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Original Article

South Sudan: Marital Rape Exemption

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ABSTRACT

This paper explores marital rape in South Sudan by delving into the complex history of customary law in South Sudan and how it came about, as well as the precarious legal position that victims of marital rape find themselves in. The research maintains that the marital exemption clause in the laws of South Sudan should be abolished and, in its place, a law that penalizes rape within the institution of marriage should be enacted. The paper makes a significant contribution to the literature because the topic explored is relevant to the discussion of marital rape, not only in South Sudan, but also in other countries where similar problems persist. The paper does so by critically engaging with the issue of marital rape in South Sudan, explores its history, and proposes that changes must be made not only to the way in which the crime is defined but also how its punished. In conclusion the paper implores South Sudan's decision makers to forge ways to criminalize marital rape but stops short of expressing with precision how the new changes should look like or how it should be done. Purposefully, the paper interrogates whether the validity of this archaic law is sustained by cultural imperative. Methodically, it does so by qualitatively analysing South Sudan's statutory laws, traditional beliefs and cultures. The research findings conclude that while traditional cultures may have contributed to the repugnancy, its sustenance is the result of complex interplay between political and economic interests central to the governing elites. Finally, the paper maintains that times have changed dramatically and these interests, once viewed as necessary to ensure stability and perpetual governance, have long lost that value, and arguably, are detrimental to a democratic, inclusive state.

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INTRODUCTION

South Sudan, the newest country in the world, is multi-ethnic, multi-religious, and multi-lingual, and has many customs. To preserve national unity and accommodate its mixed character, it opted, at the dawn of its independence in 2011, to adopt legal pluralism: a system in the juristic sense where the sovereign commands different bodies of law within the same sphere and the parallel legal regimes are all dependent on the state legal system.[1] Legal pluralism is pervasive in the constitution and other laws of South Sudan. As one of the sources of legislation, Section 5(b) of the Constitution of the Republic of South Sudan, amended in 2011, lists the "customs and traditions of people" as one of the four fountains of law. The institution of marriage and its regulations are just one of the many laws relegated to the customary, not legislative, sphere. This characterisation is made apparent by the express provision of Section 6(a) of the South Sudan Civil Procedure Act, which provides that in proceedings or suits that raise matters of "marriage, divorce, or family relations, the rule for decision of such question shall be any custom applicable to parties concerned."[2] Furthermore, Article 15 of the Constitution prescribes a "right of every person of marriageable age" to marry any person of the opposite sex so long as they have "fully and freely consented" to the marriage.[3] However, for the marriage to be valid, the law conditions that such a union only comes into existence by "voluntary agreement" of the concerned parties. Surprisingly, Article 247(3) of the Penal Code precludes a married party from bringing claims of rape if the rape is committed by a person legally married to them at the time of occurrence.

The interaction of this body of statutory and customary rules in the context of marriage in South Sudan has operated unjustly and oppressively against two groups of women. The first group entails women who enter into these matrimonial arrangements forcefully, against their will, and are below the prescribed legal age of 18 years (early child marriages). The second category consists of women who legally satisfy the marital age limit, but whose consent to marriage comes from a third party, usually parents, relatives, or guardians (forced-arranged marriages). In the former group, consent is vitiated by incapacity due to age because the law regards consent to marriage as unlawful if given by anyone under the age of eighteen.[4] In the latter group, consent is impaired because it emanates from a third party and not directly from the parties who "intend to marry" themselves.[5] Legally, the defect inherent in the union of these two groups renders such a marriage void ab initio; as such, individuals in such a marriage should be allowed to enjoy the full protection of the law in case they are sexually assaulted, regardless of their marital status. The focus of this paper is on those who are "properly married"—marriages that meet all the legal requirements. The argument is that the marital rape privity clause[6] is archaic, should be abolished, and society should no longer allow abusive men to continue abusing their partners by hiding behind matrimonial walls.

Despite the increased recognition that the topic of marital rape has garnered in South Sudan since its independence, literature in this area remains sparse. Because of this paucity, this paper aims to provide a comprehensive review of the current state of marital rape literature and law. It does so by first addressing the lengthy history of legal and

[1] Sally Engle Merry, 'Legal Pluralism' *The Globalization of International Law* (Routledge 2017) 29.
[2] *Code of Civil Procedure Act 2007* (South Sudan) S. 6(a).
[3] Constitution of South Sudan Article 15.
[4] Ibid, 3 Art. 15(2).
[5] Ibid, 3.
[6] In this paper, marital rape, marital exemption, spousal exemption, and spousal immunity are all used interchangeably.

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cultural invalidation of marital rape victims, and the denial of legal remedies to these victims by operation of the law. Secondly, research unmask the unfair labelling of the laws pertaining to marital rape and thereby, leading to disparate outcomes and disproportionate, on basis of status, to victims afflicted by the same crime.

Depending on the victim's marital status, the same crime can either be rape or domestic violence. A discrepancy that, incidentally, attaches different forms of culpability to perpetrators, thereby resulting in disproportionate punishment and sentencing outcomes. Overall, the paper aims to show the ambiguity in the laws pertaining to marital rape and show the disconnect and incongruity, unlike in the past, between the current political interests and marital rape laws. Thematically, this is addressed by showing the tension that exists between law and practice.

RESEARCH METHODOLOGY

Researching this topic required addressing both the theoretical component of marital rape as well as analyzing the substantive elements of the law regulating rape and its progeny—marital rape—as codified in South Sudan's statutes. As a matter of practical necessity, this research, therefore, employed a qualitative analysis of laws and other theoretical materials, thus rendering it doctrinal in its entirety. The data used consists of historical, political and cultural materials relevant to South Sudan. For comparison purposes, the study transplanted doctrinal material from other jurisdictions with similar laws to those of South Sudan. Such an analysis was done while taking into consideration the differences in context, political systems and epochs.

History of the Law of Marital Rape in South Sudan

Customary law in South Sudan is a symbol of emancipation from two centuries of external domination and, paradoxically, also the product of it.[7] Before the partition of Sudan into two contiguous states[8] in 2011, it went through two periods of colonial rule, first by Turkey and Egypt—known as Turko-Egyptian rule—spanning from 1820–1885, and subsequently by Egypt and Britain—known as Condominium rule—from 1898–1956.[9] At different intervals, both colonial powers created an arena and institutions that defined the Sudanese state. Since the colonisation of Sudan, just like the rest of Africa, was about the scramble for resources more than it was about territorial expansionism, the colonisers, from the beginning, enacted laws limited to achieving and perpetuating that objective and neglected other laws that had no bearing on their economic interests.[10] To maintain peace and stability in the frontiers, the colonisers legitimised pre-existing local governance structures and empowered them with the means to administer laws in accordance with local customs and cultures, among which was a body of laws governing social relations, including marriages.

The end of British rule in 1956 led to the independence of the Sudanese state; however, more importantly, power was transferred to the Sudanese Arab riverain tribes. This transition to the Christian Southern Sudanese population was nothing more than a replacement of one coloniser-in—in this case, the British—by another coloniser, the Arab elite. The two successive colonizers of Sudan, though separated by culture, religion, and geography to a South Sudanese, were united by their disdain and racist tendencies towards the people of South Sudan. As such, their rule and power had to be challenged. Therefore, war broke out in the southern part of the country

[7] Jan Arno Hessbruegge, 'Customary Law and Authority in a State under Construction: The Case of South Sudan' (2012) 5(3) *African Journal of Legal Studies* 295.
[8] The partition resulted in the creation of two states: the Republic of South Sudan and the Republic of Sudan.
[9] R.S O'Fahey, 'Islam and Ethnicity in the Sudan' (1996) 26(3) *Journal of Religion in Africa* 258.
[10] Liv Tonnessen, 'Women at Work in Sudan: Marital Privilege or Constitutional Right?' (2019) 26(2) *Social Politics: International Studies in Gender, State & Society* 223.

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immediately following independence. To neutralise Southern Sudanese resistance, the Arab ruling elite that initially succeeded the British proposed a dual legal system predicated on accommodating the various pre-existing cultures, norms, and people of Sudan as a way to govern the country. The Arab ruling class borrowed a leaf from the former masters of Sudan by empowering local traditional authorities and allowing them to apply laws and practice the cultures of Southern Sudan. This discretion made the chief powerful, but sometimes allowed them to apply the laws selectively or even oppressively. Such an arrangement also made it easier for the ruling elite in the centre to avoid confronting difficult cases of oppressive laws administered by traditional rulers by insinuating the jurisdiction of traditional leaders. More importantly, the Arab elite permitted the acceptance of this dual system as a matter of political expediency, not practical necessity.

Then, from 1955–1972, a Southern Sudanese guerrilla movement started an insurgency to challenge the central government for various reasons. This new war lasted for seventeen years and ended with an armistice[11] that created a two-tiered government in one country: a government in the south and one in the north. The government of Southern Sudan promulgated a constitution that further entrenched laws that prioritised customs and administration by traditional authorities.[12] Here again, the central government, in fear of upsetting the Southern elite, arrogated the government in the south with broad powers that regulated social relations and allowed the traditional elite to practice laws and decide cases in ways that were, at times, unconstitutional, had the same cases been applied in a similar fashion in the northern part of the country. Again, this motif was political prudence. The collapse of this agreement in 1982 coincided with the beginning of the second liberation. The second liberation struggle lasted for 21 years, ending in the culmination of a peace agreement in 2005. This agreement guaranteed the right of self-determination through an internationally recognised plebiscite for the people of Southern Sudan, which eventually led to the partitioning and creation of a separate state called the Republic of South Sudan in June 2011.

Although both insurgencies were conducted at different epochs, what remains unique to both is that not only were both a "peasant-based revolution," they also controlled and exercised power over large swathes of territory in Southern Sudan. More importantly, the peasantry became its "main reservoir from which the Movement recruited its required manpower, got its logistical support, and drew its moral and political support."[13] In exchange for the continuous uninterrupted flow of logistics from the civil populace under traditional authorities, the fighting forces during both liberations allowed and legitimised traditional authorities to practice and exercise customary law, including family matters and rules governing marriages. Again, as previously stated, the same pattern is replicated here in the guerrilla movements that deferred to traditional authorities the administration of justice in areas where they had effective control, save for military offences. Moreover, to ensure compliance with judgments, traditional authorities relied on the force and violence of the insurgents who could be summoned if and when needed. This compromise was strengthened by one that allowed traditional rulers to recruit insurgency personnel. In exchange, traditional chiefs were allowed to administer justice, even in repugnant ways. This synergy is notorious for the high number of forced and child marriages that occurred during this period. Therefore, here again, for military and war exigencies, we see the rights

[11] Elias Nyamlell Wakoson, 'Sudan's Addis Ababa Peace Treaty: Why it Failed' (1990) 12(2/3) *Northeast African Studies* 19.
[12] Bona Malwal, '*The Anya-Nya Liberation Movement, 1955-1974. Sudan and South Sudan: From One to Two*' (Springer 2015) 66-85.
[13] Kuol Deng-Abot Kuol, 'An Investigation into the Roles of Traditional Leadership in the Liberation Struggle in Southern Sudan 1983-2005' Master's Degree Dissertation Thesis (2008) University of Fort Hare, accessed on 13 May 2014 via, https://core.ac.uk/download/pdf/145052338.pdf

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of women sacrificed on the altar, ironically, of a liberation force that picked up arms to safeguard the rights of South Sudan's people.

Following a referendum in January 2011, the people of Southern Sudan opted to partition the Republic of Sudan "into two independent nations"[14]. One of the prerogatives for this new sovereignty was the adoption of a new constitution.[15] In giving effect to that choice, drafters of the Constitution crafted a "dual constitution" that accommodated elements of customary and statutory law. The strategy behind this dualism was appeasement and the need to reward traditional leaders for their support of the guerrilla movement during the war years.

The above historical account, therefore, disputes the narrative typically advanced by apologists of local government and adherents of customary law that, misleadingly, justify the persistence of child and forced marriages based on cultural necessity. Instead, the above-mentioned history affirms the contrary. It shows that the existence of this repugnant practice is a result of a much more complex and sinister interplay of the relationship between traditional authority and the de facto or *de jure* political systems. These systems sustain and perpetuate, from time to time, the durability of this omni-present customary laws for other ulterior objects: during Anglo-Egyptian rule, it was the economic imperative, for the Muslim-Arab elite that inherited power from the British, it was the political expediency of preserving national unity of the country, while for the Southern Sudanese guerilla movements, it was a partnership of convenience central to ensuring the longevity of each. In other words, the survival of each depended on the protection of the other, a relationship that required turning a blind eye to the other's wickedness when logic demanded doing so.

Denial of the Protection of Rape Laws to Married Couples

Article 247(1) of the South Sudan Penal Code defines rape as sexual or carnal intercourse with another person against their will and without consent.[16] However, a married person cannot file a suit against the person to whom they are married as long as the marriage is valid.[17] This legal conceptualization relies on a dichotomous gaze of analyzing rape: "rape versus sex, non-consensual versus consensual sex, forced sex versus sex without force etc."[18] The above binary understanding of rape in South Sudan means that consent becomes the boundary that marks the difference between rape and making love.[19] However, to understand the preclusion of married couples from rape's protective mantle requires one to combine the above stated dichotomies with the "dominant working understanding" of customary law that brings concepts of marriage, at least in South Sudan, within Lord Hale's purview. This view couches marriage within a "contractual consent theory" which regards that "a woman gives up the rights on her body as a result of the contract with she entered into with her husband, upon marriage, and cannot be retracted."[20] It is this thinking that pervaded the minds of the drafters of the privity clause of Section 247(3) of the South Sudan Penal Code, thereby barring victims of rape, if in a matrimonial relationship, from bringing a suit of rape, and concomitantly precludes a perpetrator from being charged, let alone, convicted of rape.

[14] Douglas H. Johnson, 'The Political Crisis in South Sudan' (2014) 57(3) *African Studies Review* 167.
[15] Kevin L. Cope, 'South Sudan's Dualistic Constitution,' in Denis J. Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 295.
[16] The Penal Code Act 2008 (Republic of South Sudan) Section 247(1)
[17] Penal Code of South Sudan Section 247(3)
[18] Hilkje Charlotte Hanel, 'What is Rape? Social Theory and Conceptual Analysis' viewed on 1 May 2024 on https://www.ssoar.info/ssoar/bitstream/handle/document/92476/ssoar-2018-hanel-What_is_Rape_Social_Theory.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2018-hanel-What_is_Rape_Social_Theory.pdf
[19] Joanne Conaghan, 'The Essence of Rape' (2014) 39(1) *Oxford Journal of Legal Studies* 151.
[20] Jeannie A. Morris, 'The Marital Rape Exemption Comment' (1981) 27 *Loyola Law Review* 597.

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Furthermore, in South Sudan, the payment of a dowry not only solemnises the marriage but also gives the marriage its legal effect, and ultimately customarily binds the union.[21] Such a practice administered by traditional leaders and elders—who themselves come from the communities that encourage these customary practices—are undoubtedly influenced by the theory that a "wife is her husband's chattel or property";[22] in situations where a woman is subjected to a form of forced sex or abuse is inflicted by her husband, such an act is just construed as another way in which her "husband is just making use of his property."[23] This absurdity is also reinforced by the relationship that exists between a girl and her parents prior to marriage, a state in which they are raised to marry in exchange for a dowry that accrues to the father at marriage. Viewed as such, a girl-child is another product[24] that can be offered to the highest bidder to marry. In the calculus of this tradition, the younger the better in the 'arranged and forced marriages markets' hub. This incentivises early and forced marriages as much as it discourages victims from reporting such cases to parents who are complicit in giving girls away as property at a young age.

In South Sudan, another justification for the exclusion of marital rape is predicated on the concept of "unity in marriage" or "unity of person" literally conceptualized to mean that the "being or legal existence of a woman" at marriage is suspended and her existence is merged into that of the husband.[25] Having created one legal being—the husband—he cannot be convicted of raping himself.[26] This archaic common law view, which was first fermented in the West and subsequently anchored in their law in the case of *Clarence*[27], was transplanted to Sudan when it was still a British colony. A century later, the law lost its lustre in its original birthplace—England—yet it persists in South Sudan, the place that inherited it. Not only is its rigor undiminished, but it is also being perpetuated by new justifications that insist that the marital rape privity clause is useful in that it prevents governmental intrusion into domestic and private familial affairs—matters best governed by customs.

Unfortunately, this understanding fails to capture most forms of rape, such as acquaintance, marital, and drug-induced rape. Importantly, this understanding is irreconcilable to certain constitutional guarantees. For example, the marital rape exemption operates in a discriminatory manner by making sexual assault criminal outside the marriage institution but permissible within the institution of marriage, thereby denying married women the same protection of bodily integrity and individual autonomy that an unmarried woman enjoys.[28] This differential application of the law offends Section 14 of the transitional Constitution of South Sudan, which guarantees equality of all persons before the law[29] and prohibits any sort of discrimination on the basis of "social status" amongst many other things. The argument that purports that rape immunity prevents the government from violating privacy and the sanctity of marriage is rather odd, for the simple reason that maintaining such an argument is to implicitly advocate for "coercive sexual relations."[30] Moreover, the idea that marital rape privity clauses act as a bulwark to prevent government intervention in private spaces is defeated by the fact that, in some instances, the

[21] Jan Pospisil et al, 'Bring Enough Cows to Marry: Brideprice, Conflict and Gender Relations in South Sudan' (2024) *Peace and Conflict Resolution Evidence Platform*.
[22] Ibid, 21.
[23] Ibid, 21.
[24] Patricia Mahoney and Linda M. Williams, '*Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape*' (Brockbaker 1998) 113.
[25] Fitzpatrick v Owen (1916) 186 S.W. 832
[26] A. V. Dicey, 'Blackstone, Commentaries on the Laws of England' (1932) 4(3) *The Cambridge Law Journal* 236.
[27] R v Clarke [1949] 2 All ER 448
[28] Judith A. Lincoln, 'Abolishing the Marital Rape Exemption: The First Step in Protecting Married Woman from Spousal Rape' (1988) 35 *Wayne Law Review* 1219.
[29] Constitution of South Sudan Section 14
[30] Siddeqqa Iram and Sambit Kumar Patri, 'Is Marriage a Contract for Sexual Slavery?: A Study of Marital Rape' (2023*) NUALS Law Journal* 17: 60.

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government's interest in intervening in cases where criminality exists outweighs the right to protect individuals' privacy rights. For example, in cases of child abuse, where the state's interest in encroaching and saving the child from abuse triumphs that of privacy. If there is justification to intrude into a private setting to save a child from abuse, then justification to intrude into a private setting to save a woman or man from sexual abuse is equally valid. For the above reasons, The paper maintains that the law of the marital exemption clause in South Sudan should be abolished and, in its place, a law that penalizes rape within the institution of marriage should be enacted. In so doing, It argues in the next section for the need to have a punishment commensurate with the crime of rape among married couples by ensuring that such a law is fairly and adequately labelled in South Sudan's Penal Code.

Is Rape Fairly Labelled in South Sudan's Penal Code?

In South Sudan, there is a "gap between the narrow dominant working understanding and the external reality of sexualized violence and rape:"[31] The dominant theory is that a married woman cannot be raped by her husband and the external reality being that, indeed, there are women who are raped within the institution of marriage. That is a fact that remains unchanged even if the constitution extinguishes such a right. This chasm between theory and reality can be bridged by the creation of new laws that fairly label and reflect the "nature," "gravity," and "degree of moral wrongfulness" of the offence.[32] Doing so is necessary because the current scope of South Sudan's marital privity clause is limited and exclusive, but more importantly, it ignores reality. It is limited because rape in South Sudan is can only be invoked by unmarried couples. This is exclusive because the law discriminates against married couples only. Thus, if we satisfy ourselves with the notion that the doctrine of fair labelling is concerned with the purpose of educating, communicating, and affording fairness[33] to the public, then nothing in South Sudan's present context is more apposite to the exemption of marital rape than the doctrine of fair labelling. It is for this reason that, in this section, I engage with the doctrine of fair labelling in three ways and expose its pertinence to the subject of marital rape. First is the component of 'fairness': under this principle, "offence names must not create a false or misleading impression of the nature or magnitude of the offender's wrongdoing or encourage an inaccurate conclusion to be drawn."[34] In South Sudan, proponents of marital rape exemption argue that women—who are even denied calling themselves victims—and who experience rape from a husband while still in a valid marriage can rely on domestic violence laws,[35] which, according to detractors, offer sufficient remedies to victims of marital rape. This proposition appeals easily to most people because "marital rape and domestic violence can often overlap and, in most cases, involve similar emotions."[36] However, the truth is that they are two completely distinct crimes. Three different types of rape can[37] occur within a marriage institution; however, battered rape occurs the least in a marriage yet remains the most similar to domestic abuse. It this conflation that leads most people to "assimilate marital rape survivors into

[31] Ibid, 18.
[32] Barry Mitchell, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64(3) *The Modern Law Review* 393.
[33] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217.
[34] Andrew Cornford, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42(4) *Oxford Journal of Legal Studies* 985.
[35] South Sudan Penal Code Section 255
[36] Sarah M. Harless, 'From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims' (2003) 35 *Rutgers Law Journal* 305.
[37] Three different forms of marital rape have been identified: (1) battered rape, which involves forced sex combined with beating; (2) forced rape, where the husband only uses as much force as necessary to coerce his wife into sexual activity; and (3) obsessive rape, which involves using force to carry out strange, perverse sexual interests.

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the category of other domestic violence victims"[38] and by so doing, they "ignore the reality that some women are raped by their husbands but do not experience other forms of violence." This conceptualization of "marital rape as an extension of domestic violence excludes women"[39] who have experienced other forms of rape that do not align with abusive components. The conflation of these two distinct offences as one and the same is what makes the crime unfair.

The second is communicative value. *Chalmers and Leverick* argue that fair labelling serves a communicative purpose for the public, offenders, and agencies operating within and without the criminal justice system.[40] Regarding communicating generally with the public, fair labelling has a "symbolic function"; that being the case, the condemnation of the offender should reflect the nature of the wrongdoing.[41] Since society has a vested interest in societal truths just as much as it places a premium on the value of reputation to a person, any incompatibility between imputed crime and actual wrongdoing makes the offence 'unfair'.[42] Unfortunately, this seems to be the case for those who insist that the offense of sexual violence is a panacea for those who hide behind the immunity afforded by the privileges of the marital rape clause. In South Sudan, the consequence of this inconsistency is that the message sent to the general public is that those who rape their partners while married are violent offenders, whereas those who perform the same act while not married are rapists. The variance simplifies the magnitude of the offence in a marriage more than it does in a non-conjugal situation.

Regarding the importance of the communicative value sent to an offender, it is important that punishment and sentencing help the offender rationalise their culpability and not regard the sentence imposed on them as an arbitrary decision.[43] Here again, South Sudan, in dealing with a matter of rape as one of sexual abuse, runs afoul this principle because the sentence for a person convicted of 'rape proper' under Section 247—a person who commits rape and is not married to the victim—of the Penal Code faces a potential jail time of fourteen years and perhaps a fine;[44] in contrast, a person who commits the same crime but is married and can, thus, only be charged with 'coercive sex' is only exposed, if found guilty, to a jail term "not exceeding five years or with a fine or with both."[45] Furthermore, within the communicative paradigm of fair-labelling is the multi-pronged limb that deals with communication with agencies 'within and without' the criminal justice system.[46] In this section, owing to space limitations, I am only concerned with the communicative aspect of agencies outside the justice system. Here, just as it has been argued by *Chalmers* and *Leverick* that employers have an interest in having some information about their potential employees disclosed to them, in the case of South Sudan, where polygamy is rampant, the parents and would-be brides also have a legitimate interest in knowing about their potential in-laws or partners. Unfortunately, in South Sudan, marital rape culpability is misrepresented by punishing and charging it as sexual violence. This miscommunication operates adversely for those owed a duty to know about their potential partners, because the unfair labelling denotes a message of someone who is abusive, while in an actual sense, the perpetrator could be a rapist. Having been misinformed, the potential bride to be, or her parents in the event they proceed with a

[38] Morgan Lee Woolley, 'Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues' (2007) 18 *Hastings Women Law Journal* 269.
[39] Michelle Anderson, 'Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offences by Intimates' (2002) 54 *Hastings Law Journal* 1465.
[40] Ibid, 33.
[41] Ibid, 34.
[42] Glanville Williams, 'Convictions and Fair Labelling' (1983) 42(1) *The Cambridge Law Journal* 85.
[43] Moshikaro Khomotso, 'The Moral Foundations of Fair Labelling' (2024) Doctoral Dissertation viewed online at https://www.repository.cam.ac.uk/items/7425dd23-acc7-4287-bd19-bf61608e60f5 on 15 May 2024.
[44] South Sudan Penal Code Section 247(1)
[45] South Sudan Penal Code Section 255(1)(c)
[46] Ibid, 44.

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marriage, will expose their daughter to a more dangerous risk than the one that actually exists (the public risk communicated was exposure to a violent defendant, as opposed to a rapist). In most cases, perpetrators circumvent the risks if they can affirm that they have indulged in anger management programs, as opposed to the more intense therapeutic remedies needed for individuals suffering from rape proclivities.

One way of overcoming and demystifying the confusion and the discrepancy that arises "between offence and defence and conduct and fault"[47] when a person who should be charged and punished for rape in South Sudan is instead charged with sexual violence on "account of spousal exemption"[48] is by proving that they are married to their victim. This is problematic because the law facilitates the masking of crimes. To remedy this defect, I argue for the enactment of a new law that can apply with 'specificity' and 'particularity' in such a context: that of rape within the institution of marriage. This argument is discussed in the following section.

Specificity and Particularism of Marital Rape

In South Sudan, the penalization of marital rape has advanced along two tracks. One stream argues for the complete abolition of the exemption. The other group argues that complete abolition would open the door for the misuse and abuse of this legal provision by women to avenge on men for aggrieved issues that may be unrelated to rape.[49] This second group acknowledges the ubiquitous occurrence of marital rape; to them, remedying this depends on balancing the interests of men who may be unfairly targeted by vengeful wives against the interest of affording justice to victims of spousal rape. The answer, to the latter's group, lies in reforms that will establish a *sui generis* offense that will particularly and specifically encapsulate 'marital rape' as distinct from the general conception of rape that occurs in non-marital relations. In this section, the ideas of the latter group are discussed.

The challenge facing the reformists of marital rape exemption is how to sustain two competing obligations: how does a wife bring charges of rape against her husband while simultaneously aiming to preserve the sanctity of that same marriage or any chance of reconciliation?[50] The answer usually offered by reformists is that a marriage characterized by violent sexual abuse and rape is not worth preserving; thus, reformers contend that such a question need not be answered because such grave charges brought by a woman against her estranged spouse will almost always be accompanied by an intent to dissolve the union.[51] This pronouncement is consistent with the views of non-abolitionists who suggest that a panacea for victims of marital rape should be sought by amending divorce laws[52] and not the punishment of a spouse.

However, convincing the arguments advanced by non-abolitionists, a more robust way of "effectively equalizing treatment of marital and non-marital rape"[53] still offers a better option. In countries where the move to abolition was successful, it was mainly initiated via one of two options: legislative or judicial. Each method has inherent weaknesses and strengths. However, because the "judicial method excels in guiding the process leading up to the change and the legislative method excels in gaining legitimacy, a method that combines the strengths of both is

[47] Arlie Loughnan, 'Women's Responsibility for Crime: Dynamics of Change in Australia Since the Turn of the Twentieth Century' (2018) 5(2) *Law & History* 137.
[48] Jennifer McMahon-Howard et al, 'Criminalizing Spousal Rape: The Diffusion of Legal Reforms' (2009) 52(4) *Sociological Perspectives* 505.
[49] Ibid, 39.
[50] Mary Ellsberg et al, 'No Safe Place: Prevalence and Correlates of Violence Against Conflict-affected Women and Girls in South Sudan' (2020) 15(10) *PLoS One* e0237965.
[51] Carolyne Gatimu, 'Culture and Gender Based Violence in South Sudan' (2018) *Africa AMANI* 112.
[52] Medial Hove and Enock Ndawana, 'Women's Rights in Jeopardy: The Case of War-Torn South Sudan' (2017) 7(4) *Sage Open* 2158244017737355.
[53] Theresa Fus, 'Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches' (2006) 39 *Vanderbilt Journal of Transnational Law* 481.

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desirable."[54] Such a model is the archetypal design consistent with the "equal protections" provisions found in Section 14 of South Sudan's Constitution and other international treaties that South Sudan is a party to.[55] For the argument of the equal protection doctrine to succeed, one needs to prove at least two things. The first is whether the alleged treatment had a differential effect. The second is whether the differential treatment is reasonable and objective in furthering a legitimate goal. If there is an affirmation of the first, then proceed to the second, and if the answer is that the treatment is unreasonable, not objective, and serves an illegitimate goal, then treatment will be unequal upon one of the classes of discrimination expressed by the treaty relied upon. South Sudan has an "equality" provision entrenched in its Constitution and is a party to the International Covenant on Civil and Political Rights, which grants the same equality provisions. To impeach spousal immunity, rape is a good place to begin.

CONCLUSION

In this paper, it is argued that South Sudan's law governing rape is defective because it denies one set of women (married women) the protections it confers on another set of women (unmarried women). For a country that prides itself in waging a three-decade war to free its civil populace from marginalisation and inequality, the enactment of such discriminatory laws and the refusal to abolish them make human rights advocates question that legacy. It deliberately begin the paper with a historical account of how the marital rape law found itself in Sudan and subsequently South Sudan's Constitution, and dispel the notion that this repugnant law was previously enacted and currently sustained by cultural imperatives. It show that the existence and persistence of this law were, in fact, for political or economic expediency by the successive governments that ruled Sudan. It then show that the interaction of this obtuse history with a plural system that attempted to accommodate both laws resulted in two competing concepts of rape. Rape in nonmarital situations and sexual violence if couples are married. This incoherent and conflicting definition of rape has resulted in a difference in the labelling of the crime and how it is punished. If a man rapes a person he is not married to, he risks going to jail for 14 years, but the risk is four times lower for the same crime if committed against his own wife. Here, the application of the law differs from how it is actually labelled. Finally, the discrepancy leads me to ponder the enactment of a new law with a much harsher sentence for married perpetrators of rape. This should be done in a manner specific to the crime. However, It stop short of proposing what the scope and nature of these crimes would look like.

The paper is limited in that it fails to address how the defence of 'consent' operates in cases where the accuser and the accused are validly married. This deficiency has a bearing in terms of legally defining when the threshold of consent is secured or denied. Ordinarily, consent is a defense against rape as long as the accuser can demonstrate that the plaintiff was a willing, consenting participant in the act, and its validity and presence of consent is 'continuous.' This requirement might be difficult to achieve in a marital rape proceeding because of the existence of a valid marriage and the nature of such a relationship.

[54] Ibid, 28.

[55] International Covenant for Civil and Political Rights and International Covenant for Social, Cultural & Economic Rights; South Sudan has acceded to both treaties.

