most women stay at home, there was also an issue of English language. Participants highlighted that their mothers or wives could not understand or speak English very well, therefore would not be able to contribute effectively.

The low number of women participating presents a number of limitations. Men and women are likely to experience different difficulties and legal problems due to their specific family and gender roles. For example, women may experience additional problems such as domestic violence. In addition, the types of solutions to the problem of inadequate access to justice are also likely to have a male bias. For example, many participants suggested that the Australian legal system should provide a greater recognition of customary law. This solution, however, may be problematic for women experiencing domestic violence, as according to traditional customary values, violence against women is not necessarily a problem. Although women are not very well represented in this study, six women were interviewed about the legal difficulties that South Sudanese women face in Australia today, providing valuable information.

As outlined in Table 5.1, most participants were under the age of 30. This was mainly because the group I had access to were young men. While young men do comprise a large portion of the South Sudanese population in Australia, the prevalence of young men is another limitation. Young people are often more resilient and adapt to life in Australia quicker. They may also be more likely to be targeted by the police, and to experience different legal problems from older people, such as driving offences. However, as discussed earlier, young

people often take on extra responsibilities and act on behalf of their parents or families, and therefore were able to discuss some of the common problems their families and communities face.

Table 5.1: Age of participants

Age group	Number	Percentage
18-20	3	14
21-25	10	45
26-30	4	18
31-40	2	9
41-50	3	14
Total	22	100

All participants interviewed came from South Sudan. A wide variety of tribal communities were represented in the study. The 22 participants came from eight different tribes, with 50 per cent belonging to the largest Dinka tribe.<sup>544</sup>

The amount of time spent in Australia at the time of the interviews ranged from three months to twelve years as illustrated in Table 5.2 below. The majority of the participants had spent between five and ten years in Australia.

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<sup>544</sup> To ensure anonymity of participants, the table outlining the number of participants from the other seven tribes has been excluded.

Table 5.2: Length of time spent in Australia

Time in Australia	Number	Percentage
Less than one year	1	4
One to two years	3	14
Three to four years	3	14
Five to six years	6	27
Seven to eight years	4	18
Nine to ten years	2	9
Over ten years	3	14
Total	22	100

All but one participant had spent time in a refugee camp or a country of asylum before coming to Australia. The following table lists the countries participants spent time in.

Table 5.3: Refugee camps/countries of asylum

Country of refuge	Number	Percentage
Uganda	8	36
Ethiopia + Kakuma	4	18
Kenya	3	14
Kenya – Kakuma	3	14
Egypt	1	4.5
Ethiopia	1	4.5
Botswana	1	4.5
None	1	4.5
Total	22	100

Most participants sought refuge in Uganda. Due to the unrest in Ethiopia, 18 per cent of participants who originally sought refuge in Ethiopia were forced to leave and go to Kakuma refugee camp in Kenya. These three countries were the most common countries to which Sudanese refugees fled.

The time spent in refugee camps varied from one year to a lifetime, as demonstrated by the table below.

Table 5.4: Time spent in refugee camps/countries of asylum

Number of years in refugee camp	Number	Percentage
None	1	4
1-2 years	3	14
3-5 years	6	28
6-9 years	2	9
10+ years	8	36
Since birth	2	9
Total	22	100

A number of reasons were given for the participants applying to come to Australia as outlined in Table 5.5. While in some circumstances Australia was the only place where participants could go, most participants named reasons such as security, education and family.

Table 5.5: Reasons for coming to Australia

Reason	Number	Percentage
Education	9	41
Security	6	27
Due to War	5	23
Family	4	18
Better future	2	9
Opportunity	2	9
Australia took them in	1	4.5
Australia a peaceful country	1	4.5
Total <sup>545</sup>	30	136

Most participants lived with relatives or friends when they first came to Australia. As most Sudanese entrants come to Australia under a SHP visa as outlined in Chapter Four, they were initially under the care of the family member or friend who initiated their case.

Table 5.6: Living arrangement after arriving in Australia

Place of residence	Number	Percentage
Family member	15	68
Private rental property	5	23
Friend	2	9
Total	22	100

Table 5.6 shows that almost 70 per cent of participants stayed with a family member when they first came to Australia. This often resulted in two (or more) large families living together in one house, leading to problems of overcrowding and poor living conditions as will be

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<sup>545</sup> Total numbers add up to more than the total of participants as some participants listed more than one reason.

shown in later chapters. Almost a quarter of participants found private rental properties when they first came to Australia with the help of a family member or friend residing in Australia.

Almost all participants interviewed had attended some form of schooling in Australia as illustrated in Table 5.7. Education is something highly sought after and respected in the South Sudanese community in Australia, both for men and women.

Table 5.7: Education level

Type of education	Number	Percentage
University	8	37
TAFE	6	27
High school	2	9
University – postgraduate	2	9
Other	2	9
None	2	9
<b>Total</b>	<b>22</b>	<b>100</b>

Almost 40 per cent of participants had either attended or were currently attending university. Only two participants had not attempted any studies in Australia, with one woman being illiterate in her own language. The level of schooling has implications for this study. Educated participants generally expressed the belief that they could contribute to the study, while people with limited education were hesitant to participate. The fact that most participants in this study have completed or are pursuing higher education suggests that they feel empowered, and explains their willingness to contribute to the research. It further suggests that participants are more aware of their legal rights and responsibilities, and consequently more likely to recognise legal problems when they occur. This may lead to results that are not representative of the less educated sector of the South Sudanese community.

## **5.9 ORGANISATION OF DATA FOR ANALYSIS**

The approach to analysis is based on grounded theory, more specifically the method of thematic analysis. Grounded theory ‘utilises theoretical sampling in which emerging analysis guides the collection of further data’.<sup>546</sup> Thematic analysis, a specific form of grounded theory, aims to identify themes within the data.<sup>547</sup> It is the most commonly used analysis method in qualitative research involving interviews, as it allows themes to emerge from the data.<sup>548</sup> Ezzy suggests two reasons for this approach. First, it allows for the emergence of themes during the process of data collection and analysis; and second, it make possible for emerging themes to guide the remaining data collection.<sup>549</sup>

As Ezzy states, qualitative data is chaotic by its very nature.<sup>550</sup> In qualitative research, data collection and data analysis are not linear stages that occur one after another, nor can they be easily separated.<sup>551</sup> Rather, simultaneous data collection and analysis are conducted. This allows the analysis to be shaped by the participants and the researcher in a more meaningful way than if analysis is left until after the data collection has been collected.<sup>552</sup> It is the researcher’s task to understand and interpret the data and identify the emerging themes and, in turn, understand and embrace the chaos qualitative research brings. In order to reach this deeper understanding of the research, the researcher needs to immerse themselves in the interview materials they are analysing.<sup>553</sup>

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<sup>546</sup> Ezzy, D., (2002), *Qualitative Analysis: Practice and innovation*, Allen & Unwin, Crows Nest NSW, p.87

<sup>547</sup> Ibid., p.88

<sup>548</sup> Willis, 2010, op.cit., p.418; Ezzy, 2002, op.cit., p.86

<sup>549</sup> Ezzy, 2002, op.cit., p.87

<sup>550</sup> Strah, M., (2000), 'Computers and Qualitative Data Analysis: To use or not to use?', in *Research Training for Social Scientists* D. Burton, Sage Publications, London, p.228

<sup>551</sup> Willis, 2010, op.cit., p.408; Ezzy, 2002, op.cit., p.73

<sup>552</sup> Ezzy, 2002, op.cit., p.61

<sup>553</sup> Willis, 2010, op.cit., p.412



According to Willis, a critical first step of the researcher being immersed in the data is the transcription of the recording.<sup>554</sup> Following grounded theory and thematic analysis, I recognised the importance of transcribing my own data during the data collection process. This, as Ezzy points out, brings a number of benefits to qualitative research. First, it allows interviewers to observe themselves in action, which can be both enlightening and painful, ensuring constant evaluation and revision.<sup>555</sup> In addition, transcribing the interviews is a lengthy process, encouraging detailed reflection on the issues of the research and ensuring themes are recognised and research objectives adjusted accordingly.<sup>556</sup> The interviews were transcribed in total rather than choosing selectively, because during qualitative research the research objectives and questions can easily change depending on the data collected, and what we judge as important or unimportant in the beginning may not be so towards the end.<sup>557</sup> I often adjusted the interview topics as well as my interviewing style to reflect new emerging themes, such as questions about family law and issues with young people, which were not originally included.

After the interviews were transcribed, they needed to be coded and analysed. Coding is ‘a method that enables you to organise and group similarly coded data into categories or ‘families’ because they share some characteristics.’<sup>558</sup> It is a way of organising qualitative data into categories, and identifying relationships and links between these categories. The goal of coding is to learn from the data by revisiting it until the data is completely understood and the question answered.<sup>559</sup> The qualitative computer analysis program *NVivo 8* was employed to assist in the coding process. This program allowed me to code any themes or categories under ‘nodes’ and store them in a hierarchical order. It is important to note

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<sup>554</sup> Ibid., p.413 (original emphasis)

<sup>555</sup> Ezzy, 2002, op.cit., p.70

<sup>556</sup> Ibid.

<sup>557</sup> Willis, 2010, op.cit., p.159

<sup>558</sup> Saldana, J., (2009), *The Coding Manual for Qualitative Researchers*, Sage, London, p.3

<sup>559</sup> Richards, 2005, op.cit., p.86

however, that this program did not analyse the data – it merely assisted in ‘sorting and managing the data’, which I later analysed.<sup>560</sup>

At the outset of coding, characteristics of basic personal information were constructed, derived from the first demographic part of the questionnaire. This allowed for quick reference during the analysis process as well as a quantitative overview of participants by creating categories and common links and relationships. These categories then aided in the production of tables provided earlier in the chapter, such as age, time spent in refugee camps and education level.

I began the analysis process by establishing nodes for each possible legal problem listed in the interview schedule and coding the relevant data. However, new unexpected issues emerged from the data, such as family responsibilities and expectations leading to problems with the law. This led me to take a deeper look into the data and employ the theory of thematic analysis by identifying themes from my data that I had not anticipated. It also led me to take another look at the interview schedule and develop questions further in order to explore the emerging issues in more detail, highlighting the use and importance of grounded theory in my research. This process ensured the validity of my research, incorporating the strategies of the *Quality Legitimation Model* discussed earlier by following up surprising findings and checking for representativeness.<sup>561</sup>

## **5.10 CONCLUSION**

This chapter has presented the research design of the thesis. A qualitative methodology was selected to ensure the participants’ stories are heard. This is the most appropriate method of collecting data on vulnerable groups, as it allows the researcher and the participants to forge relationships and explore the data together in semi-structured, face-to-face interviews. While certain limitations exist in qualitative research with vulnerable groups, this chapter has explored the strategies adopted to overcome these limitations, such as the ‘Community

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<sup>560</sup> Willis, 2010, op.cit., p.416

<sup>561</sup> Onwuegbuzie & Leech, 2007, op.cit.

Orientation Strategy'. The chapter has also explained the process of data collection and analysis, highlighting the importance of grounded theory to allow for the emergence of new themes and surprising findings. The strategies and processes adopted throughout the thesis have ensured the validity of the study, which is not always clear in qualitative research.

Analysis of the data is presented in the remaining chapters. These chapters are a product of the thematic analysis described above and of the participants' experiences as they described them to me. Therefore, while the earlier chapters presented the South Sudanese story before coming to Australia, describing their prior experiences and addressing the common issues the face during resettlement, the next three chapters focus more on their actual experiences and perceptions after resettlement in Australia. They present some of the South Sudanese stories of life in Australia and highlight the challenges experienced by the participants in accessing and understanding the Australian concept of justice, in turn answering the research question.

# CHAPTER 6

## PROBLEMS EXPERIENCED

The fact that problems are so frequent as to be nearly normal is more a cause for concern than for dismissing them as merely problems of everyday life.<sup>562</sup>

### 6.1 INTRODUCTION

This chapter explores the range of problems experienced by South Sudanese participants living in Adelaide. Ten legal problems were identified and participants were asked whether they had experienced them. If they had experienced one of the specific problems listed, they were asked additional questions, such as the actions they took to resolve those problems and their satisfaction with the outcome. These problems were then discussed in-depth, exploring the reasons behind the actions taken and any services that were helpful throughout the process.

The chapter illustrates that participants did in fact experience a number of problems that can be defined as legal problems. The most common type of problems experienced were tenancy issues, such as neighbourhood disputes or problems with the landlord. Driving issues were also commonly experienced, where participants were involved in car accidents or had their licence disqualified due to ignorance of the law and legal processes. These findings are consistent with current literature investigating the settlement needs of African communities in Australia.<sup>563</sup>

Most of the problems experienced were not recognised as legal problems, and participants did not take any action to resolve most problems. Genn defines a legal problem as a ‘justiciable event’, that is a matter which raises legal issues, whether or not recognised as legal by the

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<sup>562</sup> Currie, 2009, op.cit., p.9

<sup>563</sup> Australian Human Rights Commission, 2010a, op.cit; Pittaway & Muli, 2009, op.cit; Springvale Monash Legal Service, (2008), *Comparative Analysis of South Sudanese Customary Law and Victorian Law*

respondent.<sup>564</sup> Everyday problems, on the other hand, are problems that do not raise legal issues in themselves, but are experienced in the shadow of the law.<sup>565</sup> As the opening quote suggests, the common nature of these problems is troubling, as the problems often get dismissed as trivial. Currie argues that many problems encountered in people's everyday lives have legal aspects and potential legal consequences, which can escalate to more serious legal problems if not addressed.<sup>566</sup> In addition, problems can have an accumulative effect, where each problem comes with the possibility of further, more serious problems.

This chapter therefore, also explores the everyday problems faced by participants. Due to the common nature of these problems, they have become somewhat invisible and embedded into the lives of participants. As a result, these problems are not always recognised nor dealt with, and can lead to further social exclusion and vulnerability. Throughout this chapter, I argue that the everyday problems are significant, as they are linked to the general and social wellbeing of participants. Consequently, in order to address the complex nature of these problems, a holistic approach, acknowledging the connection between the problems, is necessary.

The following table illustrates the range of problems experienced by participants.

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<sup>564</sup> Genn, 1999, op.cit., p.12

<sup>565</sup> Currie, 2009, op.cit., p.2

<sup>566</sup> Ibid.

Table 6.1: Number of participants experiencing legal problems

Problems <sup>567</sup>	Numbers	Percentage
Tenancy issues	16	72%
Driving issues	15	68%
Workplace issues	11	50%
Immigration problems	10	45%
Unfair treatment/discrimination	7	32%
Discrimination by police	10	45%

## **6.2 TENANCY ISSUES**

Tenancy issues were the most common problems reported by participants. Almost three quarters of participants stated that they had experienced tenancy issues, and others who did not experience these issues themselves reported that they either know of other people who have, or highlighted it as a general problem within the South Sudanese community:

But this is, this are is very very sensitive, like problematic for the Sudanese community. That's why I think private rental condition, find problems around late payments, they pay their rent late, issues with neighbours, issues with the landlord. This is quite common. (Gabriel)

Access to rental properties was identified as more problematic. Participants noted that common presumptions about Sudanese families making bad tenants contribute to discrimination by landlords.<sup>568</sup> As Khadija explained:

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<sup>567</sup> The ten problems discussed in the interview have been grouped into six different categories as outlined in Table 6.1. One additional problem (robbery) was not identified as significant, and has been excluded from these categories.

<sup>568</sup> Also reported in Australian Human Rights Commission, (2010b), *African Australians: Human rights and social inclusion issues project - A compodium detailing outcomes of the community and stakeholder consultations and interviews and public submission*, p.144

It's always, always, always hard to get a house. I think it's to do with where we are from... And one of the reasons why we don't, why it's hard for us to get houses include the landlord don't trust us, maybe they think we don't pay the rent because we don't have money. So there is those. It's always hard, it's always hard.

Finding appropriate housing was especially a problem for people who have not been in Australia for very long, and who did not have adequate identification or rental history.

I mean landlord needs somebody good, and they also need to have some ID. And during that time, us only being here for six months and I start looking for my own accommodation. And then they request a lot of things maybe I can get only 80 out of a 100 [identification points]. This is including licence and passport and have you got good accommodation from your current address. So these are the things which did not lead me to get the house soon. I was also looking for the house for five months. (Peter)

The size of a common South Sudanese family, often consisting of eight or more members, presented a further difficulty in acquiring housing.<sup>569</sup> Living conditions were often cramped when participants first came to Australia, as they stayed with friends or family until they found suitable housing of their own. Jok recalled staying with his cousin when he came to Australia:

Oh, it was crowded. Himself, his wife and his three children, plus his two in-laws, and then plus four of us. So you can do the math, and it's a four bedroom house.

While for Jok this situation was only temporary, some large families face this difficulty on a permanent basis. For families of this size, it is very difficult to find appropriate housing, as Nyankol explained:

When we were looking for a house most house landlords didn't want like big families, because of property damage and things like that.

Once participants found accommodation, they often encountered problems with their neighbours. These problems ranged from noise disturbance from either side, to verbal abuse and racism to physical threats where the police had to be involved. Most of the participants

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<sup>569</sup> Ibid., p.143

who reported experiencing problems with their neighbours lived in public housing units at the time and could not easily move. A large number of newly arrived South Sudanese entrants rely on public housing due to their inability to find high paying employment as a result of the lack of experience and having to take care of large families.<sup>570</sup>

Two participants noted being harassed by their neighbours to the point where they felt unsafe and needed to call the police.

For example, Atem, who was living in public housing, noted experiencing difficulties with his neighbour to the point where he feared for his and his family's safety:

The tenant who is above our house, he is like under the drugs influence. And every time, I mean I can just say that is also racist in another way. Because whenever he go out, coming back from there you can hear him trying to just be rude, to be swearing at the road... And the other day he went, he got a big log in his house, so we had the music inside, he just started now to pound the floor downward, beating it with that log... He just continued like that throughout the night, and I think it was not only for us alone but the whole tenants who live around that unit because it is a big unit, it's a Housing Trust unit.

This problem then escalated to the point where the police had to be called to remove the neighbour:

And I was just heading to work, I left my partner inside, at that time she was pregnant. When I was getting out, straight away he came down. He started swearing 'You fucking African, who even brought you here, I don't want even to be together with Zulus, you are dirty people', all these sorts of things... Straight away he came down with that log, he wanted to fight with me. I just decided to run down, straight away down... I went to the extent of calling the police. With that log he came down to my room. At the door there is security screen door, started banging there. I just called my wife inside the door not to come out. She was scared inside until when the police came. Instead of going to work, I could not go to work I just waited and they came.

John experienced a similar problem, and expressed frustration at the inability to resolve the problem. John called the police, filed a claim to be transferred to alternative housing, but eight months later was still waiting for action. Participants in these situations were faced with the

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<sup>570</sup> Ibid.



choice of waiting several months for a transfer, or finding adequate private housing to escape the abuse.<sup>571</sup> This left them feeling unsafe and vulnerable in their own houses, scared to go outside due to the harassment from their neighbours, as Atem notes:

And this guy continued disturbing us every night, and every time we would get out we would have to be extra careful... Maybe one day I won't be home, my partner will be at home and he will just knock at the door, she will open the door and he will do something.

Both Atem and John were not aware of any other potential services they could access apart from the police and the Housing Trust, and counted on these services for help. They did not feel that they were legally protected or that they could access the legal system to resolve their issues other than to call the police in an emergency where they felt unsafe. The police, however, could only remove the immediate danger in each situation, but in the long term the tenants were left to live with the possibility of future abuse.

Lam reported being verbally abused by his neighbour to the point where he had to call the police to resolve the immediate situation on a number of occasions:

I notified the police, twice, and then police came to his house and talked to him. And I think that went well after that.

Khadija was also verbally abused by her neighbours on several occasions, noting being called names such as 'black monkey'. When dealing with problems with neighbours, participants were generally not aware of any services available to help, such as Consumer and Business Service or Tenancies tribunals. When asked why she did nothing about her problem, Khadija replied:

I felt like there is nothing I can really do, like who am I supposed to talk to? Yes, so I just ignored it. I did talk to my uncle about it though, but what can we do?

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<sup>571</sup> Housing authorities do not benefit from voluntary relocation, thus relocation is not considered a priority service. See Baker, E.L., 2002, 'Public Housing Tenant Relocation: Residential mobility, satisfaction, and the development of a tenant's spacial decision support system', PhD Thesis, Adelaide University, Adelaide, p.45

On top of disputes with neighbours, several participants identified being harassed by their landlord, as well as instances of power abuse by landlords. For example, after being mistreated in a number of ways by the landlord, Atem noted that he had advised the landlord of his wish to move:

Because from our agreement he told us that if we want to move out, we had to let him know three weeks before. So we did inform him, but he said no, he have to, he is too busy anyway, after when he finish, he will let us know if he will permit us to move.

This example raises a number of issues. First, it highlights the perceived harassment by the landlord, as the landlord does not legally have the right to keep a tenant in a property for longer than the agreement outlines. The South Australian tenancies law states:

- 1) The tenant under a residential tenancy agreement for a periodic tenancy may, by notice of termination given to the landlord, terminate the tenancy without specifying a ground of termination.
- 2) The minimum period of notice under this section is 21 days or a period equivalent to a single period of tenancy (whichever is longer).<sup>572</sup>

In this instance the participant followed the appropriate measures to leave the rented house by advising his landlord of his plans 21 days in advance. The landlord then refused to permit the tenants to move until he was ready for them to leave, highlighting the power imbalance between landlords and migrant tenants.

Most participants did not appear to be aware of their rights when it came to harassment by the landlord. In fact, there was a general perception that a rental property is the landlord's property; therefore the landlord is protected by the law and able to do with it as they please:

I think that the other thing that people always come like to a conclusion from my community is, well he deserved that, or he has that full right of his property, so if I continue possibly by the law I will be caught wrong. (Atem)

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<sup>572</sup> Residential Tenancies Act, 1995, South Australia, Section 86

The belief held by participants that nothing could be done to help the situation acts as a substantial barrier to access to justice for South Sudanese tenants, since it prevents action being initiated to resolve their problem through the legal system.

Jok further reported his landlord often coming to his house without notice, and sometimes even entering the premises without permission:

He wants to know all about our privacy in the house. Because if you come in the house all the time, like sometimes you come without notice, it's like you want to see what we are doing. Maybe I'm entertaining some other visitors, which is not really good [that he comes]. Yea I think that was the only time that we really felt there was a bit of harassment from the landlord, and I just thought maybe it's also happened with others, because we've been in friendship with the landlord, but if it happened like how about those landlords that are not having a good friendship with their tenants, so maybe a lot is happening in there... And we just look at it as like kind of harassing people, not really accepting us to have... our right, full right of living in the house, the property.

This example is a clear breach of privacy and tenancy laws.<sup>573</sup> However, Jok was unaware that the landlord was breaking the law by entering to the property without his prior consent.

The tenancy issues discussed here are also highlighted in other studies. Finding appropriate and affordable housing is one of the most significant settlement needs of new arrivals. It has been reported that new arrivals often struggle with overcrowding and dissatisfaction with public housing.<sup>574</sup> While these issues in themselves may not be legal, as no legal resolution is available, they are nonetheless problems that affect participants' everyday lives and can possibly have legal consequences. For instance, difficulty finding appropriate housing may lead to settling for substandard quality accommodation, and accepting negligence by the landlord. The Australian Human Rights Commission's consultations identify numerous examples of poor quality housing provided to African Australians, such as broken windows

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<sup>573</sup> Section 72 (1) of the Residential Tenancies Act SA states that a landlord may enter the premise only if:

- (c) the entry is made at a time previously arranged with the tenant, or
- (e) ... the tenant has been given at least 48 hours written notice, or
- (h) the entry is made with the consent of the tenant given at, or immediately before, the time of entry.

<sup>574</sup> See Department of Immigration and Citizenship, 2003, *op.cit.*, p.76-78

and no heating or cooling.<sup>575</sup> African new arrivals have also been reported to struggle with racial discrimination throughout this difficult process. Studies have found that direct and indirect racial discrimination is present in the private rental market, where white Europeans are often favoured over African families.<sup>576</sup>

The Australian Human Rights Commission also acknowledges the difficulties African Australians face after acquiring accommodation. The report suggests that more specific education about rights, delivered in a culturally appropriate manner, is necessary to empower the community and inform them of their rights and responsibilities in the rental market. It recommends education on topics such as:

- what is involved in establishing a tenancy;
- tenant and landlord rights and responsibilities;
- connecting utilities and paying bills;
- how to maintain a property; how to exit a tenancy; and
- what to do when things go wrong, including making complaints of discrimination.<sup>577</sup>

An example of such education is the Community Education Program by the Migrant Information Centre in Eastern Melbourne.<sup>578</sup> The program focused on two specific communities, providing education on applying and obtaining a property and the rights and responsibilities of landlords and tenants. This type of education empowers communities, providing them with the necessary knowledge and skills to enforce and protect their rights as tenants. While such a form of education can assist communities in understanding their rights, in turn addressing some of their problems, it is limited to addressing problems of unawareness and disempowerment. Other, more substantial structural barriers to access to housing, such as discrimination and negligence on the part of the landlord, require more than education.

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<sup>575</sup> Australian Human Rights Commission, 2010b, op.cit., p.143

<sup>576</sup> Department of Immigration and Citizenship, 2003, op.cit., p.78; Australian Human Rights Commission, 2010a, op.cit., p.24

<sup>577</sup> Australian Human Rights Commission, 2010a, op.cit., p.26

<sup>578</sup> Migrant Information Centre Eastern Melbourne, (2007), *Migrant and Refugee Assistance Project - Final Project Evaluation*

### **6.3 DRIVING ISSUES**

Over two thirds of participants reported experiencing problems with road rules. These included breaking the road rules, licence disqualification, driving accidents and problems getting a driver's licence. The problems stemmed from a number of factors, including the lack of knowledge of Australian road rules, lack of English language as well as ignorance of services available.

Participants noted the cost involved in meeting the requirements as the main barrier preventing them from acquiring their driver's licence:

And it was really difficult you know to get many, because every lesson is 50 dollars [and 50 lessons are required to pass], and I was doing year 12. I will say it was really a difficult thing in Australia, getting your driver's licence is difficult, this I will say. (John)

And then this L needs me to get some money to work for P. That's what now I am trying very hard to, at least to get ways of doing this. Because to get a job here in Australia needs you to drive. (Abraham)

Furthermore, Lam believed his diving instructor was treating him unfairly, as he failed the driving test three times without any explanation of why this occurred:

Now I have done 35 lessons, and I went to road test three times and I failed but I don't know what is the problem. Is it a problem with the instructor or is it me who made the mistake? But to me I don't believe that it is me or my mistake... They fail me intentionally that is what I can't understand... So now it has really discouraged me... But it's very hard for me to go to customer service officers and ask them, the receptionist sometimes they are not very polite, especially in government agencies.

One third of the participants have been involved in car accidents throughout their time in Australia. These include accidents they believed were their fault, as well as accidents they did not think were their fault. Quite often, at the time of the accidents the participants were not aware of their rights or the procedures, or were confused about whose fault the accident was.

Like, I was driving and one of the guys just stopped suddenly, so I just hit that person... It was their fault because they stopped suddenly and it was hard for me to control. (Garang)

In this situation Garang believed that he was not at fault, as it was the car in front of him that stopped and caused him to hit it. However, in a situation like this, it is quite common that the car behind would get charged with failure to keep a safe distance, and therefore be at fault.

Lam also noted getting into a car accident and being treated unfairly due to a lack of awareness of the law:

I was just two years here, and I wasn't failing any person and I had hit a car that was standing and stopped back somewhere... I was new at the time, I was really not aware of a lot of things so no one talked to me about why I was paying that amount. That car would have been \$500, the price of the car. But I was sent a bill by the insurance company to pay \$2700, which we agreed to pay in instalments, at the time I was a student at Flinders University. So I thought there was a bit of something that was not clear, I know the car, I know the model, and I thought it was \$500 worth of car.

Lam believed that he was being unfairly treated by the other person and their insurance company, as they never explained why the amount he was required to pay was so high. He admitted that had that problem occurred now, ten years later, he would have treated it differently. Now that he was aware of the processes and services available, he would be more likely to access these services and seek legal advice on the issue:

Some participants reported having their licence disqualified and driving while disqualified. Biel experienced both of these issues at once, when he was disqualified for driving without a valid licence:

I passed my test on Saturday. And then on Sunday I got into my car and went to work. And on my way to work I had an accident... So then the police came and he asked me about my licence, and I gave to him the paper that I got from the test. And he said 'Well this does not allow you to drive'... So yea, after a month, after I even got my P, my licence was taken. It was disqualified.

This particular problem was caused by lack of awareness of the law and road rules. Biel was not aware that he was required to take his piece of paper to the Transport Office in order to be licensed to drive.

While ignorance of the law is not a justification for breaking it, there is a general lack of knowledge and understanding of driving laws within the South Sudanese community which should be taken into account. As most newly arrived South Sudanese families have most

likely never driven a car or learnt road rules in Africa, the Australian road rules are foreign to them. The Springvale Monash Legal Service found that Sudanese Victorians experience difficulties in understanding and following the driving requirements due to the limited driving experience and lack of understanding of the rules.<sup>579</sup> The report concluded that ‘greater investment into education for South Sudanese drivers is required upon their arrival, and participants indicated a desire that driving and licensing laws be taught in community centres and as part of high school education’, which is consistent with the current study.<sup>580</sup> It takes time for the community to develop and share this knowledge amongst themselves, and factors such as lack of English language and low socio-economic status prolong this process.

#### **6.4 WORKPLACE ISSUES**

Workplace problems among participants were also common. Half of the respondents reported that they had experienced these problems, ranging from difficulties finding employment, receiving and accessing adequate services as well as problems within the workplace such as discrimination and loss of employment.

A high proportion of participants highlighted experiencing barriers in the search for suitable employment. The lack of English language, for example, restricted their ability to find employment, as this is required in the majority of Australian jobs. Further, the lack of work experience narrowed choices, as most jobs require some previous work experience. Participants reported:

When I first came to Australia it was very difficult for me to get a job. It took me about one year and half to get a job. So I will say getting a job in Australia is really hard, and because of language of course they say you don't speak good English. But I guess they have to give us a chance first you know, I could be learning English. So getting a job is difficult... I also have to say work experience, because they don't accept if you worked one time in Sudan or Kenya, you know they don't recognise that experience. (John)

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<sup>579</sup> Springvale Monash Legal Service, 2008, op.cit., p.59

<sup>580</sup> Ibid., p.61-62

Yea, I think getting, problem getting a job. Like I stayed for almost six months, six months without a job, any job which I can do. But I had no work history here, no person who as a reference can support me. (Gabriel)

I mean, generally there is no really more opportunities of getting work... So employment is a big problem which is still existing. And not only with me, but with most of the people in the community. That's why if you can see most of the people in the community they tend to go for interstate, or more especially in South Australia it's a big problem. Sometime they prefer to go to the countryside, and work in the countryside, some are on the farm, some work in some industries in the countryside. (Atem)

Finding suitable employment, or in some cases finding any kind of employment can be frustrating for the South Sudanese community, as Nyankol explained:

And most of the times they are like 'oh, you know, we can't hire you, you have to have experience'. And it's like okay you know, I don't have the experience but I am willing to have some sort of training. Because how can you get experience if you haven't worked, and how can you work if you haven't had some sort of training?

This is further complicated by the fact that the experience or knowledge the participants might have gathered in Sudan or other countries is not recognised. Another important factor in finding and acquiring employment is the use of references. In most cases when applying for jobs, employers ask for referees who can vouch for the employee's character and work ethic. If the employee is new to the country and has had no prior experience in Australia, then they are not likely to have adequate references.

Several participants further believed that discrimination is present within some workplaces:

But I tried looking for work which is the part time work, I couldn't get, put in the application sometime they can't even call me for interview. Not that my application is not all that, but I thought maybe because of my name, because I prefer using [my African name], and when people look at it, it's not more of Aussie, not more Australian, but it's more of migrant. And possibly they just, I thought they just thought as it is from migrant, more especially from the resume the background says Sudanese and Sudanese are not really good people, so I don't think we need to employ him. (Atem)

But yea it is a bit tricky when you apply for a job you know, when you actually put your resume in, maybe you will get a phone call for the interview but you know when the employer actually recognises your accent you know, they will say 'Oh I will call you back another time'. It happened to me like three times or more, that's what happens. (Joseph)



This indirect discrimination by potential employers was perceived to create difficulties accessing suitable employment for the South Sudanese community.

Participants also reported discrimination within the workplace. This was experienced as indirect discrimination, where discrimination was embedded into the workplace, as well as direct discrimination based on race. For example, Lam was aware of his rights at work, and shared his concerns about being discriminated against with the employer:

I'm happy with the people in general, but there will always be one or two people doing different stuff over the last five years... Sometimes someone may use indirect, because discrimination is hard to detect. Very very hard.

However, he stressed the point that such indirect discrimination, which is deeply embedded into the workplace, is very difficult to resolve:

But the outcome of this [reporting it to the employer] was maybe two weeks three weeks keeping away and then come back again, doing the same thing. So it's not finished. It's there for the rest of your life. So I should say that it is a bit of an issue for me and maybe for others also.

Gabriel also believed he was being underrated due to his race by another employee, stating 'this guys is just cross with me because I'm black.' He believed that African people face direct discrimination every day, and are generally seen and treated differently to Australian employees:

So, generally in the workplace you will find the way a white person talks to a white person is different, just in a polite way. But when a white person is talking to me, try to underrate you know, giving some directives, giving orders you know. I found that one ridiculous, but it happens in the workplace. And this is a common thing again in the African community in general. Even the offices of this work, people talk differently, the tone there is different.

Both types of discrimination discussed here, indirect and direct, are embedded in people's everyday lives and difficult to address. These experiences serve as a fitting example of the extent of everyday problems, as they illustrate how problems can become ignored and accepted as a part of people's everyday lives.

Participants also reported being unfairly dismissed from their workplace. Atem, for example, fell off a ladder at work straining his shoulder and was told to go home and look after himself. He experienced pain, and went to see a General Practitioner who advised him to take three days off work. Atem explained that he had followed the correct procedure and filed Work Cover compensation, which paid for his medical bills and his three days off work. However, after returning to work, he was advised he had been let go:

These three days went, the fourth day I went back to work, when I reached there, the boss said the work is finished, he said you don't work here anymore... I just thought I was fired from work because of that incident.

Although the employer denied letting this participant go due to the accident, Atem believed that he lost his job because of it. When asked why he did not take any action to resolve this problem, he answered:

One is I don't know who really to contact. And I believe there are many people also in the same circumstances... But when they are fired like that, they don't know where to go. The only thing is just come and sit down, try to look for another job... we don't know which services will be there to support us to make us really address these issues that happen in the workplace.

Atem highlighted this issue as a significant problem within the South Sudanese community, and stated that people are losing jobs unfairly and unable to take any action due the lack of awareness of their legal rights and services available. This in turn, he argues, leads to an inability to retain jobs and to move up in the workplace, consequently leading to problems of poverty and disadvantage:

And I think that's the other thing that makes possibly most of the Sudanese people, I'm sorry to generalise but most of the Sudanese people not to settle in one work for a long time. Because you continue working there, by the time an accident is always coming by its own way, I mean even though you want to avoid, but it's unavoidable. If any accident happens, even though it is small and by the time you come back to work you will straight away be fired. And you don't know what to do, what procedures you have to follow, or who to appeal to. And after that you have to look for another job. You have the idea okay, because I got this one before by myself, so I'll get another one also. Which makes you move from work to the other, and sometime you tend not to get work for a long time.

Bol also reported being unfairly dismissed from his workplace, and unable to take any action to rectify the issue. While Bol did attempt to seek assistance from Legal Aid, this attempt failed and left him feeling helpless in the situation:

But I tried also with kind of Legal Aid that deals with people, it's across the city somewhere. But I didn't go much, because when I was there they told me that there was nothing much they can do. So then I said forget about it, it's better I go to school and get some knowledge and so on.

In both these examples, the participants felt they had been unfairly dismissed from their employment. However, they lacked the skills and ability to take any action and consequently gave up on pursuing this problem any further and returned to study instead. Bol's case illustrates that even with the knowledge about possible solutions to pursue a case, participants still feel intimidated and are likely to give up when they encounter difficulties in this process.

Workplace issues have been highlighted as important settlement challenges for African communities in other studies. Westoby reports that the workplace system is alien for refugees who have lived in refugee camps and never participated in such a system. Participants in Westoby's study expressed distress about the alienating process of applying for jobs, such as addressing selection criteria and attending interviews.<sup>581</sup> The Australian workplace system makes it difficult for refugee background communities to find suitable employment and raise their socio-economic status. This is further complicated by the fact that the experience or knowledge they might have gathered in Sudan or other countries is not recognised.<sup>582</sup> Dhanji argues that lack of proficiency in English and non-recognition of overseas qualifications result in former Sudanese refugees relying heavily on government social welfare or being employed

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<sup>581</sup> Westoby, 2007, op.cit., p.6

<sup>582</sup> This finding is supported by numerous other studies, including Carrington, K. & Marshall, N., (2007), 'Common Issues, Costs and Benefits', in *The Social Costs and Benefits of Migration into Australia*, K. Carrington, A. McIntosh and J. Walmsley, Centre for Applied Research in Social Science - The University of New England,

in factories, cleaning services, fruit picking or loading and unloading jobs that do not require these skills.<sup>583</sup>

A number of studies also highlight cases of unfair dismissal and racial discrimination within the workplace.<sup>584</sup> A general lack of awareness of workplace procedures and rights and obligations is reported throughout these studies. It has been suggested that specific programs need to provide information to new arrival communities about the Australian work environment and how to make a complaint of workplace discrimination.<sup>585</sup> These workplace issues keep the participants and their communities from acquiring and retaining suitable employment. As illustrated by the legal needs discussions, lack of employment can be a substantial barrier in accessing services and justice when needed, and can lead to further problems such as low socio-economic status. Therefore, eliminating workplace issues can work towards eliminating poverty within the community, in turn eliminating some of the disadvantage in terms of access to justice.

## **6.5 IMMIGRATION PROBLEMS**

Over half of the participants had attempted to bring a family member or a friend to Australia by the time of the interview. They noted that life in refugee camps, where most their families reside, is very difficult and they are under a lot of pressure to take care of their families back in Africa. This pressure extends to an obligation to send money back to their families, as well as to do their best to bring the rest of their families to Australia. Participants, as well as numerous other studies, have expressed that this separation from their families is a great source of distress and cause of under-productivity.<sup>586</sup>

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<sup>583</sup> Dhanji, S., (2009), 'Welcome or Unwelcome? Integration issues and resettlement of former refugees from the Horn of Africa and Sudan in metropolitan Melbourne', *Australasian Review of African Studies*, Vol.30, No.2, p.166-67

<sup>584</sup> See for example Australian Human Rights Commission, 2010a, op.cit.; Dhanji, 2009, op.cit; Shakespeare-Finch & Wickham, 2010, op.cit.

<sup>585</sup> Australian Human Rights Commission, 2010a, op.cit., p.13

<sup>586</sup> Carrington & Marshall, 2007, op.cit., p.147

But if government allowed us to bring, in Kakuma refugee camp now people are still, hard life there... Yea, difficult life, difficult life. So sometimes they try to ring us here and say help me and we may have plenty of food but we don't have money. We eat, government give us money, you pay your rent and your bills and you eat. We eat really, yea every day we have plenty of food but no money. If they come here, will be good... Yea but over there very hard to get food, the food we get here. It's good here. (Lillian)

Lillian expressed guilt over having vast amounts of food in Australia, while her family in Kakuma went hungry. She highlighted that because there is not enough money to send back to buy food, the only way to give their families a better life is to bring them to Australia.

While most participants attempted to bring their families to Australia through the Immigration Department, almost half of the cases were unsuccessful, or they took years to be finalised. This creates a problem for participants, as their families in Africa rely on their help. In some cases, bringing their families to Australia is the only way to ensure their safety, and rejection by the Immigration Department can have devastating effects on their families:

And then I tried to send, you know propose my uncle, my father's youngest sibling, and they sent me a letter and said there was a rejection. Now that uncle of mine passed away which is really bad. (Jok)

Participants also identified the lack of information provided by the Immigration Department as a problem. When their applications were rejected, no reason was given for the rejection, and they were not advised what criteria they did not meet or how they can improve their future applications.

I tried bringing my mum and my sister, but unfortunately they didn't make it because they said that this form was not successful and I wasn't told what the problem is. (Garang)

Some participants also noted that the rejection happened right at the end, when everything else had been finalised. This caused distress to the families, as they were led to believe they would be reunited right up until the rejection at the end.

Yea we had, like I had a cousin who I put in the form for, but got rejected. Actually it happened, like he went for the interviews, he did the medical check, passed everything. But at the last moment it came to the issuing of the visa, they rejected him. So I tried to follow that up, but they told me there is nothing they can do. So the whole thing died just like that, they just decided to give up. (Gabriel)

Yea, it happened once to my uncle that was about to come here. Yea he did like the medical interview, just waiting for the result. And then at the last minute they said 'Oh, they can't come'. Yea, I don't know what exactly happened, I think it happened between the Immigration officer so don't know why, they didn't speak to somebody or, I don't know what happened. (Abel)

While participants expressed frustration with this process, this was not at the rejection itself, but the lack of reasoning and explanation given for it. Participants expressed the wish to be advised of the reasons for the rejections, so that they can rectify the faults and not waste money on future claims.

They just said his application has been refused, but they don't tell people that he was rejected because of this, this and that. (Achan)

I would want to know the reason but I could not get anyone. (David)

I think there are a lot of issues with the Immigration Department... they are actually told not to say the reason, they are clearly told don't say the reason. If they said why you just smile, 'As a secretary representative or delegate I use my responsibility to do what is right for Australia', and that's it... In other departments if you go people talk to you a bit nicely, Immigration is tough. And when you want to ask more information they say 'Look, go to your Immigration agent, we are not allowed by law to tell you what issues are there'. So that is a big problem, yea. (Lam)

However, while they expressed the wish to be advised of the reasons for the rejections, most participants understood that there is only a limited intake and rejections are common.

So I can't blame anyone because there are a lot of people from the Middle East and depends on how you frame your application. Maybe it's related to what they want. (David)

Yea, somehow it can be unfair, but look in the other way around it can be fair. Seeing it is their job, they have to judge who they actually, I mean who they are going to allow to come here. (Joseph)

But I don't know, maybe because Peace Agreement come out in Sudan that is why they don't allow any [Sudanese] refugees to come here. (Lillian)

Participants also stressed the importance of bringing families together, especially reuniting children with their parents. Family is an important aspect of enhancing African migrants'

integration and participation in social, economic and political life.<sup>587</sup> It took Bol over five years to bring his own children to Australia, even though he was an Australian citizen for half that time. He expressed the significance of reuniting the dependents with their providers, as otherwise they have nobody to look after them:

[Criteria], that's a general word, but to me is to have somebody who is in Australia, especially for kids. They are my biological children, how can they not meet the criteria to come here when their father is here as a citizen of this country? You know, I got my citizenship, since 2006. At least, they would have looked at it and know that I am a citizen. Yea but, it didn't happen because every year I was applying at least twice, that is early January or late December, around mid of the year, May I would get a rejection, immediately I would reapply. Just the same way since 2003 to 2008. Yea, I was even frustrated, when I submitted my last form I prayed and talked to God that 'God, this is the last form I am applying for, if this does not succeed, then I'm not going to apply'. But God heard my prayers and it succeeded, and that is why they are here. From this, this is just a small number of the people who I'm looking after, I am looking after 36 people including those who are here, the six of them. So 30 are remaining, and I know that it will be a hard time for me to start from zero again to bring them here...Yea, there is a difference between a cousin and your own children, you know? There is a big difference, but yea. What do you do? Rules are rules, regulations are regulations, you have to abide by the regulations. (Bol)

Several participants were aware of and accessed immigration and legal aid services. However, they explained that these services were costly and not always effective:

Yea I went to Legal Aid two years ago because I was trying to get my husband here... Yes, for the first time he was rejected. And then I went to the private legals and they said you have to pay this amount so that he can get here within six months. But then I applied in 2007, until today, still there. (Achan)

Yea, since 2003 when I came, I started applying, applying, applying, all my applications were being rejected, until 2008 that the case was successful. Yea, I think it was successful because I was working through Legal Aid, and I had to pay a lot of money for that and other things, that is why it was successful. (Bol)

These immigration experiences present an example of the everyday problems faced by participants, which can have negative effects on their social and health wellbeing. The effect of the immigration regulations can be seen as separating families. The lengthy process of

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<sup>587</sup> Australian Human Rights Commission, 2010b, op.cit., p.202

immigration can cause families like Bol's to be without a primary caregiver for a long period of time, in turn causing pressure and anxiety for Bol. However, despite this struggle, participants were still committed to and respectful of Australian law, asking for more communication rather than a change in the process.

## **6.6 EXPERIENCES OF DISCRIMINATION**

Five participants reported being directly discriminated against due to their race by a stranger. This discrimination came mainly in the form of verbal abuse. For example, Abraham noted being discriminated against by a bus driver, who would often verbally abuse and shout at him because of his race:

He was very aggressive, very aggressive with us. And there were two drivers on our site, and I came to learn that they, they hate the Africans. They hate the black people.

Joseph was also verbally abused by an elderly lady while getting on a bus:

So what she did, she turned around, she said to me 'oh you black bastard'. I didn't say anything, then she actually spat on me... I was so upset, I couldn't even get into the bus.

In both these cases, racial discrimination was evident and completely unprovoked.

While both these participants noted feeling upset and hurt over the comments, they understood that perpetrators did not represent the views of all other people living in Australia. They, like other participants interviewed, understood that discrimination is likely to happen and that some people may not be happy about African immigration to Australia.

Maybe they have been given the wrong information about the Africans. When they see you like this, they do not know what type of person you are. They just know that you are from Africa, you are bad... But we have no problem with them. Because for us we can not hate somebody for nothing, if he did not do bad to you. And I can not hate you because your sister did me bad, or someone from your people. (Abraham)

However, participants drew a line regarding the type of discrimination they considered acceptable.



Sometimes you have to find the courage to just forget about it and move on, there is nothing that you can do. So long as it is not someone like a political figure that is saying those things, I don't have a problem, because every country has bad people and good people. (Nyankol)

Most participants were upset by the former Immigration Minister Kevin Andrew's comments that Sudanese people are not integrating and that their intake should be cut.

I was very upset with the comment made by one of the ministers from the immigration office... I mean generally it's not good to make like general comments like that to the media because they will make other people who are living even with the people here, I mean with the Africans or with the Sudanese here to feel, to feel that some way they are also failing. (Atem)

All participants who raised discussion about the Minister's comments expressed that these comments were detrimental to the Sudanese community. Announcing to the rest of Australia that Sudanese people have trouble integrating, are causing problems and their numbers should be cut, causes the rest of society to view Sudanese people negatively and with little respect. This is illustrated by Atem's comments on how he believed the Australian community views African people:

Most of the Australians or most of the people here they really look at it as an embarrassment to go and ask an African fellow who is here, doesn't matter how long you have been here, doesn't matter what you know, doesn't matter what you have, they don't feel good to go and ask even the mere time, what time it is.

#### 6.6.1 Discrimination by police

Ten participants reported experiencing discrimination or unfair treatment by a police officer. Atem, for example, noted being pulled over and asked whether the car he was driving was his. He believed this question to be discriminatory, suggesting that the car did not belong to him and he should not have been driving it. When asked why he thought the police officer might have done this, Atem answered:

I just thought maybe he saw that I'm a black person in the car and he has to stop me.

Bol strongly suggested that the police looked negatively upon all Sudanese people because of a small number of Sudanese youth who get into trouble with the law, which he believed to be

unfair. This in turn causes the police to treat all Sudanese with less respect than other members of society.

Actually, what I'm thinking of is because of a lot of problems especially with the young boys, Africans. But it's not all of us who are committing the crimes. They are taking Africans as all that, since they are Africans, once an African does something, it means the whole community is doing it. Which is wrong, to me it's totally wrong... Once they see you to be a black man, automatically it's you, your community is doing this, that means they are all Sudanese [doing it].

Jok, who believed he was pulled over and unfairly treated by police on his way to Victoria, supported this view. When asked whether he believed he was being unfairly treated due to his race, he responded:

At the end of the day that's what you've got to believe. I like to believe that you know the system is fair, but like you know those enforcing the system sometimes are not fair because you are black or whatever, they are always going to relate that and directly or indirectly discriminate against you. So, it's, there are a few people that actually do the practice, like you know discrimination, but the system is trying to be fair, it's just the people enforcing it that aren't.

Other participants reported minor incidents with the police where they believed they were being mistreated. For example, Achan went to the police station to report abuse, and to ask for assistance. She approached the police as she had no one else to turn to, and because she believed that if anyone can help her with such a situation it would be the police. The police officer at the station told her there is nothing they can do however. Achan then, with the help of a friend, went back to the police station and questioned why the female police officer would not provide help:

But then she was asked why can't she help me, but she complained that because when I went there, I don't even know how to speak English. And they sent another police officer to interview me if I can speak or not. They found that at least I can speak, they understand what I was saying.

In this case, Achan believed she was being unfairly treated by a police officer as she refused to provide the necessary help, which left her and her children in danger of abuse.

Policing has been identified as one of the most significant issues confronting African youth in Australia, both in the interviews as well as other Australian studies.<sup>588</sup> An alarming rate of almost half the participants in this study believed they were racially discriminated against by a police officer. This finding is also presented by the Australian Human Rights Commission, who found '[y]oung African Australians gave examples of being regularly stopped and questioned by police in public, police asking them to move on without any legitimate reason and racist comments being made to them by police officers.'<sup>589</sup> However, in most cases participants did not report the discrimination nor take any other action because they felt that nothing could be done to resolve that problem. The Australian Human Rights Commission reports additional reasons for non-reporting, such as a fear of authorities and a fear of being seen to make trouble, as well as the lack of confidence that the matter would be properly investigated.<sup>590</sup>

The experiences of discrimination, especially in the hands of police, cause serious, yet common and embedded everyday problems for participants and the South Sudanese community in general. These experiences cause further social exclusion for the communities, who are already vulnerable and disadvantaged. The Australian police should be seen as problems solvers, rather than problems causers. The negative perceptions of police caused by first or second hand experiences of discrimination can result in participants not trusting or accessing police services. This fear and powerlessness prevent South Sudanese communities from accessing services, and acts as a significant structural barrier to access to justice.

## **6.7 RESPONDING TO LEGAL PROBLEMS**

Participants responded to legal problems in a range of ways. Most took no action to resolve their problems, while some accessed legal services and/or courts and lawyers. For example, Atem who was told by his landlord that he cannot leave the rental property, was able to say to his landlord 'it's not up to you to permit us to leave' (although he did wait the longer period

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<sup>588</sup> For a more detailed discussion see Smith & Reside, 2010, op.cit.

<sup>589</sup> Australian Human Rights Commission, 2010a, op.cit., p.29

<sup>590</sup> Ibid., p.31

the landlord requested). Participants were most likely to access services for breaches of road rules such as road accidents as illustrated in Table 6.2 below. This consisted mainly of filing police reports and obliging to a court summons. The least common problems the participants took action for was unfair treatment and discrimination and discrimination by police.

Table 6.2: Number of participants who took action for particular problems

Problems	Numbers	Percentage
Tenancy issues	10	62%
Workplace issues	3	27%
Driving issues	11	73%
Immigration problems	4	40%
Unfair treatment/discrimination	1	14%
Discrimination by police	1	10%
Attended court	7	32%
Contact with police	8	36%
Sought legal advice	4	18%

Out of the ten participants who felt that they had experienced discrimination or unfair treatment by a police officer, only one took action to resolve this problem. Although not in the form of a written report, Gabriel complained about the behaviour of a police officer. Gabriel went to the police station to get a police clearance for a work placement, and became upset when the police officer suggested that he was going to cause trouble because most African people cause trouble. He felt angry at this statement, and reported it to the officer in charge:

And then I told him ‘don’t ever do that, because you will get yourself into trouble, because if I want I can write your number, the time you said that, these things to me, then send it forward and then you can even be stood down’. So he was really apologetic and we stopped there, so just said that’s enough.

However, it must be noted here that Gabriel is an educated man who was undertaking post-graduate university study and was aware of his rights. Most other participants were unaware of possible avenues of reporting police discrimination, or if aware of police reporting, did not know how to go about doing this. The few participants who were aware felt disempowered in this situation, noting that nothing can be done to prevent his type of behaviour:

Well, one thing is I don't know how to do that. And the second thing is I myself don't believe that there could be anything better that can be done if I was going to report it. (Biel)

This creates a problem of access to justice for this group, as their rights are being breached while they are unable to access the necessary mechanisms to resolve this issue. Improving awareness and education in this situation would not address the underlying powerlessness participants felt when faced with police discrimination.

In cases where participants did not take any action to resolve the problem, they listed reasons such as 'what is the point?' or 'nothing could be done'. For example, Deng had his bike stolen and did not report it to the police. He stated:

But why is it necessary to report it to the police and yet the police will not be able to get access of getting it back? What is the goodness of it reporting yet you don't get it? That is one of the issues to us that fail us not to take our issue ahead.

This type of response was the most common reason given for inaction, suggesting low levels of confidence and empowerment in resolving legal issues.

When asked what services they were aware of to help them with their legal problems, participants gave three main answers; legal aid, police, and none. Several participants knew they could use legal aid if they needed advice or assistance with a legal problem:

Legal aid is one. Through that I can get a lawyer. (Gabriel)

I know about the legal aid, I think it's the office on Wakefield Street. And apart from that I'm not really sure. (Jacob)

I know nothing except the Legal Services Commission. And I know that it doesn't deal with anyone who is even working. If you are working, they don't deal with you. (Lam)

While these participants were aware that they could access legal aid for advice and assistance, most never had and did not know how or when they needed to. They had simply been told, either by other service providers or friends and family members, that these services exist. Some were only aware of legal aid as a possible service, as Biel outlined:

Well I think I would go to legal aid and if they can help. But if they can't help well there is no other alternative. There is no other way that I know I would go to.

When asked if aware of any services to help him throughout his before-mentioned problem with the neighbour, Atem responded:

Well, I really got confused, and I couldn't know exactly where to go because I have the belief that if you go to any other services, these services at the end will come back to the police. That was my own perception. And because the police are the peacekeepers, and the people who are really supposed to take the law seriously, and enforce it on people.

Most participants expected the police to respond to all their legal problems or direct them to a service that could do this:

The only thing I know maybe if I have a problem I can call the police. That's the only thing I know. (Peter)

Like you just go to the police I think, police can help you and you can find out more from them and they will tell you what to do. (Judy)

First of all I think police. Yea, police. And then the police will direct me to the law. (Abraham)

If I had a problem the first step I can take is to call the police. Then the police might transfer my case to the court. (Garang)

First I have to go to the police. And then the police have to take me, direct me which would be the right thing to do. (David)

Oh, the first thing is I would call the police. And then they are to direct me where to go, because with myself, I don't know where to go apart from going to the police. That's the only place I would have gone to if I had something, that's all. (Karl)

This is a somewhat unrealistic and unmet expectation, as police do not deal with all problems and cannot resolve all disputes. For example, as participants were largely unaware of the

distinction between civil and criminal legal matters,<sup>591</sup> they did not understand that the police may not be able to help with civil matters.

Most participants were unaware of services they could access to resolve their legal problems, reporting:

No, most people are not aware. The community is not aware about that. (David)

None, I'm not aware of any. Not really. (Khadija)

I don't know any services. I know only to go and lodge my form in Centrelink so I get my social security pay, social security money. That's what I know, and I know also to take the bus and go to city or shopping centre. (Deng)

Where would I go? I don't know... I'm not sure, I've never thought about it. But if there was a place that I knew then maybe I would think about it. Because as far as I'm concerned I don't. (Nyankol)

This ignorance of services available prevents participants from accessing services to resolve their problems, in turn leading them to dismiss their legal problems as a part of everyday normal life. The few participants who were aware of legal services often lacked knowledge and confidence to access services in order resolve their disputes:

Well, there wasn't enough help because one, we don't know who is the right person to be contacted, like to give us relevant advice. (Jacob)

So, it's more about identifying the services, most of us don't know which services are there. Up to now I don't know which services are there to help like, if a landlord has brought in some other problem, or if the tenant has a problem with the landlord, who to contact? It's a big problem, up to now... We don't know what the laws are. (Atem)

I didn't know of any other services that I could go for assistance. And again like that question, you know most of the Sudanese community, people when they have problems with the tenants or the landlords, neighbours, they don't know where to go for assistance. That's the thing. (Gabriel)

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<sup>591</sup> The effect of the differences between the two legal systems is discussed in more detail in the following chapter.

## 6.8 CONCLUSION

From these findings, it can be concluded that South Sudanese communities in Adelaide do in fact experience a number of problems. While some of these problems might not be seen as legal in that a legal resolution is sought, they often have legal consequences and are experienced in the shadow of the law. These everyday problems exist at what Sandefur calls the intersection of civil law and everyday adversity.<sup>592</sup> They are the many problems that people face in their daily lives that become part of everyday living. However, these problems can be just as important, if not more important to the people who experience them than their legal problems, as they affect their daily routines and can lead to further, more serious problems. As Currie stresses, the fact that these problems are so frequent as to be normal should be a cause for concern rather than dismissing them as everyday life problems.<sup>593</sup>

As these everyday problems occur outside the legal system, people who experience them do not generally access legal services in order to resolve them. Clarke and Forell argue that instead, disadvantaged groups in particular, are more likely to seek the help of non-legal services as a pathway to legal assistance. This is due to a number of reasons, including convenience and ignorance of other services, and also because ‘disadvantaged people prioritise their non-legal needs over their legal needs and it may be a non-legal worker who tells them that the problem they face is a legal one or has legal implications.’<sup>594</sup> This was a common theme in the present study, as participants did not recognise their problems as legal ones until they were informed otherwise, either by a friend, a service provider or by me.

These everyday legal problems often have an accumulative effect, where each problem results in the possibility of further, more serious problems. The larger the number of problems, the more likely people are to experience health and social issues that directly cause further

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<sup>592</sup> Sandefur, R.L., (2007), 'The Importance of Doing Nothing: Everyday problems and responses of inaction', in *Transforming Lives: Law and Social Process*, P. Pleasence, A. Buck and N.J. Balmer, The Stationary Office, Norwich, p.113

<sup>593</sup> Currie, 2009, op.cit., p.9

<sup>594</sup> Clarke, S. & Forell, S., (2007), *Pathways to Justice: the role of non-legal services*, Justice Issues, Paper 1, June 2007, Law and Justice Foundation of New South Wales, p.10



problems.<sup>595</sup> Numerous studies have also identified problem clusters, illustrating how problems interrelate and accumulate.<sup>596</sup> For example, Genn has identified an overlap between divorce, family and children related problems.<sup>597</sup> Pleasance *et al* also point out the family cluster, and further identify others, including a problem cluster involving homelessness, unfair police treatment and action being taken against the respondent.<sup>598</sup>

As a result of this accumulation, the experience of everyday problems can reproduce inequality.<sup>599</sup> Currie argues that social exclusion can be defined as what happens when multiple problems occur at the same time, and when there is a lack of effective means to deal with those problems.<sup>600</sup> Therefore, the existence of these problems and the lack of knowledge of their rights and obligations and ways to resolve those problems leads participants, who are already vulnerable groups in society, to be more socially excluded.

Buck *et al* argue that in order to deal with this problem and help people move out of experiences of social exclusion, suitable legal advice and assistance is crucial.<sup>601</sup> Clear information about rights and responsibilities and summary advice to deal with the problems would enable people to avoid the civil justice system.<sup>602</sup> Furthermore, Pleasance *et al* report that early and appropriate advice in relation to one problem is likely to prevent multiple problems, consequently preventing people from becoming more vulnerable to social exclusion.<sup>603</sup> If these problems are not dealt with, not only can they lead to further, more

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<sup>595</sup> Currie, 2009, *op.cit.*, p.36

<sup>596</sup> For example Pleasence, P., Balmer, N.J., Buck, A., O'Grady, A. & Genn, H., (2004), 'Multiple Justiciable Problems: Common clusters and their social and demographic indicators', *Journal of Empirical Legal Studies*, Vol.1, No.2; Genn, 1999, *op.cit.*; Genn & Paterson, 2001, *op.cit.*

<sup>597</sup> Genn, 1999, *op.cit.*

<sup>598</sup> Pleasence, *et al.*, 2004, *op.cit.*

<sup>599</sup> Sandefur, 2008, *op.cit.*, p.340

<sup>600</sup> Currie, A., (2006), 'A National Survey of the Civil Justice Problems of Low- and Moderate-Income Canadians: Incidence and patterns', *International Journal of the Legal Profession*, Vol.13, No.3, p.218

<sup>601</sup> Buck, A., Balmer, N.J. & Pleasence, P., (2005), 'Social Exclusion and Civil Law: Experience of civil justice problems among vulnerable groups', *Social Policy and Administration*, Vol.39, No.3, p.319

<sup>602</sup> Currie, 2006, *op.cit.*, p.238

<sup>603</sup> Pleasence, *et al.*, 2004, *op.cit.*, p.326

serious problems and marginalisation, they can also lead to a negative attitude and distrust towards the justice system.<sup>604</sup> For South Sudanese communities, who are already vulnerable in terms of access to justice and struggling to be included in the Australian society, these everyday problems and appropriate advice and assistance to deal with them are of high significance.

However, while clear information about rights and responsibilities and early advice can prevent further problems and address the lack of legal awareness, it does not address the structural barriers present. The South Sudanese community is a vulnerable group, who often fear and distrust legal officials. As a result, they often feel distanced from the legal system and unable to access justice. As Chapter Two has illustrated, providing information about available services is not likely to assist in overcoming this perception of powerlessness and inability to access legal justice.

A growing body of literature suggests that what is needed in order to address these problems of everyday life is a holistic approach that deals with all the problems, not just the legal aspects.<sup>605</sup> Assistance from their first point of contact enables people to 'escape from civil justice problems that might well act to entrench or even worsen their predicament.'<sup>606</sup> This approach views legal problems from the point of view of the people who actually experience them, identifies appropriate gatekeepers and ensures these non-legal services are able to assist address their legal problems.<sup>607</sup> The approach requires legal and non-legal services to work together to identify disadvantaged and marginalised people who are not accessing legal services.<sup>608</sup> In this way, Currie argues that access to justice services can play a role not only in alleviating legal problems, but also a broader range of social and health problems. As a result,

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<sup>604</sup> Currie, 2009, op.cit., p.36

<sup>605</sup> See for example Curran, L., (2005), 'Making Connections: The benefits of working holistically to resolve people's legal problems', *Murdoch University Electronic Journal of Law*, Vol.12, No.1; Buck, *et al.*, 2005, op.cit., p.320; Pleasence, *et al.*, 2004, op.cit; Sandefur, 2007, op.cit; Currie, 2009, op.cit.

<sup>606</sup> Buck, *et al.*, 2005, op.cit., p.320

<sup>607</sup> Melville, A. & Laing, K., (2010), 'Closing the Gate: Family lawyers as gatekeepers to a holistic service', *International Journal of Law in Context*, Vol.6, No.2, p.186; Currie, 2009, op.cit., p.37

<sup>608</sup> Curran, 2005, op.cit.

holistic access to justice services can assist in building an inclusive society, diminishing disadvantage and ‘assisting people without the means to do so themselves to resolve or avoid the problems that might limit their ability to enjoy the benefits that are the fundamental purposes of society.’<sup>609</sup>

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<sup>609</sup> Currie, 2009, *op.cit.*, p.38

# **CHAPTER 7**

## **BARRIERS TO ACCESS TO JUSTICE**

### **7.1 INTRODUCTION**

This chapter presents the barriers to access to justice participants and their communities face. Family law was identified as the most problematic area of access to justice. Changing gender and family roles often contribute to family conflict, resulting in violence and family breakdown. This chapter identifies women and youth as the most vulnerable group within the South Sudanese community in terms of access to justice. Due to the patriarchal nature of the South Sudanese culture and a number of social, economic and personal factors, South Sudanese battered women are likely to struggle to access services to escape violence. Furthermore, young people are challenged with conflicting roles and expectations of two cultures, negative media representations and police discrimination, while attempting to develop their own identities in a new environment.

The chapter also shows that while participants generally viewed the legal system as important and effective, they expressed a concern that the system is discriminatory and less effective for African refugee background communities. Participants highlighted a lack of knowledge and understanding of the law as a beneficial dispute resolution mechanism as the main barrier preventing access to the legal system. Interviewees also felt unable to access the system due to a lack of understanding of their legal rights and responsibilities. This resulted in a feeling of helplessness, leading participants to ignore problems, accepting them as part of everyday life.

### **7.2 FAMILY LAW PROBLEMS**

#### **7.2.1 Changing gender roles**

The most problematic area participants identified was family law. While this issue was not directly covered in the interviews, almost all participants presented it as a significant legal problem for the South Sudanese community.

I will say the Africans, 90 per cent have problems with their wives and kids, because of the law in this country. So I will say this law is hard to understand. (John)

Due to the differences between the law in Australia and Sudan or other African countries participants resided in, there are a number of misunderstandings when it comes to Australian family law. In Sudan, Kenya or Uganda, family law is not governed by formal law. Rather, family disputes are regulated and resolved within families and communities, applying customary dispute resolution processes. This difference causes confusion about family law, as people are likely to be unaware of the Australian laws and continue to handle family matters through customary processes:

Yea that will definitely affect the families, because they grow up there and they believe that when they come here they will still do what they are doing there. (Achan)

The main cause of family law problems are the changing roles of husbands and wives. In a South Sudanese family, the mother or the wife has a specific role, as Nyankol explained:

All you are supposed to do is get older and get married, and have children, and the man is basically responsible for you and you have no say whatsoever.

Participants expressed that South Sudanese women are expected to stay at home, have children and take care of the home, while the men work and provide for the family:

They stay at home and do housework, like collect wood, fetching water, cooking. But not the men, men just sit. If you cook food, you bring, men can eat, and you can come back and take the plate back. Men cannot cook or wash dishes in the house, no, not good. (Lillian)

I feel like in Sudan most women, because we come from a very traditional military regime, because it has been in war for many, many years. So I feel like the role of women is just so different, women are voiceless there...A woman is not supposed to be you know more smarter than men, or she is not meant to be more successful than men. (Nyankol)

When South Sudanese families arrive in Australia however, they are faced with a different way of life, and gender roles and expectations change. For example, women in Australia are given more opportunity to pursue a career or education, and are provided with social security payments for their families. These new opportunities can be seen as both very beneficial as well as quite detrimental for South Sudanese families. They are beneficial in that they provide

women with more rights and choices as to how they want to live their lives. Most female participants saw this as an advantage:

Here you have a right, here women have a right to do what they want to do. They have a right to pursue their career, they have a right to follow their dreams. You know, where back home their rights are very limited. (Khadija)

Because women are more outgoing now, like women can drive, women can you know make their own decisions, women can work if they want to. So that's a problem there, especially, like women can be more independent now, they don't rely, they are more self-sufficient in some areas, and most of them are seeking education. (Nyankol)

Yea, I found that women can feel confident because they are equal with the men. So you don't have that big trouble. In Uganda, women are always down, the men are up, the boss. (Achan)

However, while women might be growing more independent and pursuing new opportunities in Australia, this independence was seen by many interviewees to be harmful to the family. Most participants, including several women, suggested that the more independent the wife becomes, the more the family falls apart, as the traditional role of the wife and family is undermined. Access to education, employment and even social security payments in the woman's name can be seen to contribute to the downfall of the South Sudanese family in Australia:

A lot of women are trying to let their husbands go and be alone, and sometimes it's because that in Australia they know freedom, but we don't treat them bad... Like especially there are a lot of family breakdowns now in the Sudanese community. I'm not one of those who is married, but I have seen a lot of people suffering. They went through pain like how they married their wives, but when they come to Australia they just become singles and some go crazy sometimes, mental health and some other issues. (Garang)

We have a lot of divorces for no reason, we have like you know wives kicking husbands out of the house, which is something unheard of in the Sudanese community, it's usually the other way around. So yea, the problems like, there a lot of problems. (Jok)

This breakdown of families is often blamed on women, as they are the ones challenging the traditional roles, as Khadija explained:

Now they [women] are not doing what they are meant to be doing, because of what it is here. Yes so it's actually bringing problems rather than making it better. It's tricky.

Atem believed that the difference in the legal systems of South Sudan and Australia contributes to these problems – that the legal system in Australia is seen to support women, therefore providing them with more freedom and independence:

Ok, husbands and wives. We understand here that the law supports women. And ours in Sudan, the laws are there to guide women. You see the difference there? But entirely is based on the man. Two different things, two different environments, a lot of problems. That's why problems are happening, people tend to be even single mothers or single fathers because of that one.

From Atem's perspective, it is the Australian way of life that is actually creating problems for South Sudanese families, as the Australian law supports women's rights and encourages women to pursue their individual paths. Khadija explained how this can cause problems for the South Sudanese community:

Because a lot of women have realised their rights now, as a woman I'm supposed to do this and I wasn't allowed to do this. So even with the marriages there is a lot of problems now because of this culture, and the culture in Sudan is very different. In fact, they actually, the elders are actually blaming the Australian culture, because women are finding the Australian culture way, way better than what they had back in Sudan. I myself would rather live here.

### 7.2.2 Domestic violence

A more problematic area is the prevalence of violence against women in South Sudanese families. This problem stems from the cultural differences between family life in South Sudan and Australia, and the shift in power relations between men and women. The South Sudanese society is patriarchal, where women do not have many rights or protections. Therefore, violence against women is common.

But back in Uganda you don't [complain] because they can definitely do something to you because you break their rule. It's not the government rule, but their rule. (Achan)

This is especially so in families, as the man is the head of the household and makes the rules.

Men in Sudan they beat ladies. Beat them... But here is good. You can't abuse someone. (Lillian)

Yea, because in Australia husband loves his wife. In Sudan, if you talk to him too much, he fight woman. Why talk to me like this, you go and fight with woman. Just different, because men and women here, they love, I think no fighting your wife. Yea, different. (Mary)

The changing gender roles and the new opportunities for women can contribute to violence within the home, as it is quite common for the relationship between men and women to be threatened if women do not conform to their traditional roles. According to traditional South Sudanese culture, violence against women is acceptable as discipline for certain types of behaviour, but the use of excessive violence crosses the boundary to abuse.<sup>610</sup> Men often see violence as something necessary in order to keep their family intact. Garang, for example, told of his cousin's marital problems:

Then one day he came across, like she came across then she wanted to like fight this guy, and that guy fight her back. And that guy hurt that woman, he broke her arm. And then she went to the police. And if that was back home, they were going to tell the woman you are wrong rather than the man, you know because she started it. It wasn't his fault, it was her fault. But I think they misunderstand what is freedom.

The criminalisation of domestic violence in Australia creates a number of legal problems for South Sudanese communities. First, domestic violence can carry serious legal consequences. For newly arrived families who are unaware of the Australian family laws, the power of the state can be an unwelcoming shock. For example, men may be unaware of the fact that it is against the law to hit their wives, as they come from a system where domestic violence issues are kept within the family with no involvement from the police. Being caught beating their wife or children can result in criminal charges leading to imprisonment, as well as the removal of children from families. In some cases, being aware of the law and the legal consequences of such actions may prevent family violence. Therefore, the lack of awareness of family law can contribute to violence within the home and have detrimental legal consequences for South Sudanese community, indicating a need for targeted legal education.

However, legal education does not guarantee that the law will be followed once knowledge is acquired. Domestic violence is an issue of conflicting cultures whose expectations and management of family roles clash. South Sudanese men often see this new found freedom and power of their wives as a threat to their family and culture, and act according to tradition.

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<sup>610</sup> Elia, L., (2007), 'Fighting Gender-based Violence in South Sudan', *Forced Migration Review*, No.27; Jok, M.J., (1999), 'Militarization and Gender Violence in South Sudan', *Journal of Asian and African Studies*, Vol.34, No.4



Rather than viewing violence as a crime, they are likely to view it as a responsibility of a man as the head of the household.<sup>611</sup>

Like this family, family thing, it's not really good. You know they always come in and they say 'Oh he is violent against women, Australia says no', you know all this. But women, our women are the problem. (Garang)

Legal education about family law, therefore, would not address the underlying cultural beliefs on domestic violence within South Sudanese homes.

Although family violence was not specifically addressed in the interviews, based on the above comments and the South Sudanese culture of domestic violence, a number of issues arise. South Sudanese women experiencing domestic violence face several barriers accessing justice. These include many of the same barriers as other battered women, such as lack of empowerment and fear, as well as additional cultural barriers including the belief that domestic violence is a private issue and thus is to be resolved within the home. This is further complicated by the immigration process itself, as Bui explains:

Being members of minority groups because of their gender, class, and race/ethnicity, abused immigrant women have to adjust, economically and culturally, to life in a new country and, at the same time, deal with intimate violence in an unfamiliar social setting.<sup>612</sup>

Domestic violence is an accepted practice in South Sudanese culture, and it is likely that battered women's attitudes towards this violence are both shaped and shared by their community members. As a result, women may not get the message that domestic violence is wrong, and may be discouraged by other family members from seeking help.<sup>613</sup> Often, immigrant women do not know that domestic violence is a crime, or that social, legal and

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<sup>611</sup> For a more detailed discussion of family law problems, see Milos, D., (2011), 'South Sudanese Communities and Australian Family Law: A clash of systems', *Australasian Review of African Studies*, Vol.32, No.2

<sup>612</sup> Bui, H.N., (2003), 'Help-Seeking Behavior Among Abused Immigrant Women', *Violence Against Women*, Vol.9, No.2, p.235-36

<sup>613</sup> Erez, E. & Hartley, C.C., (2003), 'Battered Immigrant Women and the Legal System: A therapeutic jurisprudence perspective', *Western Criminology Review*, Vol.4, No.2, p.161

health services are available to assist in dealing with violent situations.<sup>614</sup> This lack of knowledge translates to a lack of empowerment, leading to the acceptance of domestic violence as an everyday problem.<sup>615</sup> In situations where battered immigrant women do know that domestic violence is a crime, they are often reluctant to call the police because they are afraid of the possible legal consequences for the husbands. Therefore, knowledge of legal repercussions can also serve as a barrier to access to justice for battered women.

Economic obstacles pose significant barriers preventing battered immigrant women from separating from their abuser.<sup>616</sup> South Sudanese women are often dependent on their husbands as their sole means of support, and lack the skills to attain employment. This is further complicated by the fact that a large number of South Sudanese women are illiterate and not proficient in English. Not only does their inability to read prevent them from understanding the information presented to them, but their language problems reinforce barriers to communicating effectively with helping agencies and potential employers. The lack of linguistic skills can therefore contribute to the isolation of immigrant women, reinforcing their dependence on the family.<sup>617</sup>

Growing up in a culture that emphasises collectivism over individualism, immigrant women act in the interests of other family members, including parents, siblings and children.<sup>618</sup> They are often reluctant to seek assistance for domestic violence due to the fear of being shunned by their families or ostracised by their community.<sup>619</sup> Furthermore, as members of a minority group, immigrant battered women are often reluctant to report abuse to the police due to the fear they will not be helped, or that their husbands would receive unfairly harsh treatment

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<sup>614</sup> Ibid., p.158

<sup>615</sup> Bui, 2003, op.cit., p.225

<sup>616</sup> Dutton, M.A., Orloff, L.E. & Aguilar Hass, G., (2000), 'Characteristics of Help-Seeking Behaviours, Resources and Service Needs of Battered Immigrant Latinas: Legal and policy implications', *Georgetown Journal of Poverty Law & Policy*, Vol.7, No.2, p.295

<sup>617</sup> Ibid., p.157

<sup>618</sup> Bui, 2003, op.cit., p.232

<sup>619</sup> Dutton, *et al.*, 2000, op.cit., p.158

because of racial discrimination by the police.<sup>620</sup> These factors create a sense of powerlessness for battered South Sudanese women, who accept domestic violence as an everyday, personal problem that is disconnected from the law.

### 7.2.3 Problems faced by youth

South Sudanese culture is very different to Australian culture, and the expectations of children within a family are also quite different. The South Sudanese household is run by the father, and children are to respect the parents, especially the father, and act according to custom. This custom conflicts with the way of life in Australia however, often causing tension between parents and children. For example:

A lot of young people now they don't live at home. In our culture, the only reason you can leave your parents' house is when you are married. Whether a boy or a girl, doesn't matter. You have to move out of the house once you get married, otherwise you stay with them. (Jok)

This is quite different in Australian culture, where young people are expected to leave their parents' house and build their own lives, often before they are married. In Australian culture, children and young people are much more independent than children and young people in South Sudan. That is, they are provided with education and employment opportunities, social security payments and assistance with accommodation.

So children are not really dependent on their parents, and because they are not really dependent on their parents, they feel this power, certain power over them. And this is creating a problem in the Sudanese community. (Jok)

Furthermore, as young people acculturate and gain language skills faster, they are often expected to take on additional responsibilities within their families, such as interpreting and representing their families.<sup>621</sup> These changing expectations can often lead to intergenerational

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<sup>620</sup> Bui, 2003, op.cit., p.227. See also Dutton, *et al.*, 2000, op.cit., p.158

<sup>621</sup> Francis, S. & Cornfoot, S., (2007), *Multicultural Youth in Australia: Settlement and transition*, Australian Research Alliance for Children & Youth, p.16

conflict and violence.<sup>622</sup> Much like the changing gender roles, changing familial roles and increased rights of children contribute to problems within the South Sudanese family. Shakespeare-Finch and Wickham, for example, found that '[p]arents expressed concern about losing control of their children, and experienced a sense of impotence due to the protection of children's rights by the Australian government.'<sup>623</sup> Disputes between parents and children can lead to violence in the home, as the traditional way of teaching children a lesson is to hit them:

Because back in Sudan if you find a child doing a stupid thing, you just use corporal punishment. Like you cane them, and that's the end of the story. If that child goes to the mother and tries to complain that you caned him or her, she is going to get another beating for like telling tales. (Jok)

Even one bad thing about life here, our children the young ones they go to schools, they get told call the police triple zero. Then they are like 'I'll call the police, I'll call the police'. Like if our children grow up in a bad way, rather than good way, it's because they always know triple zero. But if they get a smack, then they will learn. (Garang)

These disputes between parents and children can lead to significant legal problems for the South Sudanese families if the police are involved.

And when the police comes and as a parent you are trying to make rules and teach your child the way you were brought up. Police says you know, it's against the law. Otherwise you are going to have social services come take your children. And for that I think it is hard for the Sudanese community. (Nyankol)

There is a general lack of awareness of child protection policies and procedures within the South Sudanese community, as well as the legal system's conceptualisations of child abuse.<sup>624</sup> This lack of knowledge creates a sense of helplessness within the community when child protection services intervene, as families are unaware of their rights and processes of correcting the situation.

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<sup>622</sup> Centre for Multicultural Youth Issues, (2006), *Information Sheet: Refugee Young People and Resettlement*, No.14

<sup>623</sup> Shakespeare-Finch & Wickham, 2010, op.cit., p.36

<sup>624</sup> Australian Human Rights Commission, 2010a, op.cit., p.32-33

The transition into adulthood is also a difficult process for most young people. For South Sudanese young people, this process of identity formation is complicated by the competing values of their communities and those of their peers in their new country, their past experiences of trauma and the practical adjustment of settling into a new country.<sup>625</sup> For example, refugee young people must negotiate employment and education pathways, a new language, make new friends, learn to navigate new and complex social systems, while also negotiating individual, family and community expectations.<sup>626</sup> Jok explained:

I believe like you know, the young generation are confused. For example, I myself, I left Sudan when I was little, came to Kenya, grew up in Kenya, I've adopted some cultures there because I lived in that country for ten years, I'm not going to walk away empty handed. And I came to Australia and I grew up some more. So now I have like three different cultures... Which is a lot of pressure.

The Sudanese elders think we are not, as the young ones, we are not following our culture, this is what we are supposed to do. Example, drinking is the issue now in the Sudanese community because young men and women are not supposed to drink, you are only supposed to drink after you are married. But everyone has broken that rule except some people anyway. So that's becoming a problem and they are blaming the Australian culture. (Khadija)

African youth also encounter numerous problems with the police, as was discussed in Chapter Four. The media have sensationalised reports of incidents involving anti-social or illegal activities.<sup>627</sup> Studies suggest that young African people are over-policed, with reports of police engaging in excessive questioning and extra-legal police violence.<sup>628</sup> Participants expressed concern about the discriminating police responses to groups of young Sudanese men:

When they see people like three black men together they gather, they are talking and laughing straight away they will come and intervene and bring some chaos to that case which is just harassment to people. And if you look at really what Australians are doing, Australian community in that situation. They sit down there, four or five, they talk, they chat, but no other intervention to be taken. But if they see that

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<sup>625</sup> Refugee Resettlement Advisory Council, (2002), *Strategy for Refugee Young People*, p.4

<sup>626</sup> Centre for Multicultural Youth Issues, 2006, op.cit.

<sup>627</sup> Refugee Resettlement Advisory Council, 2002, op.cit., p.10

<sup>628</sup> Smith & Reside, 2010, op.cit., p.9

Africans gather there or that Sudanese gather there, they will possibly put down that there is a problem, that chaos will come out. I don't know if it is the idea that people, that Sudanese are really counted as creating problems, or I don't know. So, a lot is happening if not to me, but to some of our community members that are experiencing also some harassment from the police and even from passers by. (Atem)

While the previous chapter identified a number of problems South Sudanese communities face in Australia, this chapter situates family law as arguably the most significant and problematic issue for the community. The South Sudanese culture is family and community orientated. When the family falls apart, the sense of community and collectivism is undermined. Changing gender and family roles, legal regulation of family matters and new freedoms and expectations all contribute to confusion and often cause conflict within South Sudanese families.

### **7.3 BARRIERS IDENTIFIED**

Participants identified a number of barriers that prevented them from accessing services and resolving their problems. Most participants recognised the importance of the legal system as a means to enforce their rights:

It's very important. Because law is very important... If there is no law, people will become like animals. There is chance. Just laws should be there, to make things, to make world go nicely. People should have their rights, otherwise we shall eat ourselves like fish in the sea. The strong one will eat the weak, you know. But law can make you strong. Can make the weak person strong. (Abraham)

However, although they saw the legal system as important, some did not believe that it was very effective, as John explained:

For Australians of course, but for us I don't think it's very effective. For those who understand. Because it is meant for them, not for us. We have to suffer. It will take us years to understand the law. So as time goes we may say this is effective, but at the moment I will say no, this is not effective. (John)

The legal system was seen as important and effective for people who know how to use it, but ineffective for newly arrived South Sudanese refugees, who are not aware of its processes yet. Participants recognised that although in theory everyone in Australia is presented with the same rights and opportunities, South Sudanese communities are at a disadvantage, as they do not know how to seize those opportunities.

In some ways it is effective, in the other ways it is not... But if you don't know how to use it, well you are really vulnerable. It means you can suffer easy anyway, because you don't really know how you could use it. (Biel)

When asked whether they feel comfortable accessing the legal system to their advantage, most participants said they did not. The main reason given for this was the short amount of time spent in Australia and the lack of experience with the legal system:

Too many people no I think. First of all they, as we said, they still need more education about the legal system, how to access it and how it works as well. They might not use it to their advantage. (Gabriel)

Participants identified the lack of legal education and lack of experience with the legal system as the main factors preventing them from feeling confident to access the legal system. However, most expressed that this lack of comfort comes from inexperience, and that in time most South Sudanese community members will learn to navigate the legal system and become comfortable doing so:

If I have many years here, I would feel comfortable. But because there is not many, and there is no way that I will get a lawyer, I don't feel comfortable at all. (Biel)

The lack of knowledge about the benefit of the legal system as a problem resolution process was also identified as a barrier, as Nyankol explained:

Had the law been more attractive to me, if I felt like law was there to provide any basic needs that I have, then probably I would access it more. But the thing is, you don't know, the law is there but if you don't know how does it benefit you, then you probably won't access it at all.

This is an important finding, as the lack of knowledge about the personal benefit of the legal system can prevent people from seeing the legal system as beneficial, in turn preventing them from accessing it altogether.

While several participants expressed the view that they could find and access services to help them with their legal problems in the future, they highlighted this as an issue within the community:

I think I could yea. But that doesn't mean that everyone can. Some people may find it harder than others... like maybe the elders in the community, the Sudanese community, they may not know English as you said, that could be very difficult. (Jacob)

Most participants were educated people, who had undertaken study at high school, TAFE or university. Therefore, it can be assumed that they have more legal knowledge than other people in the South Sudanese community. They expressed their concern that many people in the South Sudanese community, such as the older generation and those who have not had access to such education, do not have knowledge about the legal system and do not know how to access the services necessary. This leads to a lack of familiarity with the processes of accessing justice and resolving legal disputes, as Jok explained:

There are some other people in the community that lack the language skills and their only understanding of the laws they have is inherited laws, or passed down generation from generation laws, which are, some might be applicable here in Australia, but most of them are not regarded as laws in Australia, would be just regarded as common sense. And so they know nothing about the system, they know nothing about the services, so these are the people that are having the problems.

A number of barriers were identified when considering accessing lawyers to resolve legal problems. Some participants expressed that they would access a lawyer if the circumstances required one. In fact, one participant, Lam, who has been in Australia for over ten years and has gained the knowledge and experience necessary, has his own lawyer whom he regularly consults when needed:

Yes, I have a private lawyer and I always consult him, anything I want I just put it in writing, I just talk to him sometimes on the phone. I feel like I'm a purist, I'm forced to do that.

Others outlined the importance of a lawyer when dealing with legal issues, suggesting that they would prefer to access a lawyer if their circumstances permitted:

Yea, I would definitely. Yea, if I don't know whether this is right or not, what can happen in the future. (Abel)

That would be my preference, I would really, if I have a legal problem, it's always good to have someone like you know that knows the language better than you do to explain it. And I'm not talking like the English language, I'm talking about the legal language. Because some of the way that they say might be interpreted differently and to them is, something that could save your life. (Jok)



The remaining participants who suggested that they would access a lawyer said they would do so only if they really needed to, if their legal problem was serious enough to warrant legal action:

Depending on the severity of the problem. (Gabriel)

It depends what legal problem it is, but yea, if it's a big one yea I would. (Khadija)

Probably not straight away. I would see if I had to, if the severity required it. (Jacob)

Several participants felt that they would access a lawyer if they could, but were unaware of the process of seeking legal advice:

Yea, sometime I may require a lawyer, but I do not know how to do it. (Peter)

No. That's the thing, like you don't know all these things. It's difficult like I've been here since like over ten years and I don't know all these places. (Nyankol)

But I don't know how to get a lawyer. I don't know where to start to get a lawyer, I don't know. What I can do to get the next step to get a lawyer to represent me? I don't know that. (David)

These examples illustrate that even when participants recognise that they have a legal problem and need legal advice, they may be unable to locate and access the services necessary. This suggests that even if the individual barrier of ignorance is addressed, structural barriers to access to justice still remain. Bol recognised this vulnerability, and suggested that perhaps it is the police or some other services that the participants do know how to access that should educate and direct them to legal services and lawyers:

Yes, I would access a lawyer, if the police tells me to do so because I myself, though I am here, I don't know how to access a lawyer. I don't know. To be honest with you, I don't know. Unless if I get some directives from the police or somebody like you and so on.

A common barrier preventing participants from accessing lawyers and legal advice was the cost involved:

Yea, but lawyer, lawyers need a lot of money, so we have no way for this. Lawyers need a lot of money. It's not easy. (Abraham)

Yea you can access a lawyer, but the problem is because you're not used to how to get a lawyer because we haven't been in this problem before. And I understand the lawyer needs money... and I don't have money I don't know how will it work? (Judy)

Participants expressed the view that private lawyers are too expensive, therefore unattainable:

Myself? I don't think so, because I heard that legal help is expensive, you know to hire a lawyer you have to pay a thousand dollars and I am not working, so I would say I would rely on legal aid service. (John)

No, it's very hard. I can't afford anyway, based on the conditions that I am in. (Biel)

Yes, but the thing is I don't know if there is free, or you have to pay. You might be in that position but you might think maybe it is expensive and I couldn't afford. (Achan)

This results in a belief that lawyers and legal advice is unaffordable, leading to a perception that nothing can be done to resolve the participants' legal problems. It also leads to the perception that legal services are only available to those with financial resources, as Joseph explained:

Not at all... I mean, the whole idea of you know legal system. Look, if you come from this so called low socio-economic background, it will be hard for you to access these kinds of things, and I feel like I'm one of those you know. So why would I feel comfortable? So the law is like this; if you are rich, you get some information and you get more access to justice more and better than somebody who is not up to that level, you know what I mean?

Some participants were aware of free legal aid and legal advice services and, as highlighted in the previous chapter, some accessed these services. However, there was a general perception by the participants that legal aid addresses only the most basic services, and that people with money can access better services and can thus access more justice.<sup>629</sup>

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<sup>629</sup> Clients must meet the means and merit test to be eligible for Legal Aid funding in Australia. The means test takes into account income, assets and commercial activities and lifestyle, while the merit test assesses the reasonable prospect of success, the benefit of the case to the litigant and proper use of public funds. See Legal Services Commission of South Australia, (2012), 'Eligibility for Legal Aid', accessed 05/07/2012, from [http://www.lsc.sa.gov.au/cb\\_pages/practitioners\\_eligibility.php](http://www.lsc.sa.gov.au/cb_pages/practitioners_eligibility.php)

Participants further believed that they would not be treated fairly in court. The main reason given for this perception was their background, as Khadija explained:

Because of my background, I don't know. Because of where I came from. I don't know, there is this idea in Sudanese community that, this is what they believe, that if you and I were to go to court, let's say we had a fight, they believe that the judge will be fair on you because you have fair skin or something, and not fair on me because I am African. So they think there is discrimination. Maybe for that reason, yea. But if I'm not thinking as Sudanese, maybe I will get fair treatment, so. It depends... Yea the feeling that I might not, and I think that is why we ignore most of the things that happen as well, we don't contact the police or talk to anyone. There is no point like, you are not going to get any support so what is the point, it is better to just keep it inside.

Khadija described that community members often do not access the legal system or services available due to a feeling that they would not be treated fairly, and consequently ignore their legal problems.

Gabriel elaborated on this, explaining that this view might stem out of an indirect stereotyping in court, which leads to African people not being treated fairly:

This one is harder one. Generally you are supposed to get a fair hearing. But this one again raises this issue of maybe stereotyping you know. I guess they would like you going because blacks are always associated with convicts and stuff like that. Also depending on the perception of the magistrate. So for example the Indigenous, they never get fair trial because of their stereotyping going around. So it's hard, this one is hard to answer.

This view was supported by Bol, who also believed he had been unfairly treated by the courts due to his race. As a result, Bol lost confidence in the court process:

Because I know that if I go, everything will be turned on me... because I am a Sudanese and for the previous accident that has happened to me, I don't think there will be a legal system for me.

A further barrier to accessing the legal system identified was the complicated nature of the Australian legal system:

There are too many laws, there are just too many laws I suppose... So the law is complicated... for someone coming from a different country with different laws, or a country with no laws at all. (Deng)

I think the only thing like, it should make it simple for people to understand. The whole system is not bad, but how it works is the problem. If they can make it simple and straight forward, that would be good. Because without this system you know, it would be hard to control the people. It's good the system is there, but it should be more simple and easy to understand. (Gabriel)

The Australian legal system was described as confusing by participants, making it difficult to understand and to access. The court process especially was an area of concern, as participants did not understand the procedures.

Court itself, court in Australia, even Australian born people do not understand it at all. Don't. How you behave in court, where you sit, when you talk. I went to court more than four times here for some cases with the families, but every time I go I come out with nothing at all next time. If that can be simplified for any average person to know his or her position when they are in court, that would be good. (Lam)

#### **7.4 AWARENESS OF LEGAL RIGHTS AND RESPONSIBILITIES**

When asked whether they were aware of their legal responsibilities, only a few participants believed they had the relevant knowledge. Of those who had, most had undertaken some education in Australia, which they felt has provided them with the necessary knowledge, as explained by David:

Oh, when I came here I was not aware, but when I attended the Certificate IV at TAFE, now I know what to do.

Others who reported being aware of their legal responsibilities interpreted these responsibilities as the 'morally wrong things to do', rather than being aware of the 'legally wrong things to do':

I think so. I know the difference between right and wrong, for the most time. (Jacob)

Well the common sense would comment yes. Yea, it's just like if you know there is a fire, don't step in it, try to avoid it. I think I do. (Jok)

Even though these participants believed that they were aware of their legal responsibilities, this awareness is likely to be based on their understanding of right and wrong, rather than knowledge of the laws and legal system. This is problematic because moral norms differ from country to country. Therefore, assuming that the legally wrong things to do in Australia are

the morally wrong things they are aware of, can lead to breaches of the law without the realisation of doing so.

While some participants believed they were aware of their legal responsibilities, others expressed concern with their lack of knowledge. The main reason given for their lack of awareness of legal responsibilities was the short amount of time they had spent in Australia. Participants believed that with more time, they would get to know their responsibilities better:

Not really, not really. But soon I will know. (Peter)

Not all of it, because I am a bit further, I know what is fair and what is good. And what is good, so I may say I know my responsibility, I don't understand them fully, but with time I will understand all. (John)

Yea what we are taught we can follow. But not all. Because I am still new, this takes time. We are like a child. But some of them are familiar, yea. (Abraham)

This lack of information places participants in a vulnerable position, knowing that they do not possess enough knowledge, and feeling unable to obtain it:

Me, I don't know. I don't know. Because we don't have enough teaching about the law in Australia. (Deng)

I should say I have only half the knowledge. I didn't cover most of it, I am still vulnerable in some stuff. (Lam)

When asked whether they were aware of their legal rights in Australia, participants' responses were similar. A small number expressed an awareness of their legal rights, while most felt they did not know their legal rights. Those who reported being aware of their rights expressed that they knew only 'some', and only those important to them:

I know some, but not all. (Joseph)

For myself I do, for myself I do. (Peter)

Yea, I do feel like there are some things that I'm entitled to, but not all. Not all. (Bol)

The most important rights I know, but I can't say I know all my rights, because I haven't been in this country long enough. (Jok)

Others, on the other hand, explicitly reported not being aware of any of their legal rights in Australia, recognising their vulnerability:

No. I don't feel I have any idea. Very little. Yea. Very little. (John)

I don't know. And how should I know? (Deng)

No. Up to now, no. I'm nearly four years here, but I don't know anything yet. (Atem)

Not all of it, no. I don't know, I know nothing to be honest. (Lam)

Participants raised a number of issues regarding this lack of knowledge and awareness of legal rights. First, there was a perception that more emphasis is being placed on legal responsibilities than there is on legal rights. In other words, South Sudanese refugee communities are being provided with information on how to follow the law, rather than their entitlements by law and ways of receiving those entitlements, as Lam explained:

What I'm encountering all the time is that 80 per cent of information, legal information is about your responsibilities. But my rights are left for me to fight for, and it's just they waste resources to tell you your responsibilities. It's good, it's easy to understand your responsibilities. What is difficult is to understand your rights... It's not fair.

Lam believed this to be a problem, as after all the resources have been used up to educate South Sudanese communities on the law, they are still unaware of their legal rights and still unable to enforce those rights. Therefore, people are left to explore their legal rights on their own.

It is always you can't do this, you can't do this. It's not like 'this is your right and you are supposed to do it'. Unless you have to go outside and find out what your right is otherwise you will never be told what your right is. I don't know if it is happening to everyone, or is it just us, I just don't know. (Khadija)

Due to this lack of knowledge of legal rights, participants expressed that they not only have to fight for their rights, they have to fight for the knowledge and awareness of those rights. This, Jacob explained, can cause fear when presented with problems, as people are unaware of what they can and cannot legally do, and what their rights are:

Everyone, most people know 'this is wrong' or 'this is right', but they don't know like, they don't know what, say for example if they are approached with some scenario, what they can and cannot do, what their

rights are exactly. You know things like that. And... it's scary sometimes. Not knowing what your rights are and things like that.

Judy supported this view, expressing her concern about the lack of knowledge of legal rights within the South Sudanese community:

But sometimes it was like, because this is a new place most of the time you get scared or afraid, now how can I go and approach or say something because you don't know much about the country. We are still learning... They should be taught more on what their rights are, and then if the adviser is there and give them advice on what exactly to do.

Judy believed that it is the service providers or legal advisers who should support South Sudanese communities, providing them with the necessary assistance and education on their legal rights and entitlements.

## **7.5 CONCLUSION**

This chapter has provided some valuable new information on the legal needs of South Sudanese refugee communities in Australia. Family law problems were identified as the most problematic for the community. South Sudanese families are experiencing numerous difficulties as a result of the changing gender and family roles. The new roles of wives and mothers create tension within families, often leading to domestic violence. The disadvantage of women under customary law, coupled with community pressures, their lack of education and language skills and the fear of legal repercussions prevent women from accessing legal services to escape the violence.

South Sudanese youth also face additional difficulties. They are under pressure to conform to conflicting cultures, while struggling to establish their identity in a new environment. Young people's roles and expectations often clash with those of their new peers, creating intergenerational conflict. Young African people have also been the target of media and police profiling, creating a perception that they engage in criminal, gang related behaviour. This generates tension between the youth, their community and the police, creating additional pressures and barriers to access to justice for young people.

This chapter has also identified barriers participants faced when accessing justice. While participants viewed the Australian legal system as important in keeping order and helping the society function, they did not believe that it is as effective for them as it may be for other groups. Participants identified discrimination and stereotyping within the legal system, which results in a lack of confidence and trust in the legal system. Participants did not feel confident accessing the legal system and did not feel that they would be treated fairly throughout the process, and as a result avoided the legal system wherever possible. This means that when they experienced legal problems and knew that they could take some action, they generally did not proceed.

Further, this chapter has illustrated that participants were generally unaware of their legal rights and responsibilities in Australia. This is due to a number of factors, such as the perceived complexity of the legal system and law. Participants also compared their legal rights and responsibilities to the morally right and wrong things to do, assuming that the legally wrong things in Australia are the morally wrong things they are already aware of. This causes problems however, as what is seen to be morally right in South Sudan can be legally wrong in Australia, and this assumption may lead to ignorance of and problems with the law. Additionally, participants expressed that view that more emphasis is being placed on their legal responsibilities than their legal rights. They believed that they are being provided with information on how to follow the law, but not receiving enough information outlining their legal rights and entitlements and ways of enforcing those. This leaves them feeling disempowered, unable to protect themselves and unaware of available avenues and protections.



# CHAPTER 8

## LEGAL CONSCIOUSNESS

Legal consciousness affects...how people interpret events in their everyday lives. The law shapes what remedies respondents believe are possible and plausible, as well as respondents' understanding of these common everyday events as a troubling, yet unavoidable and unremediable, part of social life.<sup>630</sup>

### **8.1 INTRODUCTION**

From the previous two chapters, it is clear that South Sudanese refugee background communities in Australia face a number of legal problems and barriers to access to justice. It is also evident that South Sudanese communities rarely access legal services to resolve their problems. For a number of reasons, they seem to deal with their legal problems in different ways, in particular through recourse to customary legal norms. The aim of this chapter is to explain this inability and unwillingness to access legal services by exploring participants' understanding of law.

This chapter argues that participants' inability and unwillingness to access legal services is related to their legal consciousness. As expressed in the opening quote, legal consciousness affects how people interpret daily events and respond to problems. Participants' legal consciousness, that is 'the way [they] conceive of the 'natural' and normal way of doing things', is likely to be based on their prior experiences of the legal system.<sup>631</sup> Accordingly, this chapter explores the pre-arrival experiences of participants, arguing that they play a significant role in shaping participants' views of law and legal officials in Australia. Factors such as time spent in refugee camps and prior encounters with police all contribute to distrust of the legal system and government officials, in turn leading to underutilisation of the system.

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<sup>630</sup> Nielson, L.B., (2000), 'Situating Legal Consciousness: Experiences and attitudes of ordinary citizens about law and street harassment', *Law & Society Review*, Vol.34, No.4, p.1087

<sup>631</sup> Merry, S.E., (1990), *Getting Justice and Getting Even*, University of Chicago Press, Chicago, p.5

Furthermore, the chapter highlights the problem of legal pluralism, presenting the customary law process as one of the main reasons behind the inability and unwillingness to access the Australian legal system. It is shown that the South Sudanese communal dispute resolution process, which draws on customary legal norms, is still utilised by South Sudanese communities in Australia. This system is in itself problematic as it is based on a patriarchal system of power that supports human rights violations.

Finally, this chapter evaluates participants' recommendations on how best to meet the needs of South Sudanese refugee background communities. While participants highlighted the need for legal education, it is argued that education does not address the underlying cultural practices that act as structural barriers to access to justice. Participants further stressed the importance of involving communities and community leaders in all decision-making and dispute resolution. This is also problematic, as South Sudanese communities are based on a power hierarchy that leaves women and children in particular in a vulnerable position. Addressing problems through the community could therefore further marginalise less powerful, vulnerable groups. Finally, following the participants' recommendation that the formal legal system needs to work collaboratively with South Sudanese communities, this chapter explores some culturally appropriate responses to the legal needs identified.

## **8.2 LEGAL CONSCIOUSNESS**

The way people conceive of the natural and normal way of doing things is connected to their legal consciousness.<sup>632</sup> Legal consciousness refers to the way people think about law and understand how legal rules and regulations affect their day-to-day lives.<sup>633</sup> Although law may not always directly influence peoples' lives or decisions, the previous chapters have shown how everyday problems can be connected to or result in problems with the law. Nielson argues that 'ideas about law, both conscious and unconscious, shape how people make sense of such interactions, what types of speech they consider problematic, and what remedies or

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<sup>632</sup> Ibid.

<sup>633</sup> Nielson, 2000, op.cit., p.1058

responses they believe are possible.’<sup>634</sup> Furthermore, legal consciousness also refers to how people do not think about the law, that is the presumptions they have about the law that sometimes get taken for granted.<sup>635</sup>

It is within legal consciousness research that the response to participants’ problems can be situated. Legal consciousness research seeks to examine the role of law in constructing understandings, affecting actions and shaping various aspects of social life.<sup>636</sup> The focus is on subjective experience of law, rather than law and its effects on society.<sup>637</sup> Ethnographic studies of legal consciousness illustrate that people interpret and respond to events in different, culturally specific ways, as Silbey explains:

The issues that might give rise to disputes and legal claims are described as cultural events, evolving within a framework of rules about what is the normal or moral way to act, what kind of wrongs warrant action, and what kinds of remedies are acceptable and appropriate.<sup>638</sup>

When measuring legal consciousness, Ewick and Silbey situate people as either before the law, with the law or against the law. These categories are used as a cultural toolkit from which people’s understandings of law are constructed.<sup>639</sup> People ‘before the law’ view the law as a distinctive, authoritative and formal hierarchical system that is separate and superior to everyday social life. People ‘with the law’ view the law as a system of rules that are part of everyday life, and that can be changed and manipulated to benefit them if the game is played correctly. Finally, people ‘against the law’ view the law as opposition to their interests, often finding themselves up against the law, wanting to resist or fight it.<sup>640</sup> These positions influence the way people understand and respond to legal problems. For example, a person

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<sup>634</sup> Ibid., p.1056

<sup>635</sup> Ibid., p.1059

<sup>636</sup> Ibid.

<sup>637</sup> Cowan, D., (2004), 'Legal Consciousness: Some observations', *The Modern Law Review*, Vol.67, No.6, p.929

<sup>638</sup> Silbey, S.S., (2005), 'After Legal Consciousness', *Annual Review of Law and Social Science*, Vol.1, p.399

<sup>639</sup> Ibid., p.349

<sup>640</sup> Ewick, P. & Silbey, S.S., (1998), *The Common Place of Law: Stories from everyday life*, University of Chicago Press, Chicago

who is ‘with the law’ is more likely to seek legal assistance than a person ‘before the law’, as they feel more empowered and connected to the law.

### **8.3 PARTICIPANTS’ UNDERSTANDING OF LAW**

This section explores the participants’ understanding of law, seeking to situate their legal consciousness. It illustrates that due to unique pre-arrival experiences and the reliance on customary processes, participants have little knowledge and faith in the Australian formal legal system. This consequently places them ‘before the law’, as they feel separated from and intimidated by the legal system. Furthermore, this section critically analyses the customary dispute resolution processes, questioning the benefit of supporting a hierarchical system that is built on patriarchal values.

#### **8.3.1 Pre-arrival experiences**

Pre-arrival experiences play an important role in the way South Sudanese communities understand law. Participants portrayed the experience of fleeing their homes and spending time in refugee camps as a difficult time of uncertainty and instability. Gabriel highlighted the hardship his family endured on their journey to Uganda:

Yes, actually, it was like, we had 10 years in refugee camp in Uganda... we just ran, because there was war, we just ran, we just went on foot... There was no transport, so the only thing we have to run. And we don’t run through the main road, we run via the bush so that people don’t see you, so people just go on foot... the road is not straight forward, across the bush, crossing the river. We have to set fire during night hours, we set fire to sit around. So people prefer travelling at night, because during day time you are likely to meet the rebels and they kill you or capture you.

Being forced out of their homes and having to run from one country to another in order to stay alive is a traumatic process. Participants told similar stories about their escape from Sudan as those of the Lost Boys reported in Chapter Four:

In Ethiopia was five years, and in Kakuma refugee camp in Kenya 13 years... And we walked, we were walking, a lot of people walking to Ethiopia, three months night and day. So we arrived in Ethiopia... stayed there for about five years, and Ethiopian people they arguing by themselves causing problems between two governments... so they forced us again to escape to the border, we were walking too, maybe a month. (Lillian)

David, who was one of the Lost Boys, also described his journey as a very difficult one:

I spent time in Ethiopia, three years in Ethiopia [and 13 in Kakuma]... I'm part of the Lost Boys yea... When we left Ethiopia... we were more than 40,000. When some lost journey and some died... some were eaten by lions and wild animals. When we were running, some died, they drowned in the river because some people didn't know how to swim, so they died when we crossed the river. Because they were shooting at us and people were running, directly into the river, so people died with their backs like [carrying] some children. So most people died there, and a lot of young children, boys, Lost Boys that died mainly. We reached Kakuma with 16,000.

Not only did David lose most his family and along with another 40,000 people was forced to travel through desert land in order to find refuge, he also experienced 24,000 of his companions dying in front of him. Having to watch their friends and families being shot in the back, eaten by lions and drowning in rivers is a horrifying experience that can cause settlement difficulties after migration to Australia. Experiences of trauma have a potential to cause additional acculturation difficulties, including accessing health care, housing and making connections in the new country.<sup>641</sup> Traumatic experiences also affect the way people perceive the law and their choice to access services. Being forced to flee their country, South Sudanese refugee communities can feel unsettled in Australia, being fearful of the possibility of being forced to leave again.

Moreover, time spent in refugee camps can influence the way South Sudanese people understand and deal with legal problems. Almost 30 per cent of participants spent over 15 years in a refugee camp, with two participants living in a refugee camp since birth. This has major implications for access to justice in Australia, as refugee camps can be corrupt institutions, and their inhabitants are likely to be completely unaware of formal legal processes and legal rules. Biel and David explained:

And the thing is for a person like me I have never been to a place where there is a proper law, structured legal system. So that is a big problem for me, because I have spent most of my life in a refugee camp, and

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<sup>641</sup> For a more detailed discussion of the effects of traumatic pre-arrival experiences on refugees see Marlowe, 2009, op.cit; Schweitzer, R., Melville, F., Steel, Z. & Lacharez, P., (2006), 'Trauma, Post-Migration Living Difficulties, and Social Support as Predictors of Psychological Adjustment in Resettled Sudanese Refugees', *Australian and New Zealand Journal of Psychiatry*, Vol.40

in those places you don't have such things anyway. And you can't expect somebody to know things just like that.

Because people are not aware about how the law works here in Australia, more than a few people. Because they have been in refugee camp, and maybe the modern law one might be in Sudan maybe in the towns, but people who have been in refugee camps, all the ones who were born during war times, they don't know anything about this. Yea so, they will not know about this... In the refugee camp there is only local court, the judge sits here, and the other ones sit here... They are not aware about this, and this needs to be taught to people.

While refugee camps do have structured customary dispute resolution systems, these systems are often corrupted by severe power imbalance. As has been discussed in Chapter Four, these customary dispute resolution systems are not just, nor monitored by formal legal authorities in any way. Therefore, leaders and chiefs exercise arbitrary power, often resulting in excessive punishment and human rights violations. The experiences of corrupt legal proceedings and personnel is likely to translate into a lack of trust in the Australian legal system, and contribute to unwillingness to access legal services.

Another factor affecting participants' understanding of the legal system are preconceptions and prior experiences with officials. Due to the war and the unstable political history in Sudan, South Sudanese communities have negative experiences and views of the police, as well as other government officials. This can create a number of problems when accessing justice in Australia. First, participants highlighted that due to the negative experiences, it is common for South Sudanese to run away from police when approached:

In Sudan mostly when you see police coming to you it's something different. They will handle you, if you are mistaken or don't resist you will be beaten there and then, you will be taken to the police cell. But here it's different, so when they reach here, still that mentality is there that ok, if police stop me, they will do the same thing the Sudanese police are doing. They will stop you if you don't really resist, they will beat you and you will be taken to the prison. So I want to run out of, you know, kind of beating, all kind of harassment that the police can give to me. And that's why you can see or hear that some Sudanese that when they are stopped, they just over speed they drive away from the police. Or they escape the police because of that idea. But when they reach here, they, I don't think that there was really enough legal support or legal services given to them. (Atem)

When we arrive here obviously, there are two different approaches to the police there. Because once you are detained in some other African countries you are beaten up. When you see that person coming to Australia seeing the police, first thing they will do is run away. When they run away the police pursue

them as criminals. And this is the need to educate police on some of the cultural issues behind this and political issues behind this.

Lam further explained that there are other ways that South Sudanese people can get into trouble with the police:

Sometimes the Sudanese, or African when they speak to someone, adult, like if I'm 23 or 15 and I'm speaking with someone of 35 years I can't look that person in the eye. This is the cultural stuff. The police here, especially the police, when you talk to the police in Australia keeping your eyes off they will establish that you are lying.

The negative experiences with police and other officials in Sudan can also cause the South Sudanese community to be wary of and not trust the police:

But police no one really trusts the police. Sometime they can be very corrupt, sometimes they can be you know realistic. I don't really trust the police. (Garang)

If people do not trust the police, it is highly likely that they will not cooperate. Distrust in the police can also result in an unwillingness to seek assistance from the police or from other officials.

Corruption of government officials is another factor creating distrust in the Australia legal system:

I can say maybe corruption. Maybe there we had a bit of corruption in, not so much in the town are but a bit outside. (John)

Having experienced a corrupt legal system where people in power can be bribed can lead to a number of problems. First, it is likely that corruption reduces their faith in the legal system as a dispute resolution mechanism, lessening the likelihood of utilising the legal system in Australia. Second, this experience may lead to a belief that Australian government officials can also be bribed, which could have serious legal consequences if attempted.

The pre-arrival experiences discussed here are unique to South Sudanese communities who have fled their war torn country and spent long periods of time in refugee camps throughout Africa before migrating to Australia. The negative experiences of government, soldiers, police

and other officials form part of their legal consciousness, and affect the way they view and interpret law and respond to legal problems in Australia. The lack of trust in official processes and lack of power in a new country results in South Sudanese communities viewing the Australian law and legal system as a formal, authoritative body that is inaccessible and removed from daily lives. This can be compared to what Ewick and Silbey term ‘before the law’, believing in the justness of formal legal procedures, but not always the fairness of the outcomes or the process.<sup>642</sup>

### 8.3.2 Legal problems perceived as criminal problems

Several participants found it difficult to identify and understand legal problems due to the way that law is perceived in South Sudan. For example, most participants only associated ‘legal problems’ with ‘criminal problems’ during the interviews, and did not recognise problems with landlords or employers as legal problems. This contributes to the participants’ inability to access the legal system, as they are simply not aware that certain problems can be resolved through the legal system, or that they have legal rights in certain situations.

One major difficulty in identifying legal problems is the lack of distinction between criminal and civil problems under South Sudanese customary law. This creates confusion when legal problems arise in Australia, as people do not understand which section their problem belongs to and how they should go about resolving it. Lam explained:

People don’t understand what is the difference between civil law and criminal law, insurance policies, corporate law. No one understands all this, and there is no way for us to make this simplify so that we can look at one paper and know what we have to do. It’s just too complicated.

Another important difference affecting the understanding of law is self-reporting of crime in South Sudanese culture.

So you do a crime in some other country like Sudan maybe kill someone, you report yourself to someone else, say this is what I did. Then people start the process very quickly. (Lam)

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<sup>642</sup> Ewick & Silbey, 1998, op.cit., p.47



Due to the customary nature of the South Sudanese legal system, the community works together to resolve and prevent crime, and to restore order to society. Wrongdoers usually assist in this process by reporting their crimes and accepting their punishment. The Australian legal system does not work in this way however, and confessing to a crime before knowing one's rights can be a disadvantage. Lam pointed out:

So most Sudanese would tell someone from Australia when they do something wrong, it will not take more effort to discover that, that is a serious vulnerability and that is serious disadvantage. And it is now up to us to tell them, no no no, that is here, it is changed. This here could be your enemy. Maybe for those who are born here, that's fine. But for us who came here, that is a serious vulnerability for us. We expect this, and we expect them to confess if they do a crime... And the resolution what we have, what we do there, we don't really investigate more, no more investigation. Someone commit rape, they come and say look this is what I did. Now it is not the rule here anymore.

This is a significant difference in the legal systems and one that can have devastating consequences for South Sudanese communities. It is imperative that they understand that self-confession of crime may not be in their best interest, and that they are informed of their legal rights and the processes of dealing with such issues.

### 8.3.3 Customary processes

As has already been established, the Australian legal system is different to the South Sudanese customary dispute resolution process. These differences lead to problems understanding the Australian law and legal system, in turn leading to underutilisation of the system. Throughout the interviews it also became apparent that the customary nature of dispute resolution still operates within the South Sudanese communities in Australia today. Keeping in mind the many downfalls of the customary law system in meeting the human rights of its most vulnerable groups, this poses a significant issue of access to justice for South Sudanese communities. This section highlights the problems of the reliance on customary processes in Australia, presenting it as the main reason for the underutilisation of formal legal services.

It's not easy to understand, and that's why you see a lot of people, many African people they fail to follow the laws, particularly Sudanese. (Peter)

It's really difficult to understand. Because one, the country I come out of, or the country I grew up in, the laws are quite different from the laws here. When you have a problem from the family itself, you begin things there, somebody from the family will intervene. Not going to the law straight away. But here anything that happens there, goes straight away the police in which is the law. (Atem)

Because like, a lot of disputes are resolved within a family, because if I have a problem I try to solve it within my immediate family, and then I go to my extended family, then I go to the whole clan, and then I go to the whole tribe. So that's how it is normally. (Jok)

When participants arrive in Australia, it can be a shock to find that problems considered to be personal, such as family disputes, are made public and dealt with by police.

As the customary law is an oral custom following tradition, it is embedded into society and followed throughout the whole community. It creates a hierarchy of power starting in the household, where the head applies the law and keeps peace, as Jok explained:

In Sudan, there is law, but it's more like you know a family orientated thing, like you know at your own house, at your home, you've got your father, your mother, and then the first born. So there is always a rank... your position in your family.

This hierarchy creates an order within the society, where every person knows their place and whom they need to approach if they experience a problem. For many interviewees, there is sense of community and family within the system where people are seen to be involved in the process:

The community can come and gather around, listening, involving. The judge also sees the views of the people standing, so when he makes the decision he includes maybe what the people say... So he is also listening, acquiring, collecting something from people standing around. Taking into account the culture... like when the judge makes the decision he has to consider what the culture has to say sometimes. (David)

Therefore, people from South Sudan are used to resolving their disputes according to a hierarchical informal court structure based on culture and community consensus, rather than written law. This can cause difficulties when accessing legal services in Australia however. For example, in a domestic violence case, South Sudanese men may expect the judge to take into consideration their culture, which permits the smacking of children and women.

Participants, who recognised the importance of keeping their culture and acting according to it, demonstrated a reliance on customary practices:

In our community we solve, if it is a problem, we always approach elder people to solve the problem... they come together and the elder people they have to talk about it, and then bring people together. That's what we do all the time. (David)

There is an expectation and community pressure to use the customary dispute resolution processes instead of accessing the formal legal services. Jok explained that taking a problem between members of the South Sudanese community to the police would bring shame to the families and the community. Instead, as a member of the South Sudanese community he is obliged to act according to their rules and customs, which includes resolving issues within the families and communities:

If it had been a Caucasian, being a white Australian, I would have like you know taken the matter to the police and saying she is harassing me right? But in my culture I can't really do that. If I do that I bring shame to myself, to the family and they will be talking about it for years. I don't want that to happen. So I have to report it to the members of my family to go and talk to the members of her family so that the members of her family can convince her not to do that.

Community leaders in particular, see the use of customary law as an integral part of keeping the community together, and are still expected to hear disputes and apply fair and just outcomes in their communities. Lam explained:

It's our social mechanism of resolving things. We think it is much better than ending up with a resolution in court, one in jail and one fined or something, that brings back some hatred in the community. There are ways to do this, the best thing put in mind by the community is to make sure that the community remains stable. We are tribes and sections and groups, and especially the non-educated ones have too much expectation on us, to see that problem is solved. So if the heads are fighting, they will lose hope and that will affect them.

While the customary law system is easily accessible and based on community consensus, it suffers from many downfalls. The patriarchal and hierarchical nature of the system creates a sense of community that is dominated by the most powerful groups, while the minority groups, including women, children and small tribal communities remain voiceless. The fact that the system is based on community consensus, therefore, means that it is based on the values and opinions of powerful men, rather than those of a community as a whole.

Consequently, the very strengths of the system become its weaknesses.

As demonstrated throughout Chapter 3, South Sudan is made up of over 50 different tribal groups. These groups differ in size, custom and power, with the largest, most powerful groups sitting at the top of the hierarchy and holding most political power. Participants reported that this tribal group hierarchy is present within the South Sudanese community in Australia, where the most powerful groups act as representative of the South Sudanese community. Bol expressed concern with this, reporting that the less powerful communities in Australia are fearful to speak up against the groups in power, as there can be repercussions for these actions, for them and their families:

Because if they call the whole Sudanese community, the rest of us are afraid of saying a word in public. If they call us, nobody will talk. The chairman is from the [ruling community]. The majority are [from the ruling community]. When they are there, people are afraid of talking because once I talk in the public to them, they will note my name, send my name back home, and I'll never go there. My people there will be punished because of what I said here.

The less powerful communities, then, do not benefit from the customary system, as the system is based on the values of the most powerful group of men in the ruling community. This places more vulnerable groups in a position of disadvantage, feeling pressured to rely on but unable to access appropriate customary services, and afraid to access formal services due to the fear of community influences:

We are doomed, we are doomed, because there is no way that we can express our feelings to the governments. Once there is anything from the government to the community, it goes first to them you see. Because they are everywhere, it goes to them first. (Bol)

Participants further suggested that community leaders often exercise arbitrary power, oppressing the less powerful members in the community.

In, mostly in our communities, these people they are like government agencies or the other organisations, but there is no any other groups which are organised who watch on those ones say ombudsman or something like that. It's not there. So if the big people decided to damage you, they can. If you have got a problem with the leader, so he can use all his or hers means against you, and you have nowhere to go. Because, it's the eye of the government representative of the government of Australia. Whatever he will say, they will agree with that one. So, that one is the chance which has been created by most of our

people... And that is the common issue in our culture back home, and the entire continent of Africa.  
(Deng)

Deng was in disagreement with his guardian, who happened to be a good friend of the community leader. In this case, Deng believed he was being unfairly treated by the community leader, but felt helpless in the situation as the community leader was the only available avenue of resolving the dispute. He highlighted this as an important issue for the community, resulting in some community members becoming voiceless and helpless:

So this issue needs to be addressed by the Australian government so that if all the African communities has got some big people, it is supposed to have a different group, like ombudsman or watchman to see what the leaders of the communities are doing right, or they oppress the other ones. Because whenever you have someone in power, you always get the opposition. So they oppress the opposition. So, this is serious.

Deng believed that in order to overcome this problem of what he referred to as power abuse by the community leaders, the Australian government should recognise that this community hierarchy exists, and should monitor the leaders' actions and intentions.

Another major weakness of customary law is its patriarchal nature and blatant violations of human rights. As outlined in previous chapters, domestic violence is a common and serious problem in the South Sudanese community. It is accepted as a private issue, and women are discouraged from talking about violence within and especially outside their community. There is a tendency within the leadership of patriarchal communities to deflect domestic violence as an imposition of irrelevant Western agendas.<sup>643</sup> Leaders are quick to point out that only a small group of women disclose domestic violence, and they are considered to be the deviant and rebellious women within their community.<sup>644</sup>

The fact that domestic violence is considered a private family issue rather than a legal issue may prevent South Sudanese families from accessing any services, customary or formal.

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<sup>643</sup> Erez & Hartley, 2003, op.cit., p.157

<sup>644</sup> Erez, E., (2000), 'Immigration, Culture Conflict and Domestic Violence/Woman Battering', *Crime Prevention and Community Safety: An International Journal*, Vol.2

These practices continue to exist in Australian society, as they are seen as traditional, cultural practices that form part of the South Sudanese community. There is an assumption that African norms and values are incompatible with Western norms and values, and as such, require different systems.<sup>645</sup> Problems such as violence against women are seen as the responsibility of the state, and culture is often accepted an excuse for noncompliance.<sup>646</sup>

However, Merry argues that the idea of culture being seen as a problem for human rights and a barrier to women's equality stems from the general tendency to culturalise problems.<sup>647</sup> Culture consists of more than beliefs and values – it involves practices and habits, and is dependant on environmental and situational factors. Merry argues 'rather than viewing culture simply as an obstacle to change, a more dynamic understanding of culture recognises its capacity to innovate, appropriate, and create local practices.'<sup>648</sup> As such, it is not acceptable to dismiss human rights violations as cultural practices. The South Sudanese culture needs to adapt to changing factors in Australia, and new meanings need to be attributed to acceptable cultural practices. Human rights need to be translated into local terms and situated within cultural contexts of power and relationships.<sup>649</sup>

This section has explored the participants' understanding of law, situating the participants as 'before the law' as they feel separated from and intimidated by the legal system. It has illustrated that due to unique pre-arrival experiences and the reliance on customary processes, participants have little knowledge and faith in the Australian formal legal system. Instead, participants heavily rely on customary dispute resolution processes, which are based on uneven power relations and susceptible to human rights violations. This places them in a vulnerable position in terms of access to justice, as their cultural obligations discourage them from accessing formal legal services, while the utilisation of customary services further

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<sup>645</sup> Hellum, A., (2000), 'Human Rights and Gender Relations in Postcolonial Africa: Options and limits for the subjects of legal pluralism', *Law and Social Inquiry*, Vol.25, No.2, p.638

<sup>646</sup> Merry, S.E., (2006), *Human Rights and Gender Violence*, The University of Chicago Press, Chicago, p.5

<sup>647</sup> Merry, S.E., (2003), 'Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)', *Political and Legal Anthropology Review*, Vol.26, p.63

<sup>648</sup> Merry, 2006, op.cit., p.228

<sup>649</sup> Ibid., p.1

marginalise the most vulnerable groups. Therefore the existing legal mechanisms, both customary and formal, can be seen to create more disadvantage than they attempt to correct.

## **8.4 ADDRESSING LEGAL NEEDS**

Participants had a number of recommendations on how best to address legal needs within the South Sudanese community. This section explores some of these recommendations, analysing their effectiveness and suggesting some possible responses. It is important to keep in mind that most these recommendations came from powerful and educated men in the South Sudanese community. Furthermore, as family issues and power relations were not directly covered in the interviews, participants were unable to recommend ways of addressing the hierarchical and patriarchal nature of the South Sudanese community.

### **8.4.1 Legal education**

Most participants strongly believed in the importance of educating new arrivals about the Australian legal system and legal processes, especially on how to enforce and uphold rights:

But when they reach here, they, I don't think that there was really enough legal support or legal services given to them... There is a lot that needs to be done with the legal services or the legal procedures. (Atem)

Yea, but there are some other people in the community that lack the language skills and their own understanding of the laws they have is the inherited laws, or the passed down generation from generation laws, which are, some might be applicable here in Australia, but most of them are not regarded as laws in Australia, would be just regarded as common sense. And so they know nothing about the system, they know nothing about the services, so these are the people that are having the problems. (Jok)

The law is already there, but the people need to be taught to know what the law says, and also so that they will not be unfamiliar with the law. (David)

Participants further highlighted that this education should be focused on teaching people how to access legal services and assistance. This would ensure that each person could resolve legal disputes when needed.

Is for people, all people to be educated about their rights, and what their action may do to someone else. (Lam)

Most of the African community they don't know where to seek legal advice, where to go for assistance. There's actually much need for education about such things. Like through this research, the research you are doing is very very good. People can put in their thinking. (Gabriel)

When it comes to the law, I will say that how would you bring somebody here, who does not know anything about that country, and expect him to behave in the same way as a citizen of that country?... So if there is a better way they could have informed them a little bit like, educate them a little bit on laws before they settled in the country that would be really nice. Because you can't assume that somebody will know everything right from the start. (Biel)

Not knowing the laws or the fact that one has legal rights is a significant barrier preventing South Sudanese communities from accessing justice and resolving legal disputes. It is also something that, according to Deng, they cannot be expected to know when they come here – it is a service that the Australian service providers should be providing:

But that means that there is no child that is born yesterday and woke up today and stands up and walks today. That means the government of Australia and her agencies allow you to bear all the hardship of the situation so that all the problems that you get will be your teacher, that's what I've seen.

Yes we know the law exist, Australia is a different country and you have to follow those rules. And that's how it is. But as an immigrant or as a new arrival you are confused because you just came to a society that's totally different from, even if you are Asian or whatever it is. I feel like the government is obligated and has a responsibility to try and teach people the laws and try and help them, try to interpret. Interpret it and basically try to make people apply it, because you know the law exists, that's the law, but you don't know as person how you can either protect yourself from breaking the law or how to protect yourself from just being a good citizen. I think that is what we should do, so have services that can help new arrivals, like basically assimilate into society. (Nyankol)

There are a lot of things that are happening like when people arrive, training has to be given to them. More especially about the law. And after when they know about the law, this will give them at least an alarm that ok, things are happening like this. As you are here, you have to go with this. And I think most of the youths they end up maybe being called gangs even though they are not gangs, or their activities look into that, I mean the things that contribute to the media or the Australian community in general looking at African or Sudanese as people who are not integrating simply because when they reach, they are not given that kind of legal advice or legal services, so they have to venture everything they want. (Atem)

Legal education has the capacity to address lack of knowledge and understanding of Australian law. For example, an abusive husband who does not perceive domestic violence as illegal may benefit from an authoritative body bringing home that abusive behaviour will not



be tolerated, regardless of his cultural background.<sup>650</sup> However, legal education, by itself, cannot change the patriarchal nature of the customary system, nor address the deeply embedded cultural attitudes and structural barriers present. Some abusive husbands will continue to be abusive even after they learn of the laws and the consequences for breaching those laws, as abusive practices are part of their culture. As Merry states, 'because gender violence is deeply embedded in systems of kinship, religion, warfare, and nationalism, its prevention requires major social changes in communities, families, and nations.'<sup>651</sup> Powerful cultural groups often resist these changes in support of tradition and culture. Therefore, in order to respond to the need within the South Sudanese communities, legal services need to provide more than legal education.

#### 8.4.2 Community involvement

Participants strongly suggested that the only way to ensure that South Sudanese people understand the information that is being presented to them is by involving communities:

For instance like the Sudanese, these services, if the government made the services without like involving Sudanese in it, it would be hard for them to understand those services... But if a government provided services with the help of Sudanese community themselves, I'm pretty sure those services are going to have a lot of effect on the community itself, and it could actually achieve those objects and purposes. So, yea consult the Sudanese community regardless of what the services the government wants to provide them with, and then they will know where to go. (Jok)

The Human Rights Commission found that community education is the most effective approach for preventing family disputes, and collaboration between service providers and leaders is essential in developing effective services.<sup>652</sup> However, participants stressed the fact the most legal education that is presented to South Sudanese people is not effective, as only few people attend and those who do attend do not understand the information that is being presented. In order to overcome this, legal education should be provided through community

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<sup>650</sup> Erez & Hartley, 2003, op.cit., p.165

<sup>651</sup> Merry, 2006, op.cit., p.2

<sup>652</sup> Australian Human Rights Commission, 2010a, op.cit., p.33

groups by allowing the community leaders to organise their communities and help provide this information.

I think it would be good if we do it through some communities. Like the, get a list of all the communities that are around, all these people have some community leaders. So we do some workshops through this community. Instead of doing legal advice sessions here at ARA I find very few people come, so the message may not get out. So the good thing is if we go out to them, the individual, like if you want you can come to our community, we contact the chairperson who organises it, all the community members, everybody will be there. Then they will get the message. (Gabriel)

Participants highlighted that by providing education through community leaders, questions or issues can be effectively addressed and resolved within the community, and the leaders can further spread this knowledge:

Doing that training or maybe do a community awareness, speak to the community leader and then the leader may call a meeting and explain the law to the people who don't have access to reading material. (John)

As has been demonstrated throughout the thesis, community leaders are still considered an important element of the South Sudanese community. The South Sudanese community largely relies on the guidance and leadership of community leaders, respecting the leaders and their decisions. Therefore, most participants stressed that it is integral for Australian service providers and policy makers to work together with South Sudanese community leaders if they are to meet their legal needs:

They are doing their best and I like that, it should be like that. But the most things, what I hope, they should consult the elders, the elders of this maybe Sudanese, from South Sudan. They should look for elders and like you now asking me, we may have some solutions to let these children be good. How we should help the Australians, how are the best ways to deal with these children, the youths. Because the youths are a problem. But we know the medicine. So if we combine the experiences and knowledge together, we shall make good youth. Yea?... And we know how to solve their problems. But needs contribution of minds. (Abraham)

Maybe, the community leaders have to meet with the people in power, and bring out the solution. (David)

The way is to get the Sudanese leaders and get them to solve our problems as Sudanese. Like sometime if the police come in, they tend to fight the police. But if that was like the parent, they have to have respect for them... Yea and if the problem's really big and community can't solve it, then they refer it to the

police... Yea like if there is a community thing, I can talk to the elders or that person just within the community rather than taking the person to court.

Garang's view was that just as there is a clear order and hierarchy in South Sudanese culture, there should be a clear order and hierarchy followed in Australia when dealing with issues with the South Sudanese community. If a legal problem within the South Sudanese community arises, it should be attempted to be resolved within the family first, then the community involving the community leaders, and only if this system fails should the legal system be involved.

This was seen as especially important for significant community issues, such as family law problems like taking children away from their parents:

They have to involve the community leaders. If it is a major problem, like breaking up the family, problem between children, and yea about culture... they will come together, the community leaders and maybe the police or other people in authority... to come together would be the right thing. Between the law, and the culture, and what the people think is a good idea. (David)

Treat them differently. If a husband and wife have a problem, send them back to the community. If a child wants to move out of the house, don't ring the police, no you ring the community first, sort it out, if they can't sort it out, then step in. That's what I mean differently. (Jok)

However, there are a number of potential problems with this recommendation. While community leaders are important elements of the customary law system, they can abuse their powers, in turn oppress groups or individuals. A possible way of overcoming this problem would be to monitor the role of community leaders, and ensure that the voices of the smaller groups are represented. Furthermore, as stressed throughout the chapter, the South Sudanese community is based on patriarchal values. While involving community leaders in legal education and dispute resolution may assist the community as a whole, it may also reinforce the power imbalance present within the community and further marginalise vulnerable groups. The imbalance of power within the South Sudanese community needs to be addressed, and the least powerful groups provided with alternative ways of accessing services and advice.

### 8.4.3 Culturally competent responses

It was further suggested that the Australian law and service providers should also recognise that the South Sudanese culture is different, and that South Sudanese families may experience greater pressures and problems conforming to laws.

I feel like there should be some sort of understanding between the Australian law and the Sudanese way of life... In some areas I feel like they need to understand where the community, their values and things like that, and try to see if the law fits with that or not. (Nyankol)

It can be challenging for legal services to recognise this difference and provide specialised treatment for South Sudanese groups, as the law is meant to be applied to all equally. However, social services can play an integral role at recognising and addressing this difference and developing culturally appropriate ways of dispute resolution. For example, the Migrant Resource Centre of Eastern Melbourne developed a program in 2007 to implement culturally appropriate prevention and intervention family violence approaches. The intervention program was based on the South Sudanese mediation process, involving communities and leaders in dispute resolution. The prevention program focused on providing the community with education and awareness sessions on Australian law, as well as providing culturally appropriate training for service providers.<sup>653</sup>

While this program was generally well received by the South Sudanese community and provided vital knowledge both to the communities and service providers, some participants found changing familial attitudes challenging and confronting. Due to the patriarchal nature of the South Sudanese family, some participants viewed the Australian culture as biased towards women and undermining of male authority.<sup>654</sup> Several community members commented that the police should not be involved in domestic issues at all, and let the community handle their own family disputes, while others were grateful for the help and information they received. This program highlights the difficulty, but also the possibility, of

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<sup>653</sup> Migrant Information Centre Eastern Melbourne, 2008, op.cit., p.2

<sup>654</sup> Ibid., p.8

combining the different dispute resolution processes to assist South Sudanese families in resolving their family disputes.

Erez and Hartley further recommend a therapeutic jurisprudence model, recognising that legal rules, procedures and agents of the legal system act as social forces, and thus can produce positive therapeutic effects for the mental health of the victims.<sup>655</sup> This model requires changes to criminal justice procedures at all system levels in order to enhance battered immigrant women's willingness to access the justice system. The authors argue for culturally competent responses in order to address the cultural needs of battered immigrant women, defining cultural competence as the translation of awareness of cultural differences into behaviours that lead to more effective interactions.<sup>656</sup> For example, police officers who attend instances of domestic violence need to be aware of social pressures on immigrant women, and consequently not pressure battered women to press charges against their abusers. Instead, police and other agents of the legal system need to respect the women's cultural and family obligations, and communicate effectively with the women in order to establish a therapeutic relationship.

Dutton *et al*, in examining the characteristics of help-seeking behaviours of battered immigrant Latina women in the U.S., also stressed the importance of culturally appropriate advice from all service providers. Each time a battered immigrant women employs a strategy successfully, be it reporting abuse to the police, seeking legal advice or accessing health care, their perception of control and self-esteem strengthens, increasing the ability and willingness to access the system in the future. Thus, the authors argue that 'a sensitive, adequate, and effective system of community, legal, and social supports is critical to battered women as they make their way through a labyrinth of obstacles toward ending the violence in their violence.'<sup>657</sup>

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<sup>655</sup> Erez & Hartley, 2003, op.cit., p.156

<sup>656</sup> Ibid., p.162

<sup>657</sup> Dutton, *et al.*, 2000, op.cit., p.248

Such culturally aware responses have the potential to address legal needs within South Sudanese families and communities. Legal education, coupled with cultural awareness for service providers could help address the lack of legal knowledge and lack of understanding of cultural obligations and practices. Appropriate, culturally sensitive responses to legal problems can potentially lead to successful experiences with the law, in turn increasing the community's trust in the formal legal system. Consequently, culturally appropriate education coupled with culturally competent legal responses can serve to raise the community's legal consciousness, increasing their awareness and respect of human rights. As Merry stresses, '[i]f human rights ideas are to have an impact, they need to become part of the consciousness of ordinary people.'<sup>658</sup>

## **8.5 CONCLUSION**

This chapter has explored some of the reasons behind the South Sudanese community's inability and unwillingness to access the legal system. It has been argued that participants' pre-arrival experiences play a significant role in shaping views of law and legal officials in Australia. South Sudanese communities have experienced war, corruption and displacement, resulting in distrust of the police and the legal system. This can lead to misunderstandings with the police in Australia, as well as a reluctance to approach or cooperate with police and other officials. The length of time spent in refugee camps can also shape the participants' understanding of the legal system as being authoritative and inaccessible.

This chapter has also offered some explanations as to why the South Sudanese communities in Australia experience difficulties in identifying and understanding legal problems. First, due to differences in legal systems, South Sudanese communities often do not view problems as legal. In fact, as the literature also suggests, most participants only interpreted legal problems as those that are criminal in nature, not understanding the distinction between criminal and civil cases. Participants also identified that South Sudanese people often confess if they have committed a crime, as that is expected under the customary law system. This places them in a

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<sup>658</sup> Merry, 2006, op.cit., p.3

vulnerable position, especially when coupled with lack of knowledge of the law and legal rights.

Furthermore, this chapter has illustrated that the South Sudanese customary law system of dispute resolution is still widely utilised within communities in Australia. Participants highlighted dependence and an obligation to use customary dispute resolution processes. This creates a problem for the vulnerable South Sudanese groups, as the customary system is based on patriarchal values and a power hierarchy, resulting in less powerful groups being disadvantaged.

Ignorance and mistrust of Australian legal rules and procedures, and reliance on customary dispute resolution processes causes South Sudanese communities to further distance themselves from the formal legal system. This results in detachment from law, placing South Sudanese communities 'before the law', where they feel disempowered and unable to access justice. This view of law and the legal system explains why participants are unable and in some cases unwilling to access legal services to resolve problems, and instead rely on customary processes they feel comfortable with.

Finally, this chapter has analysed participants' recommendations on how best to meet the needs of South Sudanese refugee background communities. It has been argued that although legal education is needed within the community, education cannot address underlying cultural practices and structural barriers to access to justice. Furthermore, while community leaders should be involved in service delivery, this process needs to be undertaken with care, recognising and responding to the hierarchical nature of the community. Finally, this chapter has responded to the participants' recommendation that the formal legal system needs to work collaboratively with South Sudanese communities by exploring some culturally competent responses. Such responses recognise the importance of involving communities, while at the same time signifying the need to address rather than reinforce power imbalances.

## CHAPTER 9

### CONCLUSION: IS LEGAL PLURALISM THE ANSWER?

Where the law works as an instrument of exclusion rather than inclusion because it disregards or discounts the knowledge and experience of the marginalised, some ask whether it is even appropriate to press for more of the same.<sup>659</sup>

The aim of this thesis was to explore the legal problems South Sudanese communities experience in Australia, the actions they take to resolve those problems, and potential solutions to address barriers to access to justice. It has been shown that participants experienced a number of legal problems. These include housing problems such as difficulty acquiring housing and harassment by the landlord, workplace issues and discrimination. One of the most significant problems identified by participants was family law. Most participants did not understand the law or legal processes regarding family law. This was highlighted as the most problematic issue within the South Sudanese community, as it can lead to breaches of the law, resulting in the removal of children or serious criminal charges.

The importance of everyday problems has also been stressed throughout the thesis. Everyday problems, the problems that do not raise legal issues in themselves, can be more significant to people than legal problems and can lead to further, more serious problems. In order to address these everyday problems that occur outside of the legal system, a more holistic approach is needed. The services that the participants do access, such as the police, refugee association workers or health services, need to provide appropriate advice so that the problems do not escalate to legal problems and the legal system can be avoided. As Currie argues, such an approach would ensure that the wider social and health problems that can lead to legal problems are alleviated, in turn lessening some of the disadvantage vulnerable groups experience.<sup>660</sup>

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<sup>659</sup> International Council on Human Rights Policy, (2009), *When Legal World's Overlap: Human rights, state and non-state law*, Geneva, p.18

<sup>660</sup> Currie, 2009, op.cit.



The thesis has also identified a number of barriers to access to justice for this group. There was a general lack of knowledge of rules and regulations, rights and responsibilities as well as legal services and options available. For example, participants were unaware of their rights and responsibilities as tenants, often accepting poor living conditions and unfair treatment by landlords as a result. Furthermore, participants believed that more emphasis is being placed on legal responsibilities than there is on their legal rights. They expressed that legal services were providing information on how not to break the law, but not enough information on how to utilise the law. This created a sense of powerlessness within the group in terms of protecting and enforcing their rights.

Other, more significant structural barriers were also identified. As has been illustrated, South Sudanese refugee background communities have unique pre-arrival and migration experiences. They have experienced traumatic events of war, and spent long periods of time in refugee camps with corrupt legal systems where they were denied the most basic amenities and human rights. As a result of these experiences, participants expressed a lack of confidence in the Australian legal system. They generally believed that they would not be treated fairly throughout court or legal proceedings, and consequently did not access legal services.

This lack of confidence has significant implications on access to justice. If people do not recognise the benefits of the legal system, then, regardless of the amount of legal services available, they are not likely to access that system. The low levels of confidence, coupled with the participants' pre-arrival experiences, situate participants as what Ewick and Silbey term 'before the law'. Participants viewed the law as a formal, authoritative hierarchical system. They largely believed that the legal system is effective and fair. However, they saw the system as superior and detached from their everyday social life, believing that it is only effective for those who know how to use and in turn benefit from it. As a new, marginalised group in Australia, participants felt the system is often discriminatory, leaving them in a vulnerable position when accessing justice.

Issues with family law also pose a significant barrier to access to justice for certain groups of the South Sudanese community. Battered South Sudanese women are especially vulnerable, as they are faced with additional barriers to access to justice. The collective nature of the South Sudanese community and family makes it close to impossible for battered women to access services to escape violent situations, as that would be regarded a selfish act and be

detrimental to their families. As violence is a private family issue in the community, women are shamed when they discuss it, especially with people outside their communities. Furthermore, as women are marginalised within their communities and do not possess workplace or language skills, they are reliant on their families and communities. Battered women do not feel empowered to access services, both because they fear the repercussions and because they do not trust the Australian system.

In order to deal with some of these problems and barriers, participants suggested a stronger need for legal education for the communities. They believed that this type of education should be provided at the community level, where community leaders can answer questions and empower people. However, as I have stressed throughout the thesis, legal education can only do so much. While education can combat the ignorance of the law and provide the community with more knowledge and to some extent more power, the underlying structural barriers still prevail. Participants' legal consciousness, pre-arrival experiences, prior dealings with corrupt legal officials and deeply embedded patriarchal values and beliefs cannot be addressed by information about the Australian legal system.

Participants further expressed a dependence and dedication to the customary system, suggesting that it is still widely utilised throughout the suburbs of Australia. They recommended that in order to meet the needs of South Sudanese communities, this system needs to be acknowledged by the Australian legal system, and community leaders given more formal dispute resolution powers. These findings suggest that what is needed in order for South Sudanese communities to access justice is something different to what the Australian legal system has to offer. Access to justice for South Sudanese communities means access to families, communities and community leaders, rather than access to formal legal services. This access could be provided in the form of arbitration and mediation within the community, with the possibility of recourse to the courts if this did not work.

However, this is no easy task, as it would require a combination of somewhat conflicting legal orders. As illustrated in Chapter Two, the Australian legal system and access to justice framework has undergone numerous changes throughout the past fifty years, all aimed at providing more access to justice for the most vulnerable groups in Australia. These changes ranged from free legal advice and representation, to more targeted legal education and self-help remedies. However, some have argued that legal education and self-help remedies have

resulted in reduced access to justice, as clients who do not possess the confidence, knowledge or language ability to deal with the matter themselves are likely to feel abandoned by the process rather than empowered.<sup>661</sup> The legal system's response to the needs of vulnerable groups in the past has only ever been effective at addressing the individualistic barrier of ignorance. It has, however, failed to empower vulnerable groups and to provide them with the necessary means to resolve their problems.

Furthermore, the Australian legal system is based on the underlying assumption that law is inherently just and that access to the law is the best way to resolve peoples' problems. The access to justice framework works on the premise that when people experience a problem that can have legal consequences, they should access legal services to resolve those problems. If they fail to access services, they experience unmet legal needs that must be addressed by the legal system. While this thesis set out to explore the legal problems of South Sudanese communities and establish their unmet legal needs, throughout the research it has become apparent that the unmet needs of participants are not exclusively legal. In some instances, the overlap of legal and non-legal problems has meant that participants did not recognise that their problems could have a potential legal solution, and instead were just accepted as everyday experiences which could not be resolved. This highlights the need for providing education about the availability of legal solutions, and also providing holistic solutions that deal with the overlap between legal and non-legal problems.

How then, can the Australian legal system respond to the unique needs of South Sudanese communities? Such a response would need to take into account the unique pre-arrival experiences of the communities, the significance of everyday problems, the importance of customary processes and the level of legal consciousness. I argue that such a response would need to recognise and respond to the legal pluralism present in Australian society.

In Chapter Three, legal pluralism was defined as 'that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs.'<sup>662</sup> This view of legal

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<sup>661</sup> Giddings & Robertson, 2001, op.cit; Melville & Laing, 2008, op.cit.

<sup>662</sup> Griffiths, 1986, op.cit., p.2

pluralism, which Merry refers to as ‘classic legal pluralism’, assumes the presence of two or more legal orders in any social field, usually the product of colonisation. South Sudan is such a legally pluralistic society, where the multiple customary law systems exist side by side with the formal legal system of the country. Since the 1970s however, the concept of legal pluralism has expanded from referring to the relations between the colonised and the coloniser, to relations between dominant groups and subordinate groups, such as ethnic and cultural minorities.<sup>663</sup> In this way, legal orders need not be separate legal systems, but:

‘Legal orders’ may be understood as the norms, rules and institutions formed by a society or group of people to ensure social stability. They usually describe what is right and how to act, and what is wrong and how not to act; and the remedies for and consequences of such actions. Plural legal orders arise when a specific dispute or subject matter may be governed by multiple norms, laws or forums that co-exist within a particular jurisdiction or country.<sup>664</sup>

According to new legal pluralism, plural orders are found in most societies, although are more difficult to see in countries without a colonial past.<sup>665</sup> Pospilis claims that subgroups such as family and community groups have their own legal order systems, which are different from the systems of other groups.<sup>666</sup> Legal pluralism moves away from legal centralism, highlighting competing, contesting, and sometimes contradictory orders outside the state order and their relations to state law.<sup>667</sup> In this way, new legal pluralism recognises the legal consciousness of different groups, taking into consideration the ways social groups interpret the law and determine truth and justice, acknowledging that ‘...a legal order that is not part of the state legal system and is not recognised by the state, can be as or more important in people’s lives than state law.’<sup>668</sup>

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<sup>663</sup> Merry, S.E., (1988), ‘Legal Pluralism’, *Law & Society Review*, Vol.22, No.5, p.872

<sup>664</sup> International Council on Human Rights Policy, 2009, *op.cit.*, p.2

<sup>665</sup> Merry, 1988, *op.cit.*, p.873. While Australia does have a colonial past and is legally pluralistic in that the Indigenous system of dispute resolution is present, this thesis does not explore the colonial effects of legal pluralism in Australia. Rather, I am only concerned with the recent developments in the Australian formal legal system, and their effect on new and emerging communities.

<sup>666</sup> Pospilis, L., (1971), *The Anthropology of Law: A comparative theory of law*, Harper and Row, New York, p.107

<sup>667</sup> Merry, 1988, *op.cit.*, p.889

<sup>668</sup> International Council on Human Rights Policy, 2009, *op.cit.*, p.4

The recognition of multiple legal orders has received considerable attention in recent years, due to the failure of state legal systems to ensure effective access to justice for the most marginalised and vulnerable groups.<sup>669</sup> The inaccessibility of the state legal order and the many barriers to formal access to justice are often the cause of minority groups' reliance on customary forms of justice. As the legal consciousness discussion has illustrated, the South Sudanese community in Australia view the state legal order as distant, irrelevant or alien. They often interpret the Australian legal system as clashing with their culture and values. For example, the Australian culture and system is often blamed for the breakdown in marriages, as women are provided with independence and encouraged to leave their families in times of violence. This clash with the Australian legal order can lead customary legal orders to flourish.<sup>670</sup> Thus, the Australian legal system itself can be seen as the cause of the dependence on customary processes for South Sudanese communities.

This suggests that in order to meet the needs of South Sudanese communities, customary law needs to be somehow acknowledged by the formal legal system. One approach is to recognise the entirety of customary law without elaborating on the content.<sup>671</sup> Recognising customary law and providing customary services to South Sudanese communities would address their needs and provide the type of access to justice they are familiar and confident with.

Recognising legal pluralism raises a number of issues however. The South Sudanese customary law system is based on patriarchal values and exposed to human rights violations. Women are oppressed under this system, expected to follow traditional cultural practices and blamed for family breakdowns. Violence against women is a common practice, and often a consequence of changing gender roles. Recognising the customary law under Australian law would in turn mean recognising the oppression of women under this system. This problem could be overcome by making exceptions about human rights violations and clear breaches of Australian law in the recognition of legal pluralism. However, Merry explains that culture often refers to traditions and customs that are justified by their roots in the past, and

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<sup>669</sup> Ibid., p.iii

<sup>670</sup> Ibid., p.10

<sup>671</sup> Ibid., p.viii

arguments about preserving culture become the basis for defending control over women.<sup>672</sup> Therefore, the oppression of women is likely to be justified as a necessary means of upholding cultural practices and keeping families together, as this is the key element of the customary system.

The power of leaders is another significant problem with the customary law system. Participants in this study highlighted the importance of community leaders, suggesting their powers be recognised and supported by the Australian legal system. Community leaders are expected to make decisions and resolve conflict within the community based on customary practices and traditions. However, these traditions and practices are based on patriarchal values, and community leaders can potentially exercise arbitrary power, oppressing the vulnerable groups within their communities, including women, young people and small, unrepresented community groups. Recognising the role of community leaders would mean recognising the powers of unelected leaders to interpret custom based on patriarchal values and power hierarchy. Therefore, acknowledging and supporting the powers of community leaders without state control could lead to indiscriminate results and possible human rights violations.

Furthermore, an important quality of the state legal order system is equality before the law. Allowing for different treatment and different standards for people with regard to the same issues can lead to discrimination and inequality before the law.<sup>673</sup> Making an exception for South Sudanese customs could also lead to a slippery slope situation, where other ethnic groups demand the same recognition. This has the potential to create an ethnic divide within the Australian community and undermine the powers of the state legal order. The recognition of plural legal orders can thus segregate society, strengthening ethnic and religious fundamentalism and in turn undermining plurality.<sup>674</sup>

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<sup>672</sup> Merry, 2006, *op.cit.*, p.10, 25

<sup>673</sup> International Council on Human Rights Policy, 2009, *op.cit.*, p.73

<sup>674</sup> *Ibid.*, p.86

Despite the problems arising out of recognition of plural legal orders, it is not an impossible task, assuming the downfalls are addressed in an appropriate way. First and foremost, as the International Council on Human Rights Policy stresses, it is paramount to have a thorough understanding of the justice needs and context of the community's laws if recognition of customary law is to be meaningful.<sup>675</sup> The importance, relevance and reliance on customary law need to be understood and appreciated before recognition of such law can begin. More importantly, the Australian legal system needs to recognise the shortcomings of the customary system and its elements, and attempt to address these in the recognition. In other words, straight recognition of the existing customary law is not sufficient – what is needed is recognition of the benefits and failures of the system, and the incorporation of a mix of services that promote the benefits and prevent the failures.

Recognising the importance of the role of community leaders, for example, and providing community leaders with more formal dispute resolution powers could increase access to justice for people who rely on the customary system. Furthermore, formal recognition could ensure that the role of community leaders is monitored more strictly, ensuring that dispute resolution complies with Australian human rights protections. Legal education could also be delivered in a community setting in a more culturally appropriate manner, ensuring that everyone has access to it. Vulnerable groups in the community, such as women and small tribal groups, could be singled out and empowered through specialised education sessions or services. In this way, the Australian legal system can step up and provide the necessary services to make up for the downfalls of the South Sudanese customary system, while at the same time recognising and supporting the benefits of the system.

While such recognition is more an ideal than a reality at present, it is certainly not impossible. Programs such as the Migrant Resource Centre of Eastern Melbourne family violence intervention program have demonstrated the possibility of combining formal legal resources, such as mediation workers, and South Sudanese communities and community leaders to address and prevent family violence. Other studies have identified cultural restraints and help-seeking behaviours of migrants and refugees, and suggested therapeutic jurisprudence models

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<sup>675</sup> Ibid., p.142

based on empowerment. Australian legal services providers would do well to explore these responses, and incorporate them into the already existing services that attempt to address the legal needs of South Sudanese refugee background communities. While the Australian legal system may not be able to deal with the amount of difference that is required for the recognition of multiple legal orders, at the very least the establishment of more culturally appropriate community-based programmes is necessary.

This thesis has unpacked the concept of access to justice by critically evaluating legal needs. It has been argued that the current access to justice framework is too descriptive and formalistic, and does not deal adequately with difference. Despite the developments in access to justice services over the past fifty years, the needs of the most vulnerable groups continue to be unmet. The thesis has identified the deep, conceptual barriers to access to justice of South Sudanese refugee background communities, arguing that the current system fails to provide this group with the appropriate means of enforcing their rights. In fact, the formalistic nature of the legal system serves to further marginalise and discourage refugees from the accessing formal legal services, resulting in reliance on customary dispute resolution processes based on patriarchal values prone to human rights violations. Therefore, in order to meet the legal needs of South Sudanese refugee background communities in Australia, the access to justice framework needs to expand through a more holistic approach to alleviate everyday problems in culturally appropriate ways. The access to justice framework needs to recognise legal pluralism and address the underlying structural barriers of difference and disempowerment, and as this thesis has demonstrated, until this happens the legal needs of refugee background communities are likely to remain unmet.



## **APPENDICES**

### **Appendix A: List of participants**

#### **Peter**

Peter is twenty years of age and has been in Australia for one year. Peter spent two years in a refugee camp in Uganda after fleeing his home in South Sudan. He did not have any friends or family living in Australia. Peter learnt some English in the camp in Uganda, and attended high school in Australia upon arrival. Peter's main reason for migrating to Australia was access to education.

#### **Deng**

Deng is a twenty-two-year-old South Sudanese man who has been in Australia for one year. Deng spent three years in a refugee camp in Uganda before coming to Australia. Some of Deng's friends were living in Australia, and Deng and three of his cousins stayed with those friends when they first migrated. Deng finished year twelve in the camp in Uganda where he learnt some English, but he has not attended any schooling in Australia aside from the free English classes provided by the government. Security is the main reason Deng provided for coming to Australia.

#### **Garang**

Garang is a twenty-one years of age and has been living in Australia for five year. Garang spent six years in Kakuma Refugee Camp in Kenya with his mother and sister. He had an aunt living in Australia, who sponsored him to migrate. After Garang and his uncle arrived in Australia, they lived with his aunt. Garang learnt English in Kakuma, and attended high school and university study in Australia. Garang listed education and security as the main reasons for coming to Australia.

### **John**

John is a twenty-two-year-old South Sudanese man who has been living in Australia for two years. He spent three years in Kakuma Refugee Camp without any family before coming to Australia. He had an uncle living in Australia before he migrated, whom he stayed with until he acquired accommodation of his own. John learnt English in Kakuma, and has completed high school in Australia. The main reason John listed for leaving Africa was the war and instability.

### **Gabriel**

Gabriel is a twenty-seven-year-old man from South Sudan who has been living in Australia for five years. He had spent fifteen years in a refugee camp in Uganda with his parents and siblings. He lived with his friends who sponsored him to come to Australia for one year after arriving in Australia. He learnt English in Africa, and attended TAFE and university study in Australia. The fact that Australia was a peaceful country where he had more opportunity was Gabriel's main reason for migrating to Australia.

### **Dominic**

Dominic is twenty-seven years of age, and has been living in Australia for ten years. Together with this family, he walked from his home in South Sudan to Uganda, where they lived for four years. Dominic had an uncle in Australia, whom he stayed with upon arrival. He learnt English in Uganda, and completed secondary and university study in Australia. The main reason Dominic migrated to Australia was the war in his home country, and the fact that he had family members living in Australia.

### **Jacob**

Jacob is a nineteen-year-old South Sudanese man who has spent twelve years in Australia. Jacob came to Australia with his family as a child, and had not spent any time in refugee camps. He learnt to speak English as a child, and has attended secondary and tertiary study in Australia. His family moved to Australia to provide their children with more opportunities in life.

**Atem**

Atem is a twenty-four-year-old South Sudanese man who has been living in Australia for four years. He spent ten years in a refugee camp in Uganda with his siblings. Atem and his siblings stayed with family members for a year after arriving in Australia. He learnt some English in Africa, completed secondary schooling in Australia and is currently completing TAFE studies. Atem's main reason for migrating to Australia was the search of a better future for him and his family.

**Abel**

Abel is twenty years of age, and has spent four years in Australia. Abel's family fled South Sudan and sought refuge in Uganda, where Abel was born. He spent all his life, that is sixteen years, in the refugee camp before migrating with his sister to Australia, where they lived with family friends. Abel learned English in Uganda, and completed high school in Australia. Security and access to education were the main reasons Abel migrated to Australia.

**Judy**

Judy is a twenty-nine-year-old South Sudan woman who has been living in Australia for six years. She spent one year in Botswana before coming to Australia, where she did not have any friends or family members. Judy learnt some English in Africa, and has completed a TAFE course in Australia. Judy came to Australia because she was accepted under the humanitarian program and was seeking a better life.

**Abraham**

Abraham is a forty-four years of age, and has been living in Australia for two months. Abraham spent two years in Egypt before joining his immediate family members in Australia. He learnt some English in Sudan and Egypt, and is currently completing an English course. Abraham's main reason for coming to Australia was the wish to be reunited with his family.

**Biel**

Biel is a twenty-five-year-old South Sudanese man living in Australia for three years. Biel travelled from Sudan to Ethiopia, where he spent two years before being forced to leave. Biel then walked to Kakuma with his sister and carer, where they resided for fourteen years before coming to Australia. Biel migrated to Australia by himself, where he stayed with his cousins. He learnt English in Kakuma, has finished high school in Australia and is currently undertaking tertiary study. Biel's main reason for migrating to Australia was security and access to high quality education.

### **Jok**

Jok is a twenty-five-year-old man who has spent seven years in Australia. Before migrating to Australia, Jok spent ten years in Kakuma Refugee Camp with his family. His cousin in Australia sponsored Jok and his family to come to Australia, and provided them with accommodation upon arrival. Jok learned English in Kakuma, has completed high school and is currently undertaking tertiary study. Access to education was Jok's main reasons for migrating to Australia.

### **Lam**

Lam is a forty-seven-year-old South Sudanese leader, who has been in Australia for twelve years. Lam spent three years in a refugee camp in Kenya before coming to Australia. He did not have any family or friends in Australia, and migrated by himself. Lam learned English in Sudan, and has completed tertiary study in Australia. The war in Sudan and the dangerous conditions of the refugee camps were Lam's main reason for migrating to Australia.

### **Mary**

Mary is a thirty-two-year-old single mother who has been living in Australia for six years. Mary spent three years in a refugee camp in Uganda before coming to Australia, where she joined her family. Mary did not learn English in Africa, and is illiterate in her own language. While she attended the free English classes in Australia, Mary has not learned to read or write English. The wish to be reunited with her family was Mary's main reason for migrating to Australia.

**Lillian**

Lillian is forty-five years of age and has spent eight years in Australia. Lillian spent five years in a refugee camp in Ethiopia and another thirteen years in Kakuma refugee camp with her family before coming to Australia. Lillian and her family stayed with a cousin upon arrival. Lillian did learn some English in Africa, and has attended numerous English classes in Australia. She listed safety, opportunity and family as reasons for migrating to Australia.

**David**

David is a twenty-nine-year-old man from South Sudan, living in Australia for five years. David was part of the Lost Boys, and spent three years in camps in Ethiopia and another thirteen years in Kakuma Refugee Camp. He travelled to Australia by himself, and lived with his cousin upon arrival. David finished high school in Kakuma, a TAFE course in Australia and is currently undertaking tertiary study. Access to education and safety were David's main reasons for applying to migrate to Australia.

**Joseph**

Joseph is a twenty-three year old South Sudanese man living in Australia for seven years. Joseph spent thirteen years in Ethiopia before migrating to Australia, where he joined some family members. He learned English in Ethiopia, and has attended secondary and tertiary studies in Australia. Safety and access to education were Joseph's main reasons for migrating to Australia.

**Bol**

Bol is thirty-six years old and has lived in Australia for seven years. Bol spent eight years in Kenya before joining his cousin in Australia. He learned English in Africa, and has completed TAFE study in Australia since his arrival. The ability to provide a better future for his family was Bol's main reason for migrating to Australia.

**Achan**

Achan is a twenty-two year old woman from South Sudan who has been living in Australia for five years. She spent all her life, that is seventeen years in a refugee camp in Uganda

before coming to Australia. Achan learned to speak English in Uganda, and has completed a TAFE course in Australia. The war in Sudan and access to education were the main reasons Achan noted for migrating to Australia.

### **Khadija**

Khadija is twenty-two years old and has been in Australia for nine years. She spent five years in a refugee camp in Kenya with her brothers before coming to Australia to join their family. Khadija learned some English in Kenya, has completed secondary studies, and is undertaking tertiary studies. She noted the conditions of the war and access to education as main reasons for her family migrating to Australia.

### **Nyankol**

Nyankol is a twenty-three-year-old woman from South Sudan who has been living in Australia with her family for eleven years. She was born in Ethiopia, and spent seven years in Kenya before migrating to Australia with her family. She spoke a little English before coming to Australia, and has since completed secondary studies and is undertaking a university degree. Opportunity and access to education were Nyankol family's main reason for migrating to Australia.

## **Appendix B: Interview Questions**

### Part 1: Questions About You

1. Are you male or female?
2. What is your age?
3. Which community do you come from?
4. What part of Sudan do you come from?
5. Did you have to spend any time in refugee camps or other countries of asylum before coming to Australia?
  - a) Where did you spend time?
  - b) How long were you there?
  - c) How did you travel to the next place?
  - d) Who did you travel with?
6. Why did you come to Australia?
7. When did you arrive in Australia?
8. Did you have any relatives or friends in Australia when you came here?
9. Did you live with friends or relatives when you first came to Australia?
  - a) How many people lived in that house/apartment?
  - b) How long did you stay there?
10. How long have you been at your current house/apartment?
11. How many people live in your current house/apartment?
12. Did you speak any English before coming to Australia?
13. Did you attend the English classes in Australia provided by the government?
  - a) Were these classes helpful?
14. Have you been to school in Australia, other than the free English classes? If so, can you tell me what you did?

## Part 2: Legal Problems Questions

1. Have you ever had any problems or disputes with housing?
2. Have you ever had any problems with your neighbours?
3. Have you ever had any problems with your driver's license?
4. Have you ever been involved in a car accident?
5. Have you ever had an accident at work where you were injured?
6. Have you ever had anything stolen from your home?
7. Have you ever been unfairly treated by a police officer?
8. Have you ever had problems with your employment?
9. Have you ever been assaulted or unfairly treated by another person?
10. Have you ever had any problems regarding Immigration?
11. Have you ever been sued by someone?
12. Have you ever been to court/tribunal for any reason?
13. Have you ever sought legal advice for a problem before?
14. Have you ever had any other contact with the police not mentioned so far?
15. Have you ever had any other contact with the law or legal system in any way not mentioned so far? For example traffic infringements, late payment of fees, supporting a friend through the legal system.
16. Have you ever had any other legal problems not mentioned so far?
17. Do you have any other comments to add?

Examples were given for each of the questions. If the participants answered yes to a question, further questions with examples were asked, such as?

- What did you do about this problem?
- If nothing, why did you do nothing?
- When you had the problem, did you know of any services you could use to help you resolve this problem?
- Did you use any services to help you resolve this problem?
  - Do you think you were treated fairly by these services?
- Do you think you were treated fairly by the other person?
- Were you happy with the result? Why/why not?



### Part 3: Views of the Legal System

1. Do you think the law in Australia is easy to understand and follow? Please explain.
2. What are the main differences between the legal system in Sudan and Australia?
3. Do you know your legal responsibilities? (How to follow the law)
4. Do you know your legal rights? (Things you are entitled to by law)
5. What services do you know of to help you with your legal problems?
6. What would you do and where would you go if you had a legal problem?
7. Would you access a lawyer if you had a legal problem? If not, why not?
8. Do you know how to use other services to help you with your problem, for example mediation or counselling?
9. Do you think the legal system is an important way for people to enforce their rights?
10. Do you feel comfortable accessing the legal system to your advantage?
11. Do you feel confident that if you went to court, you would get a fair hearing? If not, why not?
12. Do you feel confident that if you had a legal problem, you could find and access services to help you through the process?
13. If you could change one thing about the legal system, what would you change?
14. Do you have any other comments?

## **Appendix C: Information Sheet**

### Introduction:

My name is Danijela Milos, and I am a Bachelor of Justice and Society Graduate, currently doing a PhD in Legal Studies at Flinders University. Through my current research study, I am exploring how to make justice more accessible for Sudanese refugees coming into Australia.

### Rationale:

There has been a lot of controversy surrounding the integration of Sudanese refugees into the Australian community. There is a perception by the media and the federal government that Sudanese refugees 'tend to have more problems associated with them'. However, while the Australian community is quick to judge after these comments and other incidents, no one seems to be asking the Sudanese community how they are doing when settling in Australia. Do they experience problems? Do they need help with fitting into the community?

### Aims:

My research aims to do exactly this – ask the Sudanese community directly whether they are experiencing problems, and whether they need help. While there are numerous problems all new refugees may face when settling in a new country, my research is focused on the legal problems the Sudanese face. I believe legal problems are particularly important, as they can lead to very serious consequences, such as fines or jail times.

Over the next few months, I will interview Sudanese refugees in Adelaide, and ask them about the legal problems and the legal needs that they have experienced. These needs and problems include both responsibilities and rights – the problems that lead to contact with the law, and the problems that can be solved by law. In other words, my research is not just focused on the legal problems the Sudanese community has experienced – such as driving without a licence, but also the problems that they have experienced that could have been solved if they had accessed the law – such as landlord treating them unfairly.

### Benefits:

My study will benefit the Sudanese community in a number of ways;

- It will educate them on services and rights that are available to them to access justice.
- It will explore the real problems and needs the Sudanese community faces – ask the Sudanese community on what they need help with.
- It will make recommendations on further services and help that are needed in order to help Sudanese refugees uphold their legal rights.

- Based on the findings, I will recommend ways to make access to justice more available for the Sudanese community, so that they can access the legal system more readily when needed.
- The study will benefit the wider society by educating them on the Sudanese community.
- Most importantly, it will allow the Sudanese community to speak out and be heard, and make recommendations to the wider community.

Your Guarantee:

In order to achieve these benefits, I will interview members of the Sudanese community in Adelaide over the next few months. There will be questions about the legal problems and legal needs experienced in the past, as well as questions about the perceptions of law and the legal system. The interview will take about one hour.

My research and interviews will be professional. All the information provided in the interviews will be strictly confidential. All the information recorded will be stored in a private place, accessible only to myself and my research. All the questions in the interviews have been passed through an Ethics Committee at Flinders University.

Copies of my research so far and any further research will be available for any interested participants. Throughout my research, I will keep the participants and the community informed of any progress or any problems.

Contact:

If you are interested in participating in my study, or would like any further information, please contact me on the following details:

Danjela Milos  
PhD Candidate – Legal Studies  
Flinders University  
Mob: 0401 236 743  
Email: [danijela.milos@flinders.edu.au](mailto:danjela.milos@flinders.edu.au)

## Appendix D: Letter of Introduction

Dear Sir/Madam

This letter is to introduce **Danijela Milos** who is a PhD student in the Legal Studies Department at Flinders University. She will produce her student card, which carries a photograph, as proof of identity.

She is undertaking research leading to the production of a thesis or other publications on the subject of meeting the legal needs of Sudanese refugees, which focuses on how to make legal services and access to justice more available.

She would be most grateful if you would volunteer to assist in this project, by granting an interview which covers certain aspects of this topic. No more than 1 hour on one occasion would be required.

Be assured that any information provided will be treated in the strictest confidence and none of the participants will be individually identifiable in the resulting thesis, report or other publications. You are, of course, entirely free to discontinue your participation at any time or to decline to answer particular questions.

Since she intends to make a tape recording of the interview, she will seek your consent, on the attached form, to record the interview, to use the recording or a transcription in preparing the thesis, report or other publications, on condition that your name or identity is not revealed, and to make the recording available to other researchers on the same conditions. It may be necessary to make the recording available to secretarial assistants for transcription, in which case you may be assured that such persons will be advised of the requirement that your name or identity not be revealed and that the confidentiality of the material is respected and maintained. Any information provided will be treated in the strictest of confidence by the researcher, but disclosure of information related to illegal activities cannot be secure from lawful search and seizure.

Any enquiries you may have concerning this project should be directed to me at the address given above or by telephone on (08) 8201 3197 or e-mail [Francis.Regan@flinders.edu.au](mailto:Francis.Regan@flinders.edu.au)

Thank you for your attention and assistance.

Yours sincerely,

Dr Francis Regan  
Professor of Legal Studies  
Associate Head (International) Faculty of Education, Humanities, Law & Theology  
Flinders University

<p>This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee. For more information regarding ethical approval of the project the Secretary of the Committee can be contacted by telephone on 8201 5962, by fax on 8201 2035 or by email <a href="mailto:sandy.huxtable@flinders.edu.au">sandy.huxtable@flinders.edu.au</a>.</p>
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## **Appendix E: Things to know before the Interview**

The Aim of my research is to produce services to help Sudanese refugee background communities to understand their legal rights and responsibilities better, so that they can access the legal system to resolve their problems.

### Definitions:

- Legal Rights: the things you are entitled to by law. For example the right to live in safe conditions when renting a home, working in safe conditions, the right to own your own property.
- Legal Responsibilities: the things you are required to do by law. For example not commit crimes, pay your rent and bills, follow certain procedures/laws.
- Legal Problems: include both responsibilities where someone is in trouble with the law and needs to access services to help them, as well as rights where someone needs to use the legal system to uphold their legal right to something. So a legal problem may include getting in trouble for drink driving, as well as being discriminated against by landlord or police – in both cases the legal system can help you solve your problem.
- Legal System: process of enforcing the law and enforcing people's rights. Includes contact with the police, seeking legal help, counselling and mediation, going to court to resolve a legal problem.
- Legal Services: services available to help people solve their legal problems. These can include lawyers, legal advice, counselling and mediation services, refugee associations, government departments, Legal Services Commission.

You can choose not to answer any question during the interview, and you can stop the interview if you need to at any time.

Everything you say will be strictly confidential, and your name will not be recorded anywhere in the published research. No one will know that you have answered the questions published in my work.

The interview will be recorded to help me put together my research. No one else has access to these recordings.

I will need you to sign a Consent Form, agreeing that it is okay for me to record this interview. Once I type up this interview into a document, I will send you a copy to read. If

you agree with everything I have written as said in the interview, you will need to sign the Consent Form again and send it back to me. After I type up my final report, I will send you a copy of it, and if you agree with it you will need to sign it again and send it back to me.

There are three sections to the interview

- Questions about you: these are questions about where you are from, where you live etc.
- Legal Problems Questions: these are questions about actual problems you have encountered while you have been in Australia. Please provide as much information as you can about the problems that you have had and how you dealt with them. This information will be important for me to draw conclusions about what services are needed and how they can help Sudanese refugees enforce their rights better.
- Views of the Legal System: these are questions about what you think about the legal system. Here you will get a chance to report your views of the legal system, and suggest ways to make the legal system better for you.

I will read out the questions, and you tell me if they apply to you. Give as much detail as you can, and take your time thinking about the questions.

I will give you a copy of the questions so that you can follow them as I ask them. If you do not understand a question, please ask me and I will explain it to you.

# Appendix F: Consent Form for Interview

I .....  
being over the age of 18 years hereby consent to participate as requested in the letter of Introduction for the research project on meeting the legal needs of Sudanese refugees.

1. I have read the information provided.
2. Details of procedures and any risks have been explained to my satisfaction.
3. I agree to audio recording of my information and participation.
4. I am aware that I should retain a copy of the Information Sheet and Consent Form for future reference.
5. I understand that:
  - I may not directly benefit from taking part in this research.
  - I am free to withdraw from the project at any time and am free to decline to answer particular questions.
  - While the information gained in this study will be published as explained, I will not be identified, and individual information will remain confidential.
  - Whether I participate or not, or withdraw after participating, will have no effect on any treatment or service that is being provided to me.
  - I may ask that the recording/observation be stopped at any time, and that I may withdraw at any time from the session or the research without disadvantage.
6. I agree to the tape/transcript being made available to other researchers who are not members of this research team, but who are judged by the research team to be doing related research, on condition that my identity is not revealed.

**Participant’s signature.....Date.....**

I, the researcher whose signature appears below, certify that I have explained the study to the volunteer and consider that she/he understands what is involved and freely consents to participation.

**Researcher’s signature.....Date.....**

7. I, the participant whose signature appears below, have read a transcript of my participation and agree to its use by the researcher as explained.

**Participant’s signature.....Date.....**

8. I, the participant whose signature appears below, have read the researcher’s report and agree to the publication of my information as reported.

**Participant’s signature.....Date.....**

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