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Women and Girls Caught between Rape and Adultery in Sudan: Criminal Law Reform, 2005–2015



Liv Tønnessen and Samia al-Nagar

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List of Abbreviations

ACJPS	African Centre for Justice and Peace Studies
AUW	Ahfad University for Women
CEDAW	Convention on the Elimination of Discrimination against Women
CRC UN	Convention on the Rights of the Child
FGM/C	Female genital mutilation/cutting
HAC	Humanitarian Aid Commission
ICC	International Criminal Court
KCHRED	Khartoum Centre for Human Rights and Environmental Development
Maputo Protocol	Protocol to the African Charter on Human Rights and People's Rights on Rights of Women in Africa
NCP	National Congress Party
RIGDPR	Regional Institute for Gender, Diversity Peace and Rights
SIHA	Strategic Initiative for Women in the Horn of Africa
SORD	Sudanese Organization for Research and Development
UNFPA	United Nation's Population Fund
UNICEF	The United Nation's Children's Fund
UNMIS	UN Mission in Sudan
VAWU	Violence against Women Unit
WCHR	Women's Centre for Human Rights
WLUML	Women Living under Muslim Law

List of Arabic Words

Al-Mashru al-Hadari	The civilization project. The term used for the current regime's Islamization processes.
Dahyaa	Literally translated as "lost" but meaning "immoral" in this Sudanese context
Fitna	Anarchy, used to describe sexual chaos
Fatwa	Legal opinion about Islam
Hadith	Narrations originating from the words and deeds of Prophet Muhammad
Hudud (singular hadd)	Translates into limitation, restriction, or prohibition). The hudud are the ordinances of Allah, and they have fixed punishments derived from the Islamic sources.
Lian	An oath taken in cases where the husband accuses his wife of adultery but there are no witnesses except himself, whereby the husband repeats his accusation four times and a fifth time, praying that Allah's curse be on him if he was not telling the truth
Liwat	Sodomy
Mahr	Dowry
Muhsan	Refers to the legal status of an individual who, at the time of the zina, is in a valid and on-going marriage that has been consummated
Nafaqa	Maintenance; husband shall provide for wife and children
Nushuz	Disobedience (wife towards husband)
Qawama	Male guardianship
Qisas	Refers to offences in Islamic criminal law such as bodily harm and homicide.
Quran	Literally translates into "the recitation"; is the direct word of Allah revealed to Prophet Muhammad
Sunna	The Sunna comprises Prophet Muhammad's words, actions, and practices
Tazir	Refers to criminal offences for which punishments are not stipulated in the Quran or Sunna; therefore, sanctions are left to the discretion of the judge.
Wali	Male guardian
Zina	Sexual intercourse between individuals who are not married to each other. Includes both adultery and fornication.

1 Introduction¹

This report investigates criminal law reform in Sudan, focusing on two important and controversial legal reforms related to (a) a definition of rape that is clearly de-linked from the Islamic crime of *zina* (i.e., sexual intercourse between individuals who are not married to each other) and (b) a definition of “child” as an individual younger than 18 in statutory rape cases.

Many legal reforms have been proposed in Sudan since the Comprehensive Peace Agreement (CPA) of 2005 officially ended the extended civil war (Africa’s longest) between the north and south of the country. The peace accord opened up some space for women’s groups after a long period of harsh authoritarian control. All Sudanese laws were to be reviewed and reformed in alignment with the Interim National Constitution of 2005, including the Criminal Act of 1991. Although the peace agreement was largely gender-blind, the interim constitution included clauses on gender equality and affirmative action (Itto 2006). For example, article 32 of the bill of rights provides, “The State shall guarantee equal right of men and women to the enjoyment of all civil, political, social, cultural and economic rights, including the right to equal pay for equal work and other related benefits.” Pro-women activists as well as women within the government have been particularly active in advocating for legal reforms since 2005 with reference to the bill of rights. Two major legal reforms – in 2010 and 2015 – have dealt with rape.

The most recent legal reform redefines rape in Sudan’s Criminal Act of 1991. Until February 2015, “rape” was defined as *zina* (adultery or fornication) without consent. The act of *zina* was, and still is, punishable by 100 lashes for unmarried offenders and by death by stoning for married offenders. The blending of the ideas of rape and *zina* in the 1991 act meant that the strict rules of evidence used for *zina* were also applied to rape, something that constituted a serious legal obstacle for rape victims. Pro-women activists contested this legal position by forming the “Alliance of 149,” named after the rape article in the Criminal Act. Interviews conducted during the last five years show that the reform process on rape/*zina* has been politicized, especially after the International Criminal Court (ICC) indicted Sudan’s president for sexual warfare in Darfur in 2009. Around the same time as the National Assembly was amending Sudan’s rape law, it forcibly shut down the founding member and initiator of the “Alliance of 149”. In addition, the definition of apostasy as well as insulting religion was widened in such a manner that it can easily be used to clamp down on activists who are criticizing the Islamist regime.

Darfur brought the previously taboo topic of rape into the public debate by focusing attention on sexual violence in Sudanese society. This furthered debate in both government and civil society about reform of Sudan’s rape laws (including the controversial topic of marital rape), although only limited dialogue on the topic has arisen *between* government reformists and pro-women activists. Reformist Islamist women in government managed to effectively advocate for an amendment to the Criminal Act de-linking rape from *zina*, which Sudan’s National Assembly passed in February this year. However, the reform is only partial, since the Evidence Act of 1994, in which rape and *zina* are still conflated, has yet to be reformed. In addition, marital rape is not explicitly criminalized.

¹ This report is part of the project “Women’s Human Rights and Law Reform in the Muslim World,” funded by the Rafto Foundation. Fieldwork and data collection have been funded by several other projects over the past five years, including “Assisting Regional Universities in Sudan and South Sudan” (ARUSS), funded by the Norwegian Embassy in Khartoum; “Caught between Rape and Adultery in Sudan” and “Protection of Civilians: From Principle to Practice,” both funded by the Norwegian Research Council; and “Gender Based Violence in Conflict-torn Sudan,” funded by the Norwegian Peacebuilding Resource Centre (NOREF).

The other significant legal reform deals with statutory rape. Under the definition of “rape” in the pre-2015 version of the Criminal Act, the requirement of evidence for lack of consent does not apply to children, which means children have had better protection under the law. However, determining who was a “child” was a thorny issue. The Criminal Act of 1991 defines a child to be someone who has not yet reached puberty, as understood in Islam. Sudanese judges have taken varying approaches to defining “puberty,” however. Many have viewed age 15 as the dividing line between childhood and adulthood, while others have looked for physical signs of puberty (or “sexual maturity”). In practice, this has meant that girls over the age of 15 (and sometimes even below) who have raised rape cases in Sudanese courts have been treated as adults. And as adults, they have had to show evidence that they did not consent to the sexual act.

In 2010, Sudan enacted a new National Child Act that defines a child as an individual younger than 18 in accordance with the United Nations 1989 Convention on the Rights of the Child (CRC), which Sudan ratified in 1991. The Child Act specifically criminalizes statutory rape. As it stands now, the new law is in conflict with the Criminal Act, however. Although the Child Act should take precedence, our findings suggest that the implementation of the act in courts in Khartoum is uncertain in statutory rape cases: while some judges implement the Child Act in statutory rape cases for all girls under the age of 18, some still follow the Criminal Act and look for signs of puberty.

The definition of a child as younger than 18 years in the Child Act of 2010 did not receive much attention at the time of enactment, but it has become the focus of heated debate as conservative actors have realized that this new definition also has repercussions for the age of marriage, which is set at puberty in Sudan’s Muslim Family Law of 1991. Two conflicting positions within the current Islamist government (including in the judiciary itself) both employ Islamic arguments. In February 2015, an amendment to the Criminal Act was proposed to the National Assembly setting the age of criminal responsibility at 18 in accordance with the Child Act and international conventions ratified by Sudan. However, this proposal was blocked, partly by the judiciary itself, which advocated for the age of 15. Meanwhile a legal counter-mobilization against the Child Act continues and has resulted in a case currently pending in Sudan’s Constitutional Court.

The analysis in this report is based on both authors’ long-term engagement and work on women’s rights and law reform in Sudan. The report builds on 117 detailed interviews (in English and Arabic) collected through several field visits to Khartoum in May 2011; May and October 2012; February and November 2013; March, June, October and November 2014; and February and May 2015.² We have been following several law reform processes in Sudan related rape, sexual harassment, family law and the criminalization of female genital mutilation/cutting (FGM/C). The interviewees were recruited through a network of contacts we have developed through many years of engagement with Sudanese women, and many people we interviewed for this study are individuals we have engaged with through prior interviews, social interactions, and formal and informal discussions. We asked open ended questions about (a) legal reform initiatives and processes, both in general and dealing with rape in particular; (b) (Islamic) arguments and strategies for progressive law reform; (c) possibilities and constraints faced by pro-women activists and reformists in the post-CPA Sudan political environment; (d) the working relationship, cooperation, and dialogue between women in civil society and women in the government; and (e) implementation of rape laws in Sudanese courts.

² The interviewees have been anonymized in the text, but there are a few exceptions for which we have sought the interviewees’ permission. In addition to these interviews, the analysis builds on interviews and research on law reform carried out from 2006 onwards.

We interviewed a broad range of actors:

1. representatives of civil society, for a special focus on women’s groups, networks, and centers that are engaged in law reform efforts (including pro-women activists and lawyers operating in Darfur);
2. members of the ruling Islamic party (the National Congress Party, or NCP), along with members of opposition groups and other political parties;
3. government actors and institutions within the executive (ministries, presidential advisors, and institutions), legislative (parliamentarians, both male and female), and judicial branches (judges in child courts, the Supreme Court, and the Constitutional Court);
4. representatives of international organizations, including UNICEF, UNFPA, and UN-Women; and
5. to a lesser extent, representatives of the media (with a focus on journalists).

In addition to these interviews, the report builds on primary sources such as legal texts (both draft laws and final versions of laws), law review reports, campaign material and analysis, court cases, and media debates.

The report is structured in the following way: The next part of the report deals with the definition of rape in Sudan’s Criminal Act of 1991, focusing on its conflation with *zina* and the legal consequences for rape victims. Part 3 details why and how rape emerged onto the political agenda in Sudan. In part 4, we map initiatives for law reform both within civil society and within the government, as well as the current dialogue between pro-women activists and pro-women Islamist reformists on marital rape. The report also critically analyses these initiatives in light of the 2015 reform and discusses the shortcomings of that reform against the backdrop of a state under immense internal and external pressure.

Part 5 of the report details the process behind the National Child Act of 2010, including why the definition of a child fell under the radar at the time of enactment and why it has now become a topic of heated debate among Islamists in present day Sudan. It highlights the diversity of Islamic interpretations within the context of an Islamizing state, focusing particularly on how reformist Islamist women are arguing, within a religious frame, that individuals younger than 18 years should be considered children under the law. After a short overview of the judicial system, the report goes on to discuss implementation of the Child Act in child courts in Khartoum in statutory rape cases. The report concludes in part 6 with a discussion of the importance of pro-women activists and reformists uniting their efforts on issues on which they agree, in order to achieve greater legal reform success.

2 Legal Discrimination of Women: The *Hudud* and Sudan's Criminal Act of 1991

This part of the report first discusses the political context of Sudan's Criminal Act of 1991 as it relates it to *hudud* in classical Islamic law. Second, it highlights (a) the conflation of rape and *zina* in Sudan's law and the implications this has in rape cases and in the subsequent incrimination of rape victims and (b) how Sudan's law sets the age of criminal responsibility in *zina*/rape cases at puberty.

Criminal justice in Islamic law covers three main types of offences: *hudud*, *qisas*, and *tazir*. *Hudud* (singular *hadd*, which means limitation, restriction, or prohibition) are regarded as the ordinances of Allah, and they have fixed punishments derived from the Islamic sources. Among these three categories of offences (and, consequently, penalties), *hudud* assume a central place in the call for Sharia by contemporary Islamists, who consider these to be crimes against Islam itself.³ In Sudan, the introduction of the *hudud* was embedded in a larger call for Islamization, first introduced by President Nimeiri in 1983 with the so-called "September Laws" and later by Islamists who came to power through a military coup in 1989.⁴ More recently, President Omar al-Bashir and his circle of supporters instigated a process of comprehensive Islamization based on the assumption that Islam and Arabic represent the foundation of the country's national identity and should define its legal, political, cultural, and economic systems. Accordingly, the regime instituted control measures typical of authoritarian governments, with religious justifications provided to silence critics and indoctrinate citizens by for example criminalizing apostasy (article 126 of the Criminal Act) and criminalizing insults to religious creeds (article 125). Opponents of the new government were therefore argued to be not only hostile to the state, but also enemies of Islam and God. As part of the Islamists' so-called "civilization project" (*al-Mashru al-Hadari*), the regime sought to Islamize the law, including the *hudud* penalties in the Criminal Act (Tønnessen 2014). The control of women's bodies and movement and the protection of their morality and honor were central to this project (Nageeb 2004). According to Abdel Halim (2011, 230),

Women are more likely to be punished for sexual crimes because they are women, and the sexist dimension of the (Sudanese) criminal law is particularly evident in the way in which the behaviour of women is controlled and criminalized.

Zina is considered to be a *hudud* offence.⁵ In Islamic jurisprudence, *zina* is defined as sexual intercourse between a man and women outside a valid marriage contract. The punishment is the same for female and male offenders, but they are divided into two categories: (a) *muhsan*, defined as free men and women, of full age and understanding, who enjoy lawful wedlock, and (b) non-*muhsan*, who do not fulfill the above mentioned conditions. The penalty set forth in Sharia (i.e., Islamic law) for extramarital sex or adultery is death by stoning, and the penalty for premarital sex or fornication is

³ *Qisas* refers to retribution and covers offences such as bodily harm and homicide. *Tazir* refers to offences for which punishments are not stipulated in the Quran or Sunna; therefore, sanctions are left to the discretion of the judge.

⁴ Although most Muslim-majority countries have not codified *hudud*, a number of countries or regions have taken steps to introduce Islamic criminal offences and sanctions into their codified laws. Examples are Pakistan (1979), Iran (1979, after the Revolution), Sudan (1983 and 1991), Yemen (1994), the Kelantan State in Malaysia (1993), several states in Nigeria (1999–2000), and the Aceh territory in Indonesia (2009).

⁵ The *hudud* offences include in addition to *zina*; theft, highway robbery, apostasy, drinking of alcohol and gambling and lastly the false accusation of *zina* (*Qadhf*)

100 lashes.⁶ Sudan’s Criminal Act of 1991 follows this classical Islamic jurisprudence. According to article 145 (part of a section entitled “Offences of Honour, Reputation and Public Morality”),⁷

- (1) There shall be deemed to commit adultery:
 - (a) Every man who has sexual intercourse with a woman without there being a lawful bond between them;
 - (b) Every woman who permits a man to have sexual intercourse with her without there being a lawful bond between them.

Article 146 goes on to detail the punishment for *zina*:

- (1) Whoever commits the offence of adultery shall be punished with
 - (a) Execution by stoning where the offender is not married (*muhsan*)
 - (b) 100 lashes where the offender is not married (*non-muhsan*)
- (2) The male non-married offender may be punished, in addition to whipping, with expatriation for one year.
- (3) Being *muhsan* means having a valid persisting marriage at the time of the commission of adultery, provided that such marriage has been consummated.⁸

The Criminal Act goes on to define rape as *zina* without consent. Rape also falls under offences listed under the section “Offences of Honour, Public Morality, and Reputation” indicating that rape is considered an offence of a woman and her family’s honor and reputation, rather than a crime and violation of a woman’s bodily integrity. In article 149, the law defines rape in the following way:

- (1) There shall be deemed to commit the offence of rape, whoever makes sexual intercourse, by way of adultery, or sodomy, with any person without his consent.
- (2) Consent shall not be recognized when the offender has custody or authority over the victim.
- (3) Whoever commits the offence of rape, shall be punished, with whipping a hundred lashes, and with imprisonment, for a term, not exceeding ten years, unless rape constitute the offence of adultery, or sodomy, punishable with death.

⁶ The penalty of lashes has a Quranic basis. A verse in that tome prescribes punishments and states, “The woman and the man guilty of adultery or fornication – flog each of them with a hundred stripes” (Surah al-Nur 24: 2). Mir-Hosseini and Hamzic (2010, 30–31) discuss lashes and other classic punishments for *zina* in detail. On the other hand, stoning does not have a Quranic basis and is solely based on the Sunna, which is the collection of the Prophet Muhammad’s actions and teachings (called *hadith*). Jurists of all schools rely on three specific *hadith* to build their legal arguments for stoning. See Sidahmed (2001, 191).

⁷ Sudan’s Criminal Act appears in English in *Arab Law Quarterly* (Republic of Sudan 1994). We are quoting this English translation.

⁸ In Sudan’s Criminal Act, *muhsan* is defined as the legal status of an individual who, at the time of the *zina*, is in a valid and on-going marriage that has been consummated (article 146). Therefore, widowers, widows, and divorcees do not fall under the definition of *muhsan*, and Sudanese law differ on this particular point from classic Islamic jurisprudence (see Scholz 2000; Köndgen 2010).

The definition of rape is gender neutral, meaning that not only female victims are recognized by the law. Notably, however, sexual intercourse is defined to include only penal penetration, either vaginally (article 145(2)) or anally (sodomy, article 148(1)).⁹ As a result, oral rape or rape by foreign objects, such as by a gun barrel, is not considered rape according to the Criminal Act of 1991 (WLUML 2015).

In addition, a person who is not an adult cannot give consent as stipulated above. This means that children have better protection under the law than adults. But the Criminal Act defines adult based on signs of puberty, not a specific age. This means that the line between a child and an adult is in the eyes of the beholder, that is, the judge. Sudanese judges typically define puberty based on signs of sexual maturity, which means that children below 18 (mostly girls) have been tried as adults before Sudanese courts in rape/*zina* cases (for more information, see section 5.4 below)

Also, the Criminal Act of 1991 does not specifically mention marital rape as a crime. Notably, while this act is silent on marital rape, the Criminal Act of 1925 and 1974 explicitly state that the provisions on rape are only valid outside of marriage, not inside it (with the exception of anal sex, which is criminalized even within marriage) (Köndgen 2014; Tønnessen 2014) (for more on marital rape, see section 4.2 below).¹⁰

The definition of rape as *zina* without consent means that the offence needs to be proved according to the rules of evidence that apply to *zina* (Sidahmed 2001; Abdel Halim 2011). According to article 62 of the Evidence Act of 1994, the offence of *zina* must be proved by

- (a) a confession before the court unless retracted prior to execution of the sentence
- (b) the testimony of four judicious witnesses;
- (c) pregnancy of the woman if she is not married; or
- (d) *lian* oath in cases where the husband accuses his wife of adultery but there are no witnesses except himself, whereby the husband repeats his accusation four times and a fifth time, praying that Allah's curse be on him if he was not telling the truth.¹¹

DNA proof is not permissible, unless the court first establishes *zina*, based on the virtually impossible burden of proof detailed above.

The evidentiary rules applying to *zina* are historically based on the rationale in classical Islamic jurisprudence that there should be indisputable evidence for the severe punishment envisaged (Mir-Hosseini and Hamzić 2010). However, if applied to rape, the evidentiary rules effectively “render the prosecution of rape difficult if not impossible” (REDRESS and KCHRED 2008a, 23). Since such evidence is virtually impossible to obtain, a rapist “can only be incriminated if he voluntarily decides to confess his guilt before the authorities” (Sidahmed 2001, 203). This “evidentiary threshold has

⁹ Sodomy is called *liwat* in Arabic.

¹⁰ This view is not unique to Sudan. According to Lisa Hajjar (2004, 11), marital rape is “uncriminalizable” under dominant interpretations of Islamic law.

¹¹ In Islamic law, *lian* is an oath that gives the husband the possibility of accusing his wife of *zina* without legal proof and without becoming subject to the punishment prescribed for accusing someone of *zina* without evidence (which is 80 lashes); it also gives him the possibility to deny the paternity of the child if she is pregnant (Schacht 2013). It basically functions as an avenue for divorce.

contributed to impunity for rape, as a conviction can realistically only be secured where the perpetrator confesses to the crime” (REDRESS and KCHRED 2008b, 10).

Furthermore, if a woman reports the rape and starts a court case she risks being charged with the crime of *zina*, since her allegation of rape is in itself considered to be a confession to *zina*. A retracted confession is (at least in theory) no longer valid, which means the victim can no longer be punished for the *hadd* crime. Thus, married women who have confessed to *zina* are often strongly encouraged by judges to retract the confession, so that the *zina* case can be dismissed and the woman’s life can be spared.¹² A judge will often give such a woman up to a month to retract her confession.¹³

Granted, although women have been sentenced to death by stoning for *zina*, this punishment has never been carried out in Sudan (see Fluehr-Lobban 2012, 125; Köndgen 2014). Although some lower courts have sentenced married women to death by stoning, the Supreme Court has overruled the lower courts’ judgment every single time (Köndgen 2014). The last case, which received international attention, was the case of Mariam Yahia who faced both apostasy and adultery charges in 2013. She was sentenced to death by stoning, but the verdict was later overturned by the Supreme Court (Reem 2014).

Article 48(1) of the Criminal Procedure Act of 1991 instructs the police to fill out a document (Form 8) detailing injuries, recent loss of virginity, bleeding, or presence of sperm, which means that a perpetrator can still be punished for a *tazir* crime of gross indecency (article 151 of the Criminal Act).¹⁴ Form 8 can be used as evidence in court, but it is only allowed in rape cases if evidence for *zina* is there to start with. This means DNA proof is not permissible unless *zina* is established first under the high and virtually impossible burden of proof stipulated above. However, if the victim shows no signs of force being used or if this is not noted in Form 8, she (or he) also risks being charged with gross indecency or the lesser crime of indecent and immoral acts (article 152). Lawyers interviewed said they recommend that their clients *not* report rape due to this risk.¹⁵

Even where the rape is not reported to the police and a court case is not initiated, an unmarried woman who become pregnant as a result of a rape is at risk of being charged with *zina*. Sudan follows the Maliki school of Islamic jurisprudence, which considers pregnancy to be evidence of *zina* for unmarried women. In the other three schools of Sunni Islamic jurisprudence, pregnancy does not constitute proof of *zina*. The presumption of *zina* on grounds of pregnancy puts women and girl defendants in a disadvantageous position compared to men and boys accused of the same offense (Sidahmed 2001). A female defendant must bring evidence that (a) a man committed *zina* and that (b) she committed *zina* without consent. Failure to prove either (a) or (b) means that the male perpetrator walks free from the *hadd* punishment, but the female victim is still subject to the *hadd* punishment (ibid.). In the words of one activist, the consequence is that “if you cannot prove rape, you become the

¹² Interview with a lawyer (2011); interview with a Supreme Court judge (2015).

¹³ Interview with a child court judge (2014).

¹⁴ Article 151 of the Criminal Act on Gross Indecency stipulates the following:

(1) There shall be deemed to commit the offence of gross indecency whoever commits any act contrary to another person’s modesty, or performs any sexual act with another person not amounting to adultery or homosexuality, and he shall be punished with whipping not exceeding 40 lashes and he may also be punished with imprisonment for a term not exceeding one year or with a fine.

(2) Where the offender of gross indecency is committed in a public place or without the consent of the victim the offender shall also be punished with whipping not exceeding 80 lashes and he may also be punished for a term not exceeding two years with a fine.

¹⁵ Interview with a lawyer (2011).

perpetrator.”¹⁶ According to Asma Abdel Halim (2011, 233) the “law starts from the premise that a rape victim is a liar.”

The punishment of lashes is frequently enforced for *zina* and other breaches to public morality (ibid.).¹⁷ Unmarried girls who get pregnant as a result of rape are particularly vulnerable for prosecution. Any childbirth in a government hospital where there is no father to put on the birth certificate must be reported to the police (Fluehr-Lobban 2012, 125). This is complicated by the fact that abortion is both criminalized and stigmatized in Sudan (Eltayeb 2014). Although abortion is permitted under certain circumstances such as where the pregnancy is the result of rape which has occurred before not more than 90 days, such legal abortions are seldom granted due to the difficulty in providing sufficient evidence for rape (Tønnessen 2015).¹⁸

In short, female rape victims have suffered grave injustices from Sudanese courts (Köndgen 2010, 211). These women are victimized twice, “first by the men who assaulted them, and then by the legal authorities who treated each of them as the guilty party” (Sidahmed 2001, 198). According to the Sudanese scholar Abdel Salam Sidahmed (ibid., 203),

The categorization of rape as a form of *zina* has often led to applying the same stringent method of evidence used in proving a *zina* case, to establish a rape crime. . . . [T]his does not just result in a rapist walking free from the court room or receiving a very light sentence, but may even lead to incrimination of the victim of rape instead.

3 Darfur and the Emergence of Rape on the Political Agenda

The United Nations Security Council referred the armed conflict in Darfur to the international criminal court in 2005 after the passage of resolution 1593, leading to the indictment of Sudan’s sitting president Omar al-Bashir. In 2003, the governments started to arm and provide military leadership to local Arab militias, which came to be known as *Janjaweed* or “devils on horseback”. The attacks were directed at the region’s African ethnic groups: the Fur, Tunjur, Masalit, and Zaghawa. The great majority of massacres were committed between July 2003 and April 2004. The period of intense conflict lasted until January 2005. According to the UN, the armed conflict in Darfur has claimed about 300,000 lives and displaced over 2,500,000 people although both numbers and causes of death remain disputed.

An arrest warrant for Bashir was issued by the ICC on 4 March 2009 indicting him on five counts of crimes against humanity (murder, extermination, forcible transfer, torture and rape) and two counts of war crimes (pillaging and intentionally directing attacks against civilians). This was the first time the ICC indicted a head of state. According to the indictment, Bashir bears individual criminal responsibility for systematic and widespread sexual violence in Darfur.

¹⁶ Interview with a pro-women activist (2011).

¹⁷ In particular, article 152 of the Criminal Act has received a lot of attention by pro-women activists. In recent years, it also received international media coverage when Lubna Ahmed al-Hussein, a Sudanese journalist, was arrested for breaching public morality. For more information see section 4.3 below.

¹⁸ Women still seek illegal abortions. But there is an important class dimension here. While educated middle class families send girls either out of the country or to private clinics for an illegal safe abortion, those who do not have the financial means are more likely to seek unsafe illegal abortions (Tønnessen 2015).

Previously a taboo topic, according to the pro-women activists interviewed for this study, the Darfur conflict opened up space for sexual violence to be debated in the public sphere: “We never thought of sexual violence as an issue. Darfur changed that.”¹⁹

While the armed conflict and the subsequent ICC process were important in putting sexual violence on the political agenda, international legal developments dealing with war rape aided this process. In particular, UN resolution 1325 and the resolutions that followed recognized sexual violence as a “weapon in war” and a threat to international peace and security.²⁰ These new legal norms not only provided a legal basis for the work of Sudanese activists, but it also opened doors to potential avenues of funding. In the words of a Sudanese pro-women activist, “International attention, particularly resolution 1325, has opened up space for women activists to talk about sexual violence in Darfur.”²¹ While sexual violence had been recognized during Sudan’s earlier conflicts, most notably as part of the civil war between Sudan’s north and south from 1983 to 2005, it did not emerge on pro-women activists’ agendas at that time. In fact, sexual violence inflicted on women and girls in South Sudan during the decades-long civil war remains hugely under-documented and under-researched. The recent attention by pro-women activists to sexual violence during Sudan’s on-going wars can thus partly be explained by the fact that there has been a tremendous shift in international discourse on sexual violence in conflict and, consequently, in the attention, pressure, and funding directed towards ending sexual violence against women in Darfur.

In spite of these local and international developments that highlighted the issue of rape and other forms of sexual violence, creating space for debate of this issue has faced challenges. Perhaps most importantly, the Sudanese government continuously attempts to restrain activism in this area, not only in Darfur but also in the nation’s capital. In the words of an activist situated in Khartoum,

Although the rape issue and Darfur has led to women activists questioning the Criminal Act, it has also made their activism more difficult. Gender based violence as a concept is stigmatizing and people involved in it are labeled as anti-government. You have to be brave in order to continue.²²

Journalists and activists calling for reforms have been arrested and undergone trial.²³ For example, the prosecutor of the press and publications initiated proceedings against several pro-women activists, journalists, and editors after they published articles in Sudanese newspapers stating that Sudan’s rape laws are un-Islamic.²⁴ Omer al-Garay (2011), a prominent member of the political opposition, was charged with defamation against the government for writing an article entitled “Rape under Sharia Law.” The article pointed to the un-Islamic nature of Sudan’s law, in spite of the fact that it was codified by an Islamic government. He also called for investigation of the Safiya Ishag case.

¹⁹ Interview with a pro-women activist (2012).

²⁰ The UN Security Council resolutions dealing with this issue are 1325 (2000), 1820 (2008), 1888 (2009) 1889 (2009), 1960 (2010), and 1974 (2011).

²¹ Interview with a Sudanese humanitarian worker from one of the expelled NGOs (2012).

²² Interview with a pro-women activist (2011).

²³ Interview with an activist and journalist who has been forced to stand trial (2011).

²⁴ Some of those journalists and media contributors caught up in the proceedings were Faisal Mohamed Salih, Omer al-Garay, Abdalla Al-Shaik, Mohamed Latif, Faiz Al-Selaik, Mohamed Osman, Amal Habbani, and Dr. Nahid Al-Hassan (ACJPS 2011).

Safiya Ishag is a young female student activist who was raped and tortured by members of the Sudanese National Security Forces after she participated in demonstrations at the University of Khartoum in 2011. Safiya is a member of a youth group called Girifna, whose name means “we are fed up.” The demonstration she attended was an effort to bring the Arab Spring to Sudan. Safiya reported the rape at the local police station and circulated her story on YouTube (Girifna TV 2011). She received massive support from pro-women activists, opposition party members, and prominent journalists, many of whom were questioned by the police on allegations that they “invented” the rape story as a means to undermine the government. Some were arrested and underwent trial. Safiya was forced to flee the country out of fear for her life.

The cases of these journalists and other activists illustrates the sensitivity of the issue and the politicized nature of the debate. According to a pro-women activist, “The government is well aware that this [sexual violence] is happening, and it is not a rare phenomenon even in Khartoum. It happens on a daily basis. But they are putting it into a political context.” According to another activist, “women’s issues are always politicized” in Sudan. But she goes on to say,

Rape is now recognized as a war crime. This in itself makes it particularly politicized, especially when it comes to Sudan and the fact that our President is incited for war crimes in Darfur by the ICC.²⁵

While pro-women activists in Khartoum are still allowed to operate (albeit with severe constraints), activists in Darfur are even more restrained. Immediately after the 2009 ICC arrest warrant against President Bashir, the Sudanese government expelled 13 key international NGOs and three national NGOs operating in Darfur on grounds of aiding the ICC. The Sudanese organizations expelled were the Amal Centre for the Rehabilitation of Victims of Violence, the Khartoum Centre for Human Rights and Environmental Development (KCHRED), and the Sudan Social Development Organization. Specifically, these groups were accused of providing vital information on the use of sexual violence as a weapon of war in Darfur. All the expelled Sudanese NGOs were working on issues related to sexual violence, and some of them were focusing on law reform of Sudan’s rape legislation. In particular, KCHRED, in cooperation with REDRESS, had made valuable contributions in this regard (see, e.g., REDRESS and KCHRED 2008a; 2008b). In this way, the Bashir regime sent strong signals that work within the area of sexual violence is unwelcome. In the words of one of the expelled organizations,

The government confiscated all materials . . . [V]iolence against women is a sensitive area. The government has issued a memo that no organization can conduct anything on peace building, 1325 or violence against women unless with the permission from the Humanitarian Aid Commission (HAC). This came with the ICC. The government became alert. Our organization was accused of spying on the government for ICC.²⁶

²⁵ Interview with a pro-women activist and local UN-staff member (2011).

²⁶ Interview with a representative of one of the expelled organizations (2012).

The Khartoum Centre for Human Rights and Environmental Development (KCHRED) was a Sudanese human rights organization established in 2001. Its mission was to protect and promote human rights in Sudan, particularly in the conflict zones. The center provided legal aid and had programs on media and freedom of expression, human rights education, and rehabilitation of victims of torture. Between 2007 and 2009, the center – in collaboration with REDRESS – began undertaking legal reform activities, with a particular focus on the Criminal Act (including the articles on rape and adultery/fornication). In this way, KCHRED became an important advocate for criminal law reform. The organization was active in Darfur and was shut down in 2009 following the indictment of President Omar al-Bashir.

Human rights lawyers Monim Elgak, Amir Suliman, and the late Osman Hummida were also individually targeted because of their alleged cooperation with the ICC. These three human rights defenders were arrested and were later effectively forced to flee Sudan because of fear of further persecution. Amir Suliman fled to Uganda and co-founded the African Centre for Justice and Peace Studies (ACJPS).²⁷ ACJPS's activities include monitoring the general human rights situation in Sudan, and advocating at the national, regional, and international levels for reform of Sudan's justice system.

The expulsions and the crackdown on civil society efforts following the ICC process have negatively affected civil society activism in Sudan. In the words of a Darfurian pro-women activist, “The arrest warrant of Bashir has affected our work in Darfur . . . the government thinks that we are collecting rape cases and reporting them to the ICC.”²⁸ Through cooperation and receiving funding from international NGOs, pro-women activists are now accused of aiding the ICC. The ICC process has therefore worsened the working conditions of pro-women activists in Sudan. Activists working on issues of sexual violence have been particularly vulnerable to government control and surveillance in the wake of the ICC process.²⁹ This has made it difficult to carry on work within the area, especially with regards to reporting of rape cases and advocacy for law reform.³⁰ Although the political environment in Darfur is particularly difficult, Khartoum based women's NGOs are also under pressure from the regime, among them the Salmmah Women's Resource Centre, which has been the leading NGO in the campaign to reform Sudan's rape laws.³¹ The Sudanese government forcibly shut down Salmmah in late 2014 after its leader, Fahima Hashim, appeared as a speaker at the Global Summit to End Sexual Violence in Conflict in London in June 2014.

²⁷ More information about ACJPS is available on its website (<http://www.acjps.org>).

²⁸ Interview with a Darfurian pro-women activist (2012).

²⁹ Interview with a Sudanese humanitarian worker (2011).

³⁰ There are nonetheless sensitizations and awareness raising activities to communities on rape in Darfur. Although many of the international organizations have been expelled, the UN agencies are operating in the area. There are trainings initiated by UN agencies for medical assistants, doctors, midwives and social workers on for example clinical management of rape, psycho-social support and referral pathways. The medical personnel trained are providing services at health centers specifically in internal displaced camps. But to gather information on rape cases or to conduct advocacy on the issue remains difficult. Interview with activists from Darfur, 2015.

³¹ Between November and December 2012, five civil society organizations and cultural centers were shut down by HAC or the Ministry of Culture, namely, Beit al Finoon, the Sudanese Studies Center, the Arry Organization, the Narrative and Criticism Forum, and the Al Khatim Adlan Centre for Enlightenment and Human Development.

The Salmmah Women’s Resource Centre was founded in 1997 by a group of leading Sudanese activists as an independent feminist resource center. It has been working on feminist theory in relation to the practices of Sudanese women today. Salmmah’s head office is in Khartoum, with a small coordination office for programs in the South in Juba. Its main focus is mobilizing and empowering women and women’s groups to influence policy and overcome structural, political, and legal obstacles to the advancement of women’s equal rights. Salmmah’s target group is women and youth, and its programs included training, documentation, and research. The center engages in educational activities for women and others on topics such as domestic violence and sexuality.

The center has a special focus on law reform efforts dealing with violence against women. In 2007, Salmmah initiated work to advocate for reform of article 149 of the Criminal Act of 1991, in cooperation with a range of other pro-women NGOs, including the Sudanese Organization for Research and Development (SORD) and the Mutawinat Group. In 2009, the resulting “Alliance of 149” announced the launch of a campaign to reform Sudan’s rape laws as part of a UN initiative for 16 days of activism against gender based violence. The next year, in 2010, the 16 days of activism initiative focused specifically on the intersection between militarism and violence against women with reference to UN resolution 1325.

In addition, Salmmah is a cooperating partner with both Musawah and Women Living under Muslim Law (WLUML) on various projects, including advocacy to reform rape laws to eliminate the use of the Criminal Act as the basis to justify sentencing women to cruel forms of punishments (such as stoning), a campaign to stop the practice of child marriage, and challenges to Sudan’s restrictive dress code.

4 Law Reform on Rape/*Zina*: Amendments to the Criminal Act of 1991

This part of the report deals with initiatives for reforming Sudan’s rape laws, with a particular focus on the distinction between rape and *zina*. It analyses the politicized and polarized debate on legal reform, including major disagreements between the government and pro-women activists on what constitutes rape (including the controversial topic of marital rape). This part also critically analyses these initiatives in light of the recent reform of February 2015.

4.1 Initiatives and Focus for Law Reform on Rape: Civil Society

A number of early law reform efforts focused on women’s issues, although they did not specifically focus on Sudan’s rape laws. For example, a 2004 booklet from AUW critically assesses the Criminal Act from a feminist perspective with an aim to identify gaps and recommend reforms (Ahfad 2004b: 44–45). In 2006, the Regional Institute for Gender, Diversity Peace and Rights (RIGDPR) at Ahfad University for Women (AUW) organized a workshop on law reform during which scholars, lawyers, and activists debated the reform of both the Criminal Act of 1991 and the Personal Status Law of 1991 (often referred to as the family law. It regulates marriage, divorce, inheritance, and custody) from a human rights perspective (Tire and Badri 2008).³² In addition, the Mutawinat Group issued reports recommending reforms to a range of Sudanese laws (Mutawinat Group 1997; Mutawinat Group and Fredrich Ebert Stiftung 2001).

Rape laws became a more specific focus of legal reform as an outcome of cooperation between REDRESS and KCHRED in 2008 and between REDRESS and SORD in 2009. Both KCHRED and later SORD did extensive work on criminal law reform, with a special focus on the rape and *zina*

³² Sudan is one of the few countries worldwide that has not ratified the Convention for the Elimination of Discrimination against Women (CEDAW). CEDAW has been put high on the agenda of pro-women activists in post-CPA Sudan. For more on the debate on CEDAW and Islam in Sudan, see Tønnessen (2011a; 2013).

provisions. In the words of a female lawyer, “We need a legal reform. . . . There is a huge amount of cases. You hear about it every day.”³³

Pro-women activists first put the issue of reform of Sudan’s rape laws on the political agenda in post-CPA Sudan under the umbrella of a network calling itself “Alliance of 149”.³⁴ The Alliance was established in 2009, the same year Sudan’s president was indicted by the ICC. The Salmmah Women’s Resource Centre led this campaign, which aimed to educate the government and the general public on the legal complications of article 149 in Sudan (Gayoum 2011). Salmmah mobilized both Sudanese and international partners (such as WLUML and Refugee International). These partners referred to positive experiences in other Muslim countries like Pakistan – where pro-women activists were able to push for a legal reforms to differentiate rape and *zina* in 2006 – to advocate for similar reforms in Sudan. For instance, Salmmah organized an expert consultation conference between women’s rights advocacy groups from Pakistan and Sudan. Noting the similarities between the Sudanese Criminal Act of 1991 and the Pakistani Hudud Ordinance of 1979, Sudanese activists and lawyers discussed the strategies used by the Pakistani women’s movement and started planning for a Sudanese campaign, which was launched in 2010 (WLUML 2015).

In addition to highlighting the problematic definition of “rape” in the Criminal Act of 1991, the campaign brought attention to the immunities granted to a range of officials in article 42(2) of the Armed Forces Act of 2007, article 45(1) of the Police Act of 2008, and article 52 of the National Security Act of 2010 (REDRESS and KCHRED 2008b; Gayoum 2011). Considering that a bulk of the perpetrators of war rape in Darfur are themselves police, national security, and military, it goes without saying that this immunity has created a situation of impunity for rape in Darfur. In the words of a Darfurian woman lawyer,

The laws do not protect women from violence. There is no punishment for the perpetrators, especially in cases where the perpetrators are from the police and army because of their immunity.³⁵

Importantly, in their efforts to reform the laws on rape, pro-women activists have *not* advocated for the abolition of Islamic law. In the word of one activist, “We cannot say ‘abolish sharia.’ The regime will not allow it.”³⁶ Considering that the Criminal Act prescribes the death penalty for apostates of Islam, public statements about abolishing Sharia are not only frowned upon, but also involve a personal risk of criminalization. As another activist has said, “If we want to make an impact, we need to be sensitive to Islam.”³⁷ This restricts any law reform campaign.

³³ Interview with a lawyer and pro-women activist (2011).

³⁴ The Salmmah Women’s Resource Centre, Sudanese Women Empowerment for Peace, SORD, Mutawinat, the Alalag Centre for Media Services, the Sudanese Society for Environment Protection, and the Sudanese Observatory for Human Rights were all part of this alliance. Before the campaign was launched, other Sudanese NGOs were also involved, but they were shut down. Among these were the KCHRED and the Amal Centre for the Rehabilitation of Victims of Violence. The campaign was also supported by international organizations, including Refugees International and Women Living under Muslim Law (WLUML 2010).

³⁵ Group interview with women activists and lawyers from Darfur (2013).

³⁶ Interview with a pro-women activist (2011). Another, smaller group of pro-women activists have a clear secular agenda and are fundamentally against any strategic adaptation of Islam. But they express such views only in private forums, not in public debates. They refuse to engage with the present government and have therefore opted out of any advocacy for legal reform.

³⁷ Interview with a pro-women activist (2014).

For example, most activists do not campaign to de-criminalize *zina*, which is an Islamically prescribed crime (*hadd*), but merely to differentiate *zina* from rape. There is simply no room to argue for the abolition of the *hadd* against the backdrop of an Islamic state. The *hudud* have been central to the Islamist project of building an Islamic state in Sudan, and introducing strict moral codes (criminalizing *zina* as well as controlling dress and other forms of public conduct) has been viewed as important in producing an image of a pious Muslim state and society that is different from the promiscuous and sexual West. The idea of decriminalizing *zina* is thus associated with moral and sexual chaos and seen as the equivalent of legalizing prostitution. For example, a high-ranking Islamist said in an interview that the biggest challenge facing Sudan is the problem of single mothers.³⁸

This means that the public debate on sexual violence is *not* discussed within a broader context of women's right to sexuality outside the legal bond of marriage. Rather, a frequent strategy of pro-women activists is to showcase the differences between the Islamic law schools. In particular, with regard to the Criminal Act, they point out the injustices of including pregnancy as evidence for *zina* in the Maliki law school when the other three Islamic law schools do not.³⁹ In fact, Sudan is the only country among those states that have criminalized *zina* (Pakistan, Saudi Arabia, Iran, and Afghanistan) that allows pregnancy in unmarried girls as evidence of *zina*. Activists are asking, "Why take the strictest interpretation of Islam, when a more lenient and women-friendly reading of the text is widely accepted and practiced in other Muslim countries?"⁴⁰

They also assert that the way *zina* is conflated with rape fundamentally conflicts with classic Islamic jurisprudence. This jurisprudence contains measures to protect women against false accusations, with such strict requirements of evidence that it is almost impossible to prove a *zina* case. (Indeed, a false accusation of *zina* is punishable with 80 lashes.) Merging the concepts of rape and *zina* – and, in particular, not allowing DNA as proof in rape cases – is highly problematic and results in a perverse and erroneous reading of Islam: it creates a risk that victims of rape will be viewed as criminals while perpetrators will be pardoned. According to a pro-women activist,

This is not Islam! It is sending a message to the people that we are in control. They are using every measure, culture, religion, violence, to oppress women. Islam gives women many rights. What the government is practicing is not Islam.⁴¹

Not only do activists refer to alternative Islamic interpretations and practices in the region (both present and historical), but they also point to contradictions between the Criminal Act and Sudan's 2005 constitution as well as inconsistencies between the Criminal Act and international conventions, like CEDAW and the CRC. The constitution is currently the central focus. Although pro-women activists see no contradiction between Islam and these international conventions, international conventions such as CEDAW have become increasingly politicized and are often lumped together with a foreign, western agenda. Thus, while some reformist Islamist women in government are open to discussion on international standards, conservatives in government are not. And while pro-women activists have pushed Sudan to ratify CEDAW in the past (particularly after the 1995 Beijing

³⁸ Interview with a high-ranking Islamist (2012).

³⁹ Interview with a lawyer and pro-women activist (2011).

⁴⁰ Interview with a lawyer and pro-women activist (2011).

⁴¹ Interview with a lawyer and pro-women activist (2011).

conference), they are increasingly omitting reference to this convention in more recent campaigns for law reform (Tønnessen and al-Nagar 2013).⁴²

Nonetheless, CEDAW continues to occupy a central place in the hearts and minds of pro-women activists when they argue for gender equality, even when also relying on Islamic arguments (as is most often the case). Pro-women activists in Sudan point to the need to rethink the rights of women under Islam and are part of a growing trend in the region to employ Islamic feminist arguments for gender equality. Activists frequently make reference to the radical views on women's equality of the late Mahmoud Muhammed Taha (who was executed for apostasy in 1985) as well as to former prime minister Sadiq al-Mahdi (Al-Nagar and Tønnessen 2015). Notably, those advocating for gender equality within an Islamic frame include both groups that genuinely believe in Islamic solutions to the legal problems facing Sudanese women and groups that are strategically adapting an Islamic frame against the backdrop of an Islamizing state. A self-proclaimed Islamic feminist, explains,

With a secular frame of argument you are excluded from the debate. We need to deal at the level of Islamic interpretations and go back to the roots of Islam and defend women's rights from Islam. . . . I usually start my talks like this: I am half of a man? No, I am equal. I feel it is not fair. I am equal to a man. If I want to be a Muslim I have to research and find my place in Islam. . . . We have to discuss the female issue from within Islam. There is no way out. The Islamists will not accept anything outside Islam. We have to convince the younger generation through Islam. It is the only way. The Islamist groups are afraid of this. People have been executed for this. They are standing strong against any change. If you are secular, it is easy for them. You are accused of not being a Muslim. . . .⁴³

*The **Mutawinat Group** (literally translated from Arabic it means "cooperating women") was established in 1988 by a group of women lawyers to provide legal aid to women and children. The lawyer Samia al-Hashmi currently heads this group. Mutawinat registered as non-governmental, non-political, and non-religious benevolent company in 1990. The aim of the organization is to better protect women and children's legal rights in Sudan. Mutawinat is especially focused on offering free legal services to protect the rights of vulnerable women and children of Sudan, many of whom are internally displaced and refugees.*

Mutawinat also organizes legal rights awareness campaigns and fosters communication and cooperation between women's groups in Africa. Mutawinat has been increasingly involved in advocacy work on legal reform regarding women's equal rights and the protection of child rights. The organization has initiated and participated in several law reform initiatives since the 1990s, including a critical proposed revision of several laws set forth in its 1997 publication "Review of Sudanese Legislation Discriminating against Women" (see also Mutawinat Group and Fredrich Ebert Stiftung 2001). Specifically, Mutawinat proposed reforms to the Personal Status Law of 1991, the Criminal Act of 1991, the Criminal Procedures Act of 1974, the Evidence Act of 1994, the Labor Act of 2007, and the Land Act of 1970.

Mutawinat has also been a partner in the "Alliance of 149." Because Mutawinat works actively with rape cases, its lawyers have a detailed knowledge of how Sudan's rape laws are interpreted and implemented by judges and are thus well positioned to point out the shortcomings of these laws.

⁴² For example, when pro-women activists mobilized for including a 25% women's quota in the 2008 Electoral Law, they consciously and strategically did not refer to CEDAW, as doing so would have put cooperation between women in government at jeopardy (Badri, al-Nagar, and Tombe 2015).

⁴³ Interview with a pro-women activist and self-declared Islamic feminist (quoted in Tønnessen 2011b).

AUW's Regional Institute of Gender, Diversity Peace and Rights (RIGDPR) (previously the Institute of Women, Gender and Development Studies), headed by Balghis Badri, has been an active advocate for law reform, including constitutional reform. In 2006, the institute organized a workshop on "Law Reform in Sudan" in collaboration with UNMIS and the United States Institute of Peace, during which scholars, lawyers, and activists debated the topic. The papers were published in the book "Law reform in Sudan," edited by Akolda Tire and Balghis Badri (2008).

In addition, the Babiker Badri Scientific Association for Women's Studies is a voluntary, non-political, and non-profit NGO established in 1979 and located on the AUW campus. It is dedicated to enhancing women's status and achieving gender equality and has been an advocate of law reform in Sudan. In 2000, the NGO produced booklets on Sudan's laws from a human rights perspective.

The SEEMA Center for Training and Protection of Women and Child's Rights was established in 2008 and is headed by Nahid Jbrallah. SEEMA's mission is the promotion and protection of women and child's rights, combating gender based violence, and building a protective environment for women and children. SEEMA provides integrated services to victims of violence against women and children – including legal aid, health services, psychotherapy, and social support. SEEMA also provides training to potential providers of services to victims as well as to other partners.

Since 2009, SEEMA has also actively advocated for reform of Sudan's laws on rape and sexual harassment. It launched a three-year campaign to reform of all laws related to sexual violence. This campaign included training workshops for legal practitioners, advocacy sessions for decision makers and parliamentarians, and recommendations for amendments to the Criminal Act of 1991.

4.2 Marital Rape and the Muslim Family Law

In the minds of activists, the provisions of the Muslim Family Law and the Criminal Act are clearly and inherently interlinked, for example, when it comes to marital rape. Pro-women activists not only argue that rape should be clearly differentiated from *zina*; they also think it is imperative to criminalize marital rape. In 2004, AUW noted this as a serious legal shortcoming (Ahfad 2004a; Ahfad 2004b). According to a pro-women activist, "A man should not force his wife to have sex. This is rape."⁴⁴ Lawyers and activists recognize that marital rape is widespread, but the lack of a legal framework makes it difficult to find justice for victims. In one interview, a lawyer explained that "marital rape is prevalent at community level. A client came to me ask what to do as her husband forces her to sex."⁴⁵

However, interviews conducted for this study reveal that the government and pro-women activists have major disagreements about marital rape.

The Criminal Act of 1991 is silent about marital rape. This must be seen in light of the obedience stipulated in sections 91–95 of the Muslim Family Law, which requires a wife's obedience to her husband. Article 91 stipulates that "a wife is required to obey her husband if the husband has paid her the *mahr* (dowry), it is proved that she is financially secure with him, and that he provide her with suitable housing with all basic furniture in a good neighborhood." As a direct consequence, the concept of marital rape does not exist within the law; if the conditions stipulated are met, the wife may not deny her husband sexual intercourse. An Islamist informant explains the perspective of the prevailing law:

⁴⁴ Interview with a pro-women activist (2011).

⁴⁵ Interview with a lawyer (2014).

Some consider it rape when a husband has sexual intercourse with his wife when she does not consent. In Islam we do not consider it as a rape. In Islam there is a contract between the man and the woman. To give adequate support (*nafaqa*) is obligatory for the husband. The other part of the contract is that a woman should obey. Therefore, a woman cannot refuse sex. It is obligatory for her.⁴⁶

Pro-women activists call for a reform of the Muslim Family Law to eradicate these stipulations on obedience (SORD 2012a; SORD 2012b). According to a pro-women activist, “Challenging the law is crucial. If (rape) is legalized by the family law, no woman can claim that they have been raped by their husband.”⁴⁷

Activists also employ Islamic arguments in the area of marital rape and argue that stipulations of obedience do not follow the interpretation of classical jurists or even Sudanese law. Disobedience (*nushuz*) by a wife may qualify for a divorce according to Islamic law, but not rape. According to Abdel Halim (2011, 235), “Consent is paramount in Islam and without it a sexual act loses its legitimacy.”

Activists further assert that not all marriages are based on consent, particularly child marriages. The age of consent for marriage according to the Muslim Family Law is puberty, which has been interpreted to be as young as 10 years of age. According to the law, both parties have to consent to marriage. However, the woman needs a male guardian (father, brother, or uncle) to validate the marriage (under article 25). This follows the practice of the Maliki School of law and contradicts with a 1960 judicial circular based on the legal preference of the Hanafi School, under which a woman should be able to contract marriage herself without a male guardian. The debate on marital rape, therefore, is closely linked to discussions on both child marriage and male guardianship (*wali*) (Tønnessen 2014). In 2012, Asha al-Karib of SORD presented an alternative family law (SORD 2012a; Sord 2012b) in which the articles of the current law that give authority to a male guardian are completely removed. In her opinion, it is critical to challenge the current Muslim family law, which is based on “the philosophy . . . that women are less than men.”⁴⁸

⁴⁶ Interview with a female Islamist (2011).

⁴⁷ Interview with a pro-women activist (2011).

⁴⁸ Interview with a pro-women activist (2011).

The Sudanese Organization for Research and Development (SORD) is a non-profit NGO that was established in 2007 by Asha El-Karib. SORD's principle aim is to empower the Sudanese people to enjoy their rights as responsible citizens. SORD seeks to achieve gender equality, justice, and democracy and supports efforts to spread awareness of citizen's rights and responsibilities. It is an advocacy organization that employs a rights-based approach and is active in the areas of engendering democracy, girls' education, women and the law, and social exclusion.

SORD has a particularly strong gender justice program, which endeavors to change legislation and policy concerning child marriage, laws conflating adultery and rape in the criminal code, and various discriminatory aspects of family law. SORD has been one of the main actors in the campaign for reform of Sudan's rape laws. In 2009, SORD initiated an advocacy campaign for ending early/child marriage as an entry point for advocating for reform of the Personal Status Law of 1991, which it considers to be a grave violation of Sudanese women's human rights. In collaboration with researchers, legal experts, civil society organizations, and some regional international organizations, SORD undertook research and organized intensive consultation and forums. The result was an "alternative family law" – launched in 2012 – that sets the minimum age for marriage at 18 (SORD 2012a; SORD 2012b). SORD arranged roundtable discussions on the proposed alternative family law for communities in different states of Sudan as well as for all the oppositional political parties, which have confirmed their commitment to the alternative family law. As part of that process, they made a documentary film titled "Adeela" (meaning "straight, appropriate, or good") demonstrating the negative implications of the current family law.⁴⁹

4.3 A Partial Victory? The Rape Reform in February 2015

On February 22 2015, just a few months before a controversial election, Sudan's National Assembly reformed article 149. It should be noted that the amendment to the Criminal Act was not published in full until recently, and activists and lawyers have struggled to obtain copies (Salah 2015). The new rape article reads as follows:

A person shall be deemed to have committed the crime of rape, if that person copulates with another person by an act resulting in the insertion of a sexual organ or any object or any other bodily part in the vagina or anus of the victim by the use of force or the threat thereof, or by coercion causing fear of the use of violence, or by threat, detention, psychological coercion, seduction, abuse of authority against such person or another, or where the crime has been committed against a person who is unable to express consent due to natural, seduction or age-related reasons.⁵⁰

In this new definition, rape is not linked with *zina*. Women rights organizations have fought hard and long for this victory. An added victory is that rape is not defined just by penal penetration, but also now includes foreign objects or other parts of the body.⁵¹ Finally, the idea of "force" no longer includes only physical violence, but also now includes psychological intimidation. While pro-women activists, with the assistance of extensive international pressure, put the issue of rape on the political agenda, reformist women within the government worked to push this legal reform through the legislature.

Sudanese government initiatives for law reform within the realm of rape and sexual harassment have been concentrated in the Violence against Women Unit (headed by Attiyat Mustafa, see discussion in

⁴⁹ Clips from this documentary are available online (Zoul4Revolution 2011).

⁵⁰ Since Sudanese law does not recognize homosexual relations, the use of the word "copulates" (*يوافع*) in this section is inaccurate and creates a legal impossibility in the crime of rape being committed homosexually. See the Arabic version in appendix 2.

⁵¹ This is especially relevant in war contexts: for example, rapes in Darfur have taken place with the use of gun barrels.

box below) and the Women’s Centre for Human Rights (WCHR) (headed by Suad Abdel Aal). In 2007, the government hosted several workshops on combating violence against women and on the Protocol to the African Charter on Human Rights and People’s Rights on the Rights of Women in Africa (ACHPR 2003).⁵² The seminars were held in collaboration with UNMIS, and participants suggested a reform of Sudan’s rape laws. Furthermore, a National Plan of Action for Combating Violence against Women, 2011–2012, was developed by the Violence against Women Unit in 2010. The plan’s main objectives included to “review policies and legislations pertaining to women and children” and to “enact strict legislations for combating violence against women and children.” It should be noted that pro-women activists were largely excluded from these government driven initiatives, however.

The Violence against Women Unit (VAWU) was established by ministerial decree in November 2005 as a coordinating mechanism. VAWU coordinates the work on violence against women with a range of different ministries, for example, the Ministry of Welfare and Social Security, the Ministry of Health, the Ministry of Justice, and the Ministry of Guidance and Endowment. VAWU has sub-units in 14 states. The unit works in five thematic areas:

- (1) good governance and rule of law,*
- (2) sustainable development,*
- (3) building institutional capacity,*
- (4) information management, and*
- (5) scientific research.*

In 2010, the unit formulated a “Five Year Strategy to Combat Violence against Women and Children, 2012–2016.” As part of this strategy, VAWU has worked on issues surrounding Form 8, which is used by the police force to report instances of rape. In particular, VAWU has assisted the minister of justice in creating two criminal circulars indicating that Form 8 should not prevent victims of violence from obtaining medical care in hospitals. The current practice is that a victim of violence must fill out Form 8 at the police station before receiving medical care in a government hospital. However, the circulars have not been turned into legally binding amendments to the law, they are only valid in Darfur, and reports indicate that implementation is lacking (Okonje 2010, 37).

VAWU has also organized training workshops for female police officers on how to undertake investigations involving victims of violence in accordance with international and regional human rights standards. VAWU has supported a reform of article 149 of Sudan’s Criminal Act. In a 2011 interview, the unit’s leader stated that “the Criminal Act needs to be revised; to clearly differentiate zina from rape. This is an era of law reform.”

In 2009, the WCHR, located in the Ministry of Welfare and Social Security formed a committee to review women’s status under Sudan’s laws in light of the 2005 constitution.⁵³ The law reform committee identified several legal problems in the Criminal Act of 1991, the Evidence Act of 1994, and the Criminal Procedures Act of 1991 (WCHR 2009). Its report emphasized the need for a reform of article 149 by stating that “rape as a crime includes both a victim and a perpetrator which needs to be proven as common crimes clearly differentiated from *zina* which relies on evidences specified in Islamic scriptures” (ibid.,. In other words, the report tries to delink rape from the *hudud*. It thus speaks to the campaign by pro-women activists to differentiate between rape and *zina* in the Criminal Act.

⁵² This is better known as the Maputo Protocol.

⁵³ Amira al-Fadil was the minister of welfare and social security at that time.

The Women's Centre for Human Rights (WCHR) was established in 2005 as a semi-government organization within the Ministry of Welfare and Social Security. The aim of the center is to strengthen women's human rights, to monitor the situation of human rights of women in Sudan, to build capacity to promote women's rights, and to link government institutions, civil society, and activists working on human rights issues. The center has four directorates: legal aid, research, media/public relations, and administration/finance. The center also has a branch in El Fasher, Darfur.

Since 2006, the center has been implementing a project titled "Reform of Women's Status in Legislation, 2006–2013." One component of the project has been the provision of legal aid services involving 71 volunteer lawyers based in women's prisons. In 2006, the center also formed a committee for law review. This committee identified 88 articles of Sudanese laws that should be revised to become more women-friendly and in alignment with the bill of rights in the 2005 constitution.

The center has also worked with the women's parliamentary caucus and other government institutions as well as with civil society organizations in undertaking research and workshops to discuss the challenges of gendering Sudanese laws and to identify needed reforms. In 2012, the center launched recommendations for reform of the Criminal Act of 1991, the Criminal Procedure Act of 1991, the Evidence Act of 1991, and Personal Status Law of 1991. The recommendations were presented to stakeholders in a workshop. In 2015, the National Assembly approved two of the recommendations related to articles 149 (on rape) and 151 (on sexual harassment).

The WCHR and its committee on law reform rely on the 2005 National Interim Constitution as the main legal framework informing reform efforts, but they also consider national laws (particularly the Child Act of 2010) and regional and international human rights conventions that Sudan has ratified (including the Maputo Protocol and the CRC). They are careful to argue within a religious perspective, but nonetheless challenge gendered injustices within classical interpretations of Islamic law. According to an Islamist woman heavily involved in the law review process in Sudan,

We cannot take the Islamic law schools as the ultimate truth. It builds on the Quran, but it is human interpretation at the end of the day. They interpreted Islam in a certain context. Society has changed and Islamic law has to change with it. We must build it on the Quran, but interpret it in light of justice and the good life.⁵⁴

Interviews with Islamist women in government make it clear that they do not necessarily propose reforms aimed at gender equality along the same line as pro-women activists, but they propose minor reforms within the paradigm of gender equity (*insaf*). The Islamist gender ideology builds strongly on the concept of male guardianship – where women and men have different and complementary roles and responsibilities because they are born biologically different. While women are granted equal rights to men in the public sphere (education, work, politics), in a Muslim family, according to Islamists the ideal is *qawama* (male guardianship). The ideal man has the role of protector and caretaker, whereas the ideal woman has the role of the nurturer and caregiver (Tønnessen 2011a). The Islamic principle of *nafaqa* is closely related to the idea of male guardianship in the household. *Nafaqa*, in theory, specifies that once a marriage has been consummated, the husband becomes responsible for providing for his wife and children. Men's "spending of their means" becomes the justification for other elements often perceived as discriminatory against women in family life, including the role of the male guardian (*wali*) in contracting marriage and the wife's duty to obey her husband. While pro-women activists attempt to eradicate the principle of *qawama* and advocate gender equality, Islamist women (and this includes also the reformist voices) propose reforms within its framework. However, these reformists are still stretching the limits of *qawama* and some are even beginning to discuss sensitive topics, such as domestic violence.

⁵⁴ Interview with a reformist Islamist woman (2011).

The work of the WCHR has been central in putting rape and sexual violence on the agenda of the National Assembly. Through close cooperation with the women's caucus inside the National Assembly (which consists almost exclusively of women from the Islamist NCP), several amendments related to rape and sexual harassment were recommended. However, most of the recommendations for amendments to the Criminal Law were not even tabled. Only a redefinition of rape (in article 149) and sexual harassment (in article 151) were tabled and enacted.

Other proposed amendments included revising the Evidence Act of 1994 (where rape and *zina* remain conflated) and reforming the Criminal Procedure Act of 1991 (a) to permit DNA as evidence for rape; (b) to include special provisions to respect the rights of female victims of violence during the investigation of cases, to provide legal aid, and to fully inform female victims of their rights (as well as to better protect victims from degrading comments and unnecessary harm during the interrogation process); and (c) to put in place strict procedures to ensure that a rape victim is not charged with another crime if no evidence for rape is found. In addition, amendments were recommended to end the impunity of the police and security forces when they commit rape in the line of duty. These recommendations from reformist Islamist women were quite extensive, but in the end were not enacted.

Women in civil society have been critical of these reform efforts, partly because the process has not been transparent and partly because only two proposed amendments have thus far been successfully enacted. They are particularly critical of the fact that the Evidence Act of 1994 was not reformed, which basically means that the concepts of rape and *zina* remain conflated. In an interview, Hikma Yagoub, a human rights lawyer who runs a legal aid organization in Khartoum, said (Salah 2015),

The new definition will give victims and their lawyers the opportunity to achieve justice. However, it is rather meaningless without amending the evidence law of 1994, which is still in line with the old definition of rape.

It is also noted that marital rape is not explicitly criminalized.

While the rape reform is welcomed, it is regarded as a stepping stone only, as it is very unlikely to have an effect without additional reform to the Evidence Act. Even in amended article 149, the definition remains somewhat unclear. For example, it uses words such as “seduction” without defining the line between *zina* and seduction and who is the victim and who is the perpetrator in the case of seduction. We see similar problems in the redefinition of sexual harassment.

Pro-women activists are also very critical of the redefinition of sexual harassment in article 151 of Sudan's Criminal Act. The reformed law is as follows (ibid.):

A person who commits sexual harassment is anyone who carries out an act, a speech or behavior that is a temptation or an invitation for someone else to practice illegitimate sex or conducts horrendous or inappropriate behavior of sexual nature that harms a person, psychologically, or makes them feel unsafe. This person will be sentenced of no more than three years and lashing.⁵⁵

In the opinion of pro-women activists and lawyers, this provision extremely vague, as it is unclear who is the victim and who is the perpetrator. They see this amendment as part of the regime's obsession with controlling women's presence in the public sphere (SIHA 2015). As the blame is often put on women for tempting men and creating sexual and moral chaos (*fitna* in Arabic), this new

⁵⁵ For the Arabic version, see appendix 2.

article could easily be employed to arrest women for sexual harassment. In the words of a human rights activist (*ibid.*),

The article is not even clear on who the criminal is, whether it is the harasser or the harassed. Quite often male harassers will defend their actions by claiming that they were tempted by the victims' presence, clothing or even way of speaking. The law has simply legalized these misogynists' arguments.

According to pro-women activist Walaa Salah (*ibid.*), "It seems that the legislators are sending a message to women to avoid seducing men, by obscuring themselves from public spaces. This is the price being paid for not being punished, as a survivor of rape: the probability of being accused of tempting predators still stands."

In short, pro-women activists do not see these reforms as genuine. The fact that the government did not even published the amendments immediately and did not make them available to the general public shows that it is well aware of the criticisms awaiting it. Pro-women activists believe these reforms are intimately linked with a rather controversial election during the spring of 2015. The election was boycotted by the opposition and Islamists "won" nearly all the National Assembly seats. President Bashir was reelected with 94% of the vote. Female parliamentarians, almost exclusively from the Islamist ruling party, had to display some successful outcomes during their previous four-year period in the National Assembly before this election took place; thus, they pushed these minor reforms through at the same time as the regime clamped down on civil society, including women's groups. Coupled with the rape reform was a redefinition of apostasy and insults to religious creed in the Criminal Act. These definitions were widened. While apostasy was defined as renunciation of the creed of Islam, it now includes anyone who questions the credibility or otherwise misrepresents the Quran, the Sahaba, or the wives of the Prophet. This makes it more challenging for pro-women activists to critique the Islamist state's particular interpretation of Islam, not only from a secular point of view but also from an Islamic point of view as they can be charged with misrepresenting Islam.

In addition, pro-women activists believe these criminal law amendments were an attempt to send a signal to the international community to improve the country's "bad" reputation when it comes to sexual violence and harassment.⁵⁶ According to them, these amendments are merely an attempt to give the false impression that the Sudanese state is tackling the problem of sexual violence and harassment – when in fact it is not.

⁵⁶ Sudan has received a lot of negative attention internationally, ranging from the Lubna al-Hussein case to the fact that the country's president was indicted by the ICC for widespread and systematic sexual violence in Darfur.

Article 152

Pro-women activists have given a lot of attention to article 152 of the Criminal Act, which deals with public decency and stipulates,

(1) Whoever commits in a public place an act or conducts himself in an indecent manner or a manner contrary to public morality or wears an indecent or immoral uniform which causes annoyance to public feelings, shall be punished with whipping not exceeding 40 lashes or with a fine or with both.

(2) The act shall be considered contrary to public morality if it is so considered in the religion of the doer or the custom of the country where such act has occurred.

This provision received international media coverage after Lubna Ahmed al-Hussein, a Sudanese journalist, was arrested in July 2009 for breaching “public morality” by simply wearing trousers (Saddlesmania 2009). Al-Hussein strongly believes that article 152, which criminalized indecent and immoral acts without defining them, is at odds not only with Sudan’s constitution, but also with Sharia law itself. “What I wear is about the relationship between me and my God,” she has said. “Show me what paragraph of the Quoran, or quote me Prophet Mohammad saying it is the responsibility of the government to punish people in this way” (Kristof 2009). In another interview she stated,

Islam does not say whether a woman can wear trousers or not. The clothes I was wearing when the police caught me – I pray in them. I pray to my God in them. And neither does Islam flog women because of what they wear. If any Muslim in the world says Islamic law or Sharia law flogs women for their clothes, let them show me what the Qur’an or Prophet Muhammad said on that issue. There is nothing. It is not about religion, it is about men treating women badly. (Copnall 2009)

Women activists organized demonstrations after al-Hussein’s arrest. Some of them wore t-shirts with the following text: “Sudanese women who declare their solidarity in the struggle against the ‘indecent and immoral acts’ Article 152 which interferes with personal freedom and violates human rights and the principle of civilized society” (HRW 2010).

Because al-Hussein worked for the United Nations at the time she was arrested, she had immunity; thus, events following the arrest do not represent the norm. Most women who are arrested are flogged almost immediately in public order courts without having the right to a fair trial or to legal representation. When al-Hussein went to trial (after declining immunity by quitting her UN job), she sent out invitations to diplomats, media, activists, friends, and family to document the flogging. Yet Sudanese media coverage of the trial was censored, and Sudanese police fired tear gas and beat women protesting outside the court. The case sparked a series of demonstrations against article 152, leading to arrests of pro-women activists (Sudan Tribune 2010; see also BBC Arabic 2010).

Interviews with reformist women within the government invite a more nuanced analysis. They explain that the current Islamist state is inherently fractionalized. Although reformist women might not advocate full gender equality, they are putting sensitive and controversial topics on the political agenda. It is important to remember that the reforms are a negotiated result, not necessarily the best outcome hoped for by the reformists.

They face counter-mobilization among conservatives (both men and women) within their own political party. Key figures from the conservative camp, like Dafallah Hassabo, are quick to claim the un-Islamic-ness of their suggestions for reform. Reformists are also concerned with the growing political influence of Salafism in Sudan, a conservative Wahhabi inspired Islamic trend. This movement is gaining ground and also making influential inroads with the president. In the words of a

high-ranking female reformist Islamist, “Even the president becomes worried, if they say it is against Islam.”⁵⁷

Reformist women are marginalized within the regime, and while the conservatives ‘get to sit with the President’, they do not.⁵⁸ It is evident that the women arguing for reform are careful to “do it step by step” to avoid alienation by conservatives within their own political party.⁵⁹ This is one reason why they keep civil society at arm’s length – they are concerned that a close association with civil society will marginalize their position within the ruling party even further. Because conservatives often label pro-women activists as “secular” (and thus against Islam), Islamist women may be found guilty by association. They are well aware of resistance to their cause, both within and outside of the state.

5 Definition of a Child below the Age of 18 versus Puberty: Statutory Rape Cases in Sudanese Courts

The National Child Act of 2010 is significant in that it set the age of childhood as younger than 18 years. This is an important advance, considering that adulthood is defined the age at which a person shows signs of puberty in the Criminal Act of 1991 and other laws like the Muslim Family Law of 1991. Statutory rape against children under the age of 18 is criminalized in article 45 of the Child Act of 2010, and punishment is death or 20 years imprisonment and a fine.

The Child Act of 2010 also states, “The provisions of this Act shall prevail over any other provision in any other law.” This suggests that this law prevails over the contrary ideas of adulthood in the Criminal Law and the Muslim Family Law. Yet, when female parliamentarians tabled an amendment to the Criminal Act of 1991 (as part of the other criminal law reforms stated in the previous section) in order to set the age of criminal responsibility at 18, their proposal was rejected partly because the national judiciary simultaneously pressed for setting the age of criminal responsibility at 15 years.⁶⁰ Thus, the Criminal Act still defines the line between adulthood and childhood as puberty, something that means Sudan’s laws are in conflict and the judiciary has a large scope of interpretive power.

5.1 Definition of a Child: The Debate Continues

The Child Act of 2010’s definition of a child as a person younger than 18 years old is a great legislative victory that potentially could lead to other legal reforms, both in the Criminal Act and in the Muslim Family Law. This amendment was enacted with surprising ease considering its controversial nature. Both the Criminal Act of 1991 and the Child Act of 2004 set the age of criminal responsibility at puberty.⁶¹ The initiative to reform the Child Act of 2004 came as part of a range of initiatives to review Sudan’s laws in light of the new 2005 constitution. Concluding observations and recommendations of the UN committee on child rights were an important impetus in this process (Al-Nagar and Tønnessen 2011). According to an Islamist heavily involved in this law reform process,

⁵⁷ Interview with a reformist Islamist woman (2013).

⁵⁸ Interview with a reformist Islamist woman (2015).

⁵⁹ Interview with a reformist Islamist woman (2013).

⁶⁰ Interview with a reformist Islamist woman (2015).

⁶¹ The Child Act of 2004 defines a child as any male or female child whose age is below 18 years, but goes on to say “unless the applicable law stipulates that the child has reached maturity.”

When we signed the Convention on the Rights of the Child (CRC) in 1990, there was no special law on children's rights in Sudan. When we submitted the first report to the UN committee of child rights, we discovered that we need a special law and this resulted in the 2004 National Child Act. After the peace agreement in 2005, there were many changes brewing. We ratified the two optional protocols to CRC and in addition, the new constitution included an article saying that the international conventions that Sudan has ratified should be integral to the constitution. This meant that the 2004 law was in contradiction with both CRC and the 2005 constitution. This resulted in the 2010 National Child Act in which a child is defined as below 18.⁶²

After the Institute for Training and Law Reform (under the Ministry of Justice) started the process of drafting a new child act in 2009, the draft was handed over to the National Council for Child Welfare (under the Ministry of Welfare and Social Security, which is the ministry responsible for women and children's affairs). UNICEF and other international organizations such as Save the Children Sweden supported this process.⁶³

The reason why the amendment of the age of adulthood did not receive much attention at the time of enactment is related to another controversial topic, namely criminalization of female genital mutilation/cutting (FGM/C). Article 13 of the draft child act criminalized FGM/C in all its forms (Republic of Sudan 2009). This article quickly became politicized and infused with religious arguments both for and against FGM/C. A strong counter-mobilization by conservative political and religious actors deemed article 13 against Sharia law. Amira al-Fadil, the minister of social security and welfare who supported the new law, was not only accused of acting against Islam, but also of running errands for the West (Tønnessen and al-Nagar 2013). In the end, the counter campaign worked and the president himself ordered article 13 out of the Child Act of 2010.

Because conservative actors were busy criticizing article 13, changes to other parts of the law – including the definition of adulthood – did not receive much attention. The debate on this provision arose after its enactment, when conservative actors inside and outside of the National Assembly realized that setting 18 as the age of adulthood would result in a de facto reform of the Muslim Family Law of 1991, which sets the legal age of marriage. Sudan is one of few countries in the world that does not specify a legal age for marriage. Rather, the age of consent for marriage is puberty, which has been interpreted to be as young as 10 years of age in some cases. According to the Sudan Household Health Survey of 2010, within the group of women between the age of 15 and 49 years, between 37% and 37.6% were married before the age of 18 and between 10.7% and 12.5% were married before the age of 15. According to a conservative member of parliament from the ruling Islamist party, “The National Child Act contradicts Sharia as it defines a child as below 18. According to Islam, a girl can give consent to marriage at puberty.”⁶⁴ The debate on 18 as the age of adulthood quickly became intertwined with a debate on the legality of child marriage and the criminal age of responsibility in Sudan. This has opened up a new and interesting debate about age of maturity under Islam in Sudan, and conservatives and reformists within the ruling Islamist party interpret Sharia in conflicting manners.

⁶² Interview with an Islamist at the National Council for Child Welfare (2015). Article 27(3) of the 2005 constitution stipulates, “All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.”

⁶³ Save the Children Sweden, in close cooperation with Sudanese child rights NGOs, had worked extensively to advocate for children's rights in Sudan, among other things by writing a range of shadow reports to the committee of child rights (Al-Nagar and Tønnessen 2011).

⁶⁴ Interview with a conservative male politician from the National Congress Party (2013).

Whereas conservative political and religious actors (including those within the judiciary) define puberty as sexual maturity, reformist Islamist women are of a different opinion: they believe that maturity should not be understood as sexual maturity, but rather as intellectual maturity. A high ranking Islamist reformist woman has said,

. . . 18 years as a minimum age for marriage does not contradict Sharia law. Muslim scholars have given us a *fatwa* that supports 18 as a minimum age of marriage *Bulgh*, is an Islamic term which refers to a person who has reached maturity and has full responsibilities under the law. But maturity in Islam should not go hand in hand with physical signs of puberty (sexual maturity), but rather intellectual maturity.⁶⁵

The Islamist women who initiated and pushed for enactment of the Child Act of 2010 are of the opinion that setting 18 as the age of an adult does not contradict Islam. According to an Islamist leading the WCHR, “Islam is not the problem. It is very civilized. It is a beautiful religion for women.”⁶⁶ She says further that Islamic sources that seem to allow child marriage are “misunderstood.” She argues that the *hadith* in Sahih Bukhari saying that Aisha was about 9 years of age when she arrived in the house of the Prophet as his wife is doubtful according to some Islamic scholars, as it goes against the teachings of the Quran and the Prophet. Alternative interpretations of the Islamic sources state that Aisha was 19 at the time. “Besides,” another Islamist says, “Islam forbids harmful practices and clearly early marriages are harmful to girls.”⁶⁷

The debate and legislative changes surrounding the definition of a child are also important when it comes to statutory rape. As article 149 specifically states that children cannot give consent, it becomes hugely important how a child is defined. A report from the WCHR (2009) recommends reform of article 3 of the Criminal Act of 1991, since that article does not specify a specific age of criminal responsibility, but rather refers to the physical signs of puberty. This legal uncertainty in the definition of a child causes confusion about how judges will interpret the law. This is best illustrated by the case of a 16 year old girl who was raped by an adult man in 2012 in the Red Sea State (referred to in the WCHR report). The perpetrator was sentenced to death by the state court, who considered the victim as a child. However, the court of appeals considered the girl to be an adult because she showed signs of puberty – and since she could not prove the lack of consent, the case was treated as *zina* (with her being prosecuted for that crime).⁶⁸

According to the reformist Islamist women, the Criminal Act should refer to a specific age of consent in order to remove uncertainty. The WCHR report (2009) states that “Article 3 in the Criminal Act should have specify age of puberty as 18 years taking the Child Act, 2010, the African Protocol and the interpretation of Al Hanifa School as references” (WCHR 2009). A reform of the Criminal Act to set 18 years as the age of criminal responsibility was presented to the National Assembly in 2015 as part of a criminal law reform package, but it was not even put up for discussion. Concurrently, the national judiciary requested a reform setting the age of criminal responsibility at 15. In other words, the judiciary wants to take the law reform process a step back rather than forward, since setting the

⁶⁵ Interview with a reformist Islamist woman (2013). A *fatwa* is the legal opinion or learned interpretation that a qualified jurist can give on issues of Islamic law.

⁶⁶ Interview with a reformist Islamist woman (2013).

⁶⁷ Interview with a reformist Islamist woman (2015).

⁶⁸ This was echoed in interviews at the police and within family and child protection units in the state of Khartoum in 2011. Whereas cases of rape of girls under the age of 10 are reported, the interviewee said that not only do girls over the age of 10 feel shame and stigma, but also the families of rape victims are often afraid that the girl will be accused of *zina* if they report it to the police.

age of criminal responsibility at 15 would conflict with the Child Act of 2010. In the words of a reformist Islamist woman,

The judiciary wants a reform of the child act. To set the age of criminal responsibility at 15. In our opinion, the criminal act contradicts with the child act, so the criminal act should be reformed. Besides, Sudan has ratified CRC and we are obliged to follow it. Puberty is not in accordance with CRC.⁶⁹

Recently, this debate has reached Sudan's Constitutional Court. A case has been raised in that court, claiming that the Child Act of 2010 is unconstitutional. While section 27(3) of the constitution clearly states, "All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill," some claim that the Child Act contradicts another section in the constitution that requires nationally enacted legislation to have Islamic Sharia as its source. In addition, section 36(2) says that individuals under the age of 18 should not be sentenced to death, except when they have committed *hudud* crimes. This suggests that in *zina* cases, for example, a girl below age 18 who is married and has committed *zina* could be punished by stoning. But in the words of a Sudanese Constitutional Court judge,

There is a contradiction in the constitution itself. It depends on how you interpret Sharia. In my personal opinion, I believe that we should follow CRC and that it is in accordance with the Quran and the Sunna. But other judges are more strict in their interpretation.

The Constitutional Court is the apex of the judicial system in Sudan. It is the custodian of the 2005 constitution, constitutions of the states of Sudan, and (until the secession of South Sudan in 2011) the constitutions of the states of southern Sudan. Its decisions are final and binding. The president appoints Constitutional Court judges upon the recommendation of the National Judicial Service Commission, subject to approval by a two-thirds majority of all representatives of the Council of States. Constitutional Court judges may only be removed by presidential order and on the recommendation of the president of the Constitutional Court, approved by a two-thirds majority of the representatives of the Council of States.

Under the 2005 Interim National Constitution, articles 121 and 122, the court has the following mandates:

- (a) to interpret constitutional provisions at the request of the president, the national government, any state government, the National Assembly, or the Council of States;*
- (b) to have original jurisdiction to decide disputes arising under the 2005 constitution and the constitutions of northern states at the request of government, juridical entities, or individuals;*
- (c) to protect human rights and fundamental freedoms;*
- (d) to adjudicate on the constitutionality of laws or provisions in accordance with the constitution or relevant state constitutions; and*
- (e) to adjudicate on constitutional disputes between levels and organs of government, in respect of areas of exclusive, concurrent, or residual competence.*

The Constitutional Court has criminal jurisdiction over Sudan's president under article 60(2). It also has criminal jurisdiction over the vice president, speakers of the National Assembly, and Supreme Court judges.

⁶⁹ Interview with reformist Islamist woman 2015

5.2 Implementation of the Child Act of 2010 in Statutory Rape Cases

The Child Act of 2010 states, “The provisions of this Act shall prevail over any other provision in any other law.” This suggests not only the need for reform of both the Criminal Law and the Muslim Family Law, but also suggests that, in the meantime, the Child Act of 2010 should take precedence over any definition of adulthood in those laws. Nonetheless, interviews with judges and lawyers as well as the study of statutory rape cases show that the picture is more complicated. The political debate between conservatives who argue that setting adulthood at puberty is Islamic and reformists who argue that setting adulthood at 18 is Islamic are mirrored in the judgments of Sudanese courts.

5.2.1 The Judicial System, the Establishment of Child Courts, and Family and Child Protection Units

Before the report elaborates on implementation of the Child Act of 2010 in statutory rape cases, we will give a brief overview of Sudan’s judicial system, with special attention to child courts. Importantly, Sharia courts have been integrated into the regular court system as part of the Islamization processes. The Constitutional Court and Supreme Court sit at the apex of the Sudanese judicial system. There are also three other types of courts:

1. regular courts, including criminal courts, civil courts, and (more recently) separate child courts⁷⁰;
2. security courts; and
3. military courts.

⁷⁰ Regular courts include town and rural courts, district courts, general courts, and courts of appeal:

- Town and rural courts are found at the local level in each state. These courts deal with simple cases referred to them by competent judges in the locality. Rural courts function in remote areas under tribal chiefs, *omdas*, *sheiks*, and *nazir*, and their competencies are specified in the warrant of establishment issued by the chief judge of Sudan’s Supreme Court. The members of these courts are socially recognized figures with a good reputation for moral integrity, and they mostly act as justices of the peace in their localities. Rural courts apply customary law that is consistent with the general law and most often settle disputes of access to pastures and water, cultivation, and family matters. Under this regime, there has been an attempt to Islamize customary law in the image of the Islamist ideology of the state (Badri 2015). Further, due process in local courts does not appear to be clearly defined, rendering them vulnerable to arbitrary application of the law. Furthermore, customary law is weak in terms of human rights protections for women and children, since gender inequality is embedded in most Sudanese cultures.
- District courts are courts under a single judge. There are three levels known as the first, second, and third grade district courts. The first grade district court holds original jurisdiction in civil, criminal, and family matters, while the second and third grade courts deals with original jurisdiction in civil and criminal matters. The first grade district courts also handles appeals from rural and town courts.
- General (or public) courts are trial courts under a single judge that deal with civil, criminal, and family matters. These courts function as appellate courts for decisions undertaken by district courts, including appeals against the decisions of a first grade district court passed against the decisions of rural and town courts in civil matters.
- Courts of appeal deal with appeals against the preliminary and appellate decisions of the general courts and district courts in civil, criminal, and family matters.

The chief judge of the Supreme Court presides over the judiciary and, according to article 123(4) of the 2005 constitution, is directly responsible to the president.⁷¹

*The **Supreme Court** is composed of 70 judges and operates through panels or “circles” (called dawaaer in Arabic) that each are composed of three judges, with the most senior of the three acting as the presiding judge.*

According to article 125(1) of the 2005 constitution, the Supreme Court is a court of cassation and review in respect of any criminal, civil, or administrative matters that arise out of or under national laws, as well as in respect of family matters. Decisions are reached by a majority of opinion and are subject to revision only if and when the chief judge deems that an infringement of Sharia has taken place. This stems from the Basic Rules Act of 1983 (Quanun Usul Al Ahkam), which stipulates “Islamic Sharia shall be the main source for the laws of the State” (Fadlalla 1999, 205, quoting chapter 5 of that act). If that occurs, the chief judge convenes a five member panel (the majority of whom did not participate in reaching the disputed decision) to review the matter.

The Supreme Court also has criminal jurisdiction over the judges of the Constitutional Court. Finally, the Supreme Court has the mandate of reviewing death sentences imposed by any court in respect to matters arising out of or under national laws. A study of Supreme Court decision related to zina cases shows that the Supreme Court has always retracted the death sentence in such cases (Köndgen 2014). Four circuits of the Supreme Court operate outside the capital in the western, central, and eastern states.

Prior to the Child Acts of 2004 and 2010, juvenile justice in the Sudan was regulated under the Criminal Code of 1991, the Criminal Procedures Act of 1991, and the Juvenile Welfare Act of 1983. Before the introduction of Child Acts, the country’s penal philosophy was to reform and educate the juvenile, correct his or her conduct, and shield him or her from the administration of criminal justice applied to adults. Although the Criminal Act does not stipulate an age of adulthood, it does stipulate that juvenile reform measures can only be applied on children above the age of 7. After the age of 7, a child can be sentenced to (i) *reprimand* during the hearing and in the presence of guardian, (ii) *surrender* to a parent or trustworthy person, (iii) *flogging* with not more than 20 lashes (but only if the child has reached the age of 10), and/or (iv) placement in a correctional *institution* for the purpose of reform and education for a period of two to five years (Save the Children Sweden 2006). Article 59 of the Juvenile Welfare Act of 1983 provides for a special juvenile police force and stipulates that children in conflict with the law must be tried by a competent juvenile court. The Child Act of 2004, which applies to the northern states of Sudan, establishes special children’s courts.⁷² However, the Child Act of 2004 only refers to delinquent children, and under that law courts do not have a mandate to deal with cases in which children are victims of crimes. This is clarified in the Child Act of 2010, which directs the establishment of child courts dealing with children as victims of crimes. According to that act, child courts should consider “the cases submitted before it on part of the Prosecution Attorneys Bureau, the Social and Psychological Service Office or the Child next-of kin, with respect to Children, who are victims of Violations” (article 63(a)). The act also specifically stipulates that the punishments of whipping and the death sentence should not be imposed on any child.

A decree in 2006 mandates the establishment of family and child protection units within the police structure. This was made into law in the Child Act of 2010. Prior to 2006, the police force had limited

⁷¹ Specifically, that article states, “The Chief Justice of the Republic of the Sudan, who is the head of the National Judiciary and the President of the National Supreme Court, shall be answerable to the President of the Republic for the administration of the National Judiciary.”

⁷² Child courts were established in all states, with one such court in each state, except Khartoum, which has three such courts.

capacity for professional follow up of cases of sexual and physical abuse against children, even when reported. No legal support was automatically offered to child victims, and no medical or psychosocial care services were made available through the police force. The lack of a child-friendly system for dealing with cases of abuse and exploitation meant that many crimes were simply not reported (UNICEF Sudan 2008).

It should be noted that the judges interviewed reported that most cases of statutory rape in the courts involve rape of girls; however, there are also many cases of rape of boys. It is impossible to give any exact number, as there is no available statistical data on this issue. Nonetheless, according to the judges interviewed, their caseloads can involve as many as 300 cases of sexual violence each month, which indicates that there are quite a lot of cases. Interviews at the family and child protection unit in Khartoum gave the same impression:

We get a lot of reported cases of sexual abuse, especially during the summer vacation. 70% of the perpetrators are from the child's family, the neighborhood, swimming trainers, etc. In most of the cases, the girls are between 5 and 9 years of age. There are probably many cases with older girls, but social stigma prevents them from reporting. The blame is often put on the girls and because of the pregnancy evidence for *zina* the legal system does not protect girls who have hit puberty.⁷³

Many judges stated that there has been an increase in the number of cases in recent years. This *should not* be confused with an increase in the level of sexual violence against children, however. Rather, it demonstrates an increase both in awareness about such crimes and in institutional capacity to deal with such crimes (as evidenced by the establishment of family and child protection units and child courts). Lastly, the new Child Act of 2010 provides better legal protections for child victims of sexual violence. According to a Sudanese Supreme Court judge,

There seems to be more cases of rape in the last few years because people now report cases as there are special child courts to handle these cases; there is also more awareness within society that the law protects them.⁷⁴

Despite these positive developments, however, there are still many challenges related to the family and child protection units and child courts. While the Child Act of 2010 requires that police officers working at family and child protection units and judges in child courts receive human rights training, high turnover in both of these institutions means that many of them have not received this important training on international conventions such as the CRC. One consequence of this is that cases are often discarded because of social norms that place the blame on the victim of rape. This happens both when families report the case to family and child protection units (i.e., cases are rejected as *zina* and thus not properly investigated) and even in the child court judgments.

For example, one lawyer told us about the case of a 17 year old girl living in Khartoum. After a quarrel with her family, she found work away from home living with and helping a tea seller. As part of their arrangement, the girl helped the tea seller to find a house. A policeman who knew the tea seller offered his help and asked the girl to come with him to see a potential rental home on behalf of the women. When the girl went with him, he tried to rape her. but she resisted him. She reported the case, and her father, another police officer, came and supported her. The case was presented to a child

⁷³ Interview with representatives of a family and child protection unit in Khartoum (2011).

⁷⁴ Interview with a Supreme Court judge (2014).

court in Khartoum, but the judge cancelled the case and wrote in the court report that the girl is *Dahyaa* (literally translated as “lost” but meaning “immoral” in this Sudanese context).⁷⁵

Such cases also arise in conflict zones, as illustrated by the following rape case narrated by an activists in a Sudanese NGO in Darfur:

We were on our way from Al Salam Camp intending to reach Nyala. It was the rainy season. Suddenly, soldiers attacked us. We returned back to the camp and informed the sheikh. I told my husband who was greatly outraged and told me that he does not wants me as a wife anymore. . . . The sheikh came and went with us to report the case. The police detective registered the case against anonymous, and said to me “why do you, women folk, ramble at night”? He said that “this crime was an adultery for why should I go outside home while I know it was the rainy season?” He said to my husband how [did it] happened that he let a woman go on her own to Nyala. The police did not give me any document and the doctor said it was not a rape but a regular sexual intercourse, and there was no resistance, and that means it is adultery. Then they wanted to put me in prison. . . .

The concepts of rape and *zina* are not only conflated in Sudanese law, but also in social norms – something that influences whether cases are reported as well as the way the police and justice system deals with them.

5.2.2 Implementation: A Confused Judiciary

An amendment of the Criminal Act that would set the age of criminal responsibility at 18 is still pending. Meanwhile the Child Act of 2010 should take precedence over the Criminal Act. Nonetheless, when we conducted interviews with lawyers and judges in Khartoum about the implementation of the Child Act in statutory rape cases it became clear that this is not always the case. The Child Act is only partially applied primarily for children who have not hit puberty. Only some child court judges implement the Child Act in statutory rape cases for all children under the age of 18. This lack of implementation is related not only to a lack of awareness about the law, but also to some judges’ belief that the Child Act of 2010 contradicts Sharia law, which they believe sets puberty as the defining line between an adult and a child. A lawyer explains the lack of awareness:

The precedence is for the special law, which “restricts” the general law. But there is a contradictions between the Criminal Act and Child Act which becomes evident in legal practices on statutory rape cases. Some courts are enforcing the Child Act while other judges in courts within Khartoum . . . have not even heard of the Act or the child courts. Thus, they enforce the Criminal Act.⁷⁶

Some child court judges in Khartoum even employ the Criminal Act (and thus the signs of puberty measure) instead of the Child Act in rape cases. It is in the eyes of the judges to decide what constitutes signs of puberty, and this is typically interpreted as either the age of 15 or sexual maturity (*bulgh*). According to a lawyer interviewed, “There are different interpretations of puberty. For some judges, it is the age of 15 and for others it is the physical development of the body.”⁷⁷ Puberty is typically understood as sexual maturity and is defined, among other things, by pregnancy and other signs of sexual maturity. According to a lawyer, “Generally we have challenges in courts with rape

⁷⁵ Interview with a lawyer (2015).

⁷⁶ Interview with a lawyer (2014).

⁷⁷ Interview with a lawyer (2014).

cases for girls from age 12 to 17 years as judges are mostly reluctant to treat them as children even if those judges who implement the Child Act in other types of cases.”⁷⁸

If a girl is pregnant, she is considered an adult by some judges, even child court judges. This is inherently problematic, since pregnancy is evidence for *zina*, and this shifts the burden of proof to the girl to provide evidence of a lack of consent to rape. Judges supporting the use of puberty as a definition of adulthood have even stated that a man would not be convicted of rape of a girl who has reached puberty *unless* she had demonstrated physical resistance.⁷⁹ In the absence of physical resistance, they have held that the sexual act was consensual. According to judges interviewed for this study, this means that (a) if a girl who has reached puberty does not physically resist, it will not be considered rape; (b) in cases of rape where a girl does resist, she must report the rape immediately to secure evidence of resistance; and (c) in cases where a girl conceals the rape (which is not uncommon considering the social stigma) and later realizes that she is pregnant and reports the crime to the police, the concealment itself is considered as proof of consent (since she tried to “hide” the act of *zina*).⁸⁰

Other judges, specifically a number of child court judges in Khartoum, have stated that they would employ the Child Act 2010 in all cases involving girls younger than 18, even if she were married and/or pregnant. One of them said,

There is a contradiction and misunderstanding in the implementation of the Criminal Act after the 2010 National Child Act especially for the rape and *zina* cases of girls. This is related to pregnancy as evidence for *zina*. When a girl is pregnant she is considered an adult in the Criminal Act. But in my opinion the National Child Act should take precedence. If she is below 18, then the court should treat her as a child, not an adult whether she is pregnant or married. The law states the child age is below 18. It is clear.

According to one Supreme Court judge, the definition of a child as below age 18 is in accordance with the 2005 constitution and the tenets of Islam, specifically the Hanafi law school. In her opinion, puberty cannot be reduced to sexual maturity.⁸¹ Along these lines, a high ranking Islamist woman , also encourages taking intellectual maturity into consideration, saying “Puberty is related to the maturity of the mind and responsibility. Childhood ends at 18 years old and not by physical signs of the body.”⁸²

But it should be noted that we conducted interviews in Khartoum only where family and child protection units and child courts have been established and are active. These mechanisms are not implemented to the same extent outside of the urban center of Khartoum. It is believed that many cases arising outside of Khartoum are treated in criminal courts and that most judges in these courts continue to apply the Criminal Act of 1991 (and thus use the puberty standard to determine whether someone is a child). According to a lawyer,

⁷⁸ Interview with a lawyer (2015).

⁷⁹ Interviews with judges in Khartoum (2014 and 2015).

⁸⁰ Interview with a child court judge in Khartoum (2014).

⁸¹ Interview with a Supreme Court judge (2014).

⁸² Interview with reformist Islamist woman (2015).

In most of states' localities, there are no family and child protection units at police stations and child courts. These mechanisms are mostly available in urban areas. In most other areas, the Criminal Act is enforced.⁸³

While the Child Act of 2010 has implications for statutory rape cases in child courts in Khartoum, the judges' interpretation of the law is still ambiguous. This has both a practical and an ideological side: Statutory rape is not defined in the Child Act of 2010. Judges interviewed state that this necessitates that they take the Criminal Act into consideration. And since the definition of rape in the Criminal Act is diffused with *zina*, Islam dictates that adulthood be set at puberty. But there is disagreement among judges regarding the proper understanding of Islam – that is, whether defining a child as a person younger than 18 is in line or in contradiction with Sharia.

The confusion between the Criminal Act of 1991 and the Child Act of 2010 has thus far not resulted in any precedential rulings by the Supreme Court. According to a lawyer well-versed in statutory rape cases,

There are even contradictions in the Supreme Court rulings. The court is divided into specialized circles, but there is no circle for children's rights. There is still no clear position towards the National Child Act. The judges at lower courts mostly rely on the Criminal Act, except for some child courts. But even some judges in child courts are not committed to the National Child Act, largely because the Supreme Court has an unclear position.⁸⁴

According to some child court judges, the fact that the Supreme Court has not come out strongly in favor of the Child Act relates to conservative politics; conservatives believe that setting 18 as the age of adulthood contradicts Sharia. This might relate to major political disagreements among Islamists themselves on the topic. Conservative Islamists within the current regime say it is against Sharia to define a child as younger than 18, based on the practice of child marriage believed to be supported by prophet Muhammed's marriage to Aisha; on the other hand, reformist Islamists (particularly those who backed the Child Act of 2010) state that there is a vast space in the Islamic sources for reaching a consensus on adopting the age of 18. Thus, the political debates and disagreement among Islamists about adopting age 18 as a threshold is also reflected in the actual implementation of the law. The debate is still on-going at the time of this report's publication. While reformist women have thus far failed to amend the Criminal Act to set criminal responsibility at 18 in line with the Child Act of 2010, a Constitutional Court case is pending that will decide the constitutionality of the Child Act itself. Given that Sudanese judges at all levels are divided between these two political poles, the outcome of Constitutional Court case will largely depend on the composition of judges.

⁸³ Interview with a child court judge (2014).

⁸⁴ Interview with a lawyer (2014).

6 Conclusion

Sudan's pro-women activists have been pointing out discriminatory aspects of Sudan's laws since the 1995 Beijing conference, but the country's 2005 peace agreement and interim national constitution created a space for activists to mobilize and sparked review of Sudan's laws, which had been codified by the current Islamist regime during their 24 years in power. Many provisions in these laws contradict mandates of gender equality in the interim constitution as well as in international conventions. One of the laws that has taken center stage in these debates is the Criminal Act of 1991, especially as it regards how women and girls may be caught between the crimes of rape and adultery/fornication. This report has detailed recent law reform efforts regarding the definition of rape and the age of criminal responsibility.

In spite of a difficult political atmosphere, Sudan's rape laws have been hotly debated in the wake of the armed conflict in Darfur. Darfur put sexual violence on the political agenda, and the ICC's indictment of Sudan's president in connection with the systematic practice of rape in Darfur further polarized the debate and the work on criminal law reform. The indictment has proved to be a double-edged sword. It made it possible to expand the issue of sexual violence even beyond the Darfur conflict and has fostered public debate on the issue for the first time in Sudanese history. At the same time, it made activism within this area more difficult because the calls for reform are often viewed as direct threats to the current government. The room for maneuvering is getting smaller, and activists operate under severe constraints.

Despite these limitations, it is a positive step that the issue has even been debated inside the National Assembly. Some female legislators are willing to advocate for further legal reforms. Nonetheless, parallel and competing initiatives have arisen within the government and civil society. The groups proposing these initiatives often have little or no dialogue and cooperation. Reformist Islamist women in government worry that close cooperation with pro-women activists could potentially compromise their position within the NCP, and pro-women activists are reluctant to reach out to government actors because they do not want to give legitimacy to an authoritarian state that continues to suppress their activism. Both political camps want to control and "own" the process and claim its victories, something that often hinders close, genuine cooperation.

Pro-women activists and Islamist women embed their arguments for reform within competing gender ideologies – gender equality and gender equity (Tønnessen 2011b). For example, they starkly disagree on the issue of marital rape and women's obedience within family law. While pro-women activists advocate abolishing obedience clauses and criminalizing marital rape, Islamists insist that women should be obedient to their husbands within the paradigm of *qawama*. (male guardianship) According to one activist, "There is a clear division among women along ideological lines."⁸⁵ As a consequence, "there is no coherent women's movement in Sudan. We are operating from isolated islands."⁸⁶ This ideological divide weakens the reformists working from within the government to initiate reform because they cannot rely on the backing, support, and broad mobilization of women to push, lobby, and make a roar in media, the streets, and outside the National Assembly. While pro-women activists are reluctant to support isolated and single reform efforts because they want a paradigm shift of the entire Islamist mentality on women's sexuality and freedom (for example, to eradicate *qawama* once and for all), this will be difficult without the fall of the current regime.

⁸⁵ Interview with a pro-women activist (2012).

⁸⁶ Interview with a pro-women activist (2012).

The general theoretical literature on law reform in Africa and beyond underlines the importance of an independent and autonomous women's movement as well as cooperation across divides between women in order to successfully inform government policy, even in non-democratic regimes (see, e.g., Tripp et al. 2009). Past experiences of cooperation between the two camps in Sudan validate this. For example, the introduction of a 25% gender electoral quota in the Electoral Law of 2008 came after cooperation amongst and joint pressure exerted by women within civil society and the government (Abbas 2010). The fact that these groups were able to mobilize to achieve this quota demonstrates that they are able to achieve success when they work together (Tønnessen and al-Nagar 2013). But the law reform initiatives in post-CPA Sudan show that the likelihood of success is greater on women's issues that are considered non-doctrinal, meaning that they do not touch directly on Sharia law.

In spite of the fact that pro-women activists and reformist Islamist women disagree on a range of issues, they also agree on other critical issues, such as the belief that rape should be clearly distinguished from *zina*, that the legal age of responsibility should be 18 years, and that the minimum age of marriage should be 18 years. But all these issues are considered political sensitive and the law reform initiatives therefore foster resistance within and outside of the regime. Instead of reaching out to civil society for crucial support of legal reforms addressing these issues, the regime is closing down pro-women organizations. This can be considered as a backlash as previous, successful reforms are at risk, especially the Child Act of 2010, because of a growing counter-mobilization of conservative actors employing religious arguments for their cause. This was well-illustrated during the campaign to criminalize FGM/C in the 2010 law. Conservatives see any efforts to expand women's rights as influenced by the West and in contradiction with Islamic law.

Successfully enacting a new law is not enough to provide justice for rape victims in Sudan. Women also have a major role to play in drawing attention to the fact that reforms are only partially implemented in Sudanese courts. Despite the fact that many child court judges have received extensive training in human rights law as well as on the Child Act of 2010, many of them continue to use puberty as the definition of adulthood when dealing with cases of rape of girls under the age of 18. And conservative actors are pushing for the Child Act of 2010 to be annulled and ruled unconstitutional because it conflicts with Sharia.

However, Sudanese women have raised cases in the Constitutional Court before and won. The governor of Khartoum, Magzoub al-Khalifa Ahma, issued a decree in 2001 that banned women from working in places that provided direct service to men, such as restaurants and petrol stations. According to the governor, women's morality was compromised when they rendered direct services to men, and this improper behavior did not accord with Islam. Activists organized demonstrations, and eventually took the decree to the Constitutional Court (albeit raising two separate cases), arguing that this attempt to restrict their presence in the public sphere limited women's exercise of their constitutional right to work. Pro-women activists won the case, and the decree was deemed unconstitutional (Tønnessen 2011b).

Now, in 2015, another case is pending in the Constitutional Court, this time dealing with whether defining a child as a person younger than 18 years old corresponds or conflicts with Sharia. Women are ready with their interpretation of Islam: puberty as it is described in Islamic texts should not be understood to mean sexual maturity, but rather intellectual maturity. And there is nothing in Islam that stands against setting the age of intellectual maturity at the age of 18 in accordance with international conventions on child rights. The jury is still out. But the time is ripe for yet another successful example of women mobilizing to win a case in Sudan's highest court.

References

Abbas, Reem. 2014. “Mariam Yahia's Story.” CMI Field Notes, 29 May. Bergen, Norway: Chr. Michelsen Institute. <http://www.cmi.no/news/?1394=mariam-yahias-story>.

Abbas, Sara. 2010. “The Sudanese Women’s Movements and the Mobilisation for the 2008 Legislative Quota and its Aftermath.” *IDS bulletin* 41, no. 5: 100–108.

Abdel Halim, Asma. 2011. “Gendered Justice: Women and the Application of Penal Laws in the Sudan.” In *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, edited by Lutz Oette, 227–241. Farnham, Surrey, UK: Ashgate.

ACHPR (African Commission on Human and People’s Rights). 2003. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. 11 July, effective 25 November 2005. http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.

ACJPS (Africa Centre for Justice and Peace Studies). 2011. “Journalists Reporting on Sexual Violence against Women Face Criminal Charges.” *Sudan Tribune*, 6 June. <http://www.sudantribune.com/spip.php?article39116>.

Ahfad University for Women. 2004a. *Adolescents’ and Women’s Rights under the Muslim Personal Law Act, 1991*. Omdurman, Sudan: Ahfad University for Women.

———. 2004b. *The Legal Status of Adolescents and Women in Sudanese Civil and Criminal Laws*. Omdurman, Sudan: Ahfad University for Women.

Al-Garay, Omar. 2011. “Rape under Sharia Law” [in Arabic]. *Ajras Alhurria*. 6 March. http://www.sudanile.com/index.php?option=com_content&view=article&id=24723:2011-03-06-05-56-30&catid=83:2009-01-08-08-12-53&Itemid=55.

Al-Nagar, Samia, and Liv Tønnessen. 2011. *Sudan Country Case Study: Child Rights*. UTV Working Paper 2011: 3. Stockholm: Swedish International Development Cooperation Agency (Sida). <http://www.cmi.no/publications/file/4106-sudan-country-case-study-child-rights.pdf>.

Al-Nagar, Samia, and Liv Tønnessen. 2015. “Women’s Equal Rights and Islam in Sudanese Republican Thought: A Translation of Three Family Law Booklets from 1975, Produced and Circulated by the Republican Sisters”. Sudan Working Paper, Bergen: Chr. Michelsen Institute <http://www.cmi.no/publications/file/5605-womens-equal-rights-and-islam-in-sudanese.pdf>

Badri, Lamya. 2015. “Gender Relation in the Rural Traditional Legal System in Eastern Sudan.” PhD diss., Ahfad University for Women, Omdurman, Sudan.

Badri, Balghis, Samia al-Nagar, and Wani Tombe. 2015. *Introduction of the Quota System in Sudan and its Impact in Enhancing Women’s Political Engagement*. Omdurman, Sudan: Ahfad University for Women.

BBC Arabic. 2010. “Woman Flogged in Street” [in Arabic]. *BBC Arabic*, 14 December. http://www.bbc.co.uk/arabic/middleeast/2010/12/101214_sudan_women_arrest.shtml.

Copnall, James. 2009. “Lubna Hussein: ‘I’m Not Afraid of Being Flogged. It Doesn’t Hurt. But It Is Insulting.’” *Guardian*, 1 August. <http://www.guardian.co.uk/world/2009/aug/02/sudan-women-dress-code>.

- Fadlalla, Ali Suleiman. 1990. "The Development of the Legal System in the Sudan since Independence." In *Law, Society and National Identity in Africa*, edited by Jamil M. Abun-Nasr, Ulrich Spellenberg, and Ulrike Wanitzek, 199–209. Hamburg: H. Buske.
- Fluehr-Lobban, Carolyn. 2012. *Shari'a and Islamism in Sudan: Conflict, Law and Social Transformation*. London: I.B. Tauris.
- Gayoum, Akram Abdel. 2011. *149 campaign in Sudan*. London: Women Living Under Muslim Laws; Khartoum, Sudan: Salmah Women's Resource Centre.
- Girifna TV. 2011. "Rape of a Sudanese Activist by the Sudanese National Security Forces." YouTube video, 3:18. Posted 21 February. <http://www.youtube.com/watch?v=PXQeOZTCLYY>.
- Hajjar, Lisa. 2004. "Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis." *Law and Social Inquiry* 29, no. 1: 1–38.
- HRW (Human Rights Watch). 2010. "Sudan: End Lashing, Reform Public Order Rules." HRW, 15 December. <http://www.hrw.org/en/news/2010/12/15/sudan-end-lashing-reform-public-order-rules>.
- Itto, Anne. 2006. Guests at the Table? The Role of Women in Peace Processes. In *Peace by Piece: Addressing Sudan's Conflicts*, Accord 18, edited by Mark Simmons and Peter Dixon, 56–59. London: Conciliation Resources. <http://www.c-r.org/our-work/accord/sudan/women.php>.
- Köndgen, Olaf. 2010. "Shari'a and National Law in the Sudan." In *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by Jan Michiel Otto, 181–230. Leiden, Netherlands: Leiden University Press. <https://openaccess.leidenuniv.nl/bitstream/handle/1887/21170/file221087.pdf?sequence=1>.
- . 2014. "Proving the Innocence of the Victim: Pitfalls of Sudanese Zina Legislation." Paper presented at New Horizons: Law Reform and Gender Justice in the Greater Middle East, Ahfad University for Women, 21–23 October.
- Kristof, Nicholas. 2009. "The Crime: A Woman Wearing Pants." *New York Times*, 4 August. <http://kristof.blogs.nytimes.com/2009/08/04/the-crime-a-woman-wearing-pants>.
- Mir-Hosseini, Ziba, and Vanja Hamzić. 2010. *Control and Sexuality: The Revival of Zina Laws in Muslim Contexts*. London: Women Living Under Muslim Laws. <http://weld.org/sites/default/files/control%20and%20sexuality.pdf>.
- Mutawinat Group. 1997. *Review of Sudanese Legislation Discriminating against Women* [in Arabic]. Unpublished report. Khartoum: Mutawinat Benevolent Group.
- Mutawinat Group and Fredrich Ebert Stiftung. 2001. *Legislative and Legal Issues*. Working Papers Series 1.
- Nageeb, Salma Ahmed. 2004. *New Spaces and Old Frontiers: Women, Social Space, and Islamization in Sudan*. Lanham, MD: Lexington Books.
- OHCHR (UN Office of the High Commissioner for Human Rights). 2005. *Access to Justice for Victims of Sexual Violence: Report of the United Nations High Commissioner for Human Rights*. 22 July. <http://www.refworld.org/docid/46cc4a650.html>.

Okonje, Grace. 2011. *End of Programme Evaluation of the UN Women and Unitarian Universalist Service Committee Funded Programme Defending and Securing the Human Rights of Women and Girls in the Humanitarian Crisis, South Darfur, Sudan, July 2008 – July 2010*. Prepared for UN Women East and Horn of Africa Regional Office and Sudan Country Office.
<https://www.google.com/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAAahUKEwjk3bHsj-PGAhXBaz4KHd11BAA&url=http%3A%2F%2Fgate.unwomen.org%2FEvaluationDocument%2FDownload%3FEvaluationDocumentID%3D3895&ei=hnWpVeSCIsHX-QHS6xA&usg=AFQjCNGZOayhujT-G7rO92-IPjcnz1zHgg&sig2=EDvRbAUMW8OfShAhnZXbg&bvm=bv.98197061,d.cWw>

REDRESS and KCHRED (Khartoum Centre for Human Rights and Environmental Development). 2008a. *Reforming Sudan's Legislation on Rape and Sexual Violence*. Position Paper, September.
http://www.redress.org/downloads/country-reports/Position%20Paper%20Rape%205%20SEPT%2008%20_3_.pdf

———. 2008b. *Priorities for Criminal Law Reform in Sudan: Substance and Process*. An options paper prepared by REDRESS and KCHRED, January. http://www.redress.org/downloads/country-reports/Options_Paper_Law_Reform%20FinalEngl.pdf.

Republic of Sudan. 1991. Personal Status Law 1991 [in Arabic]. Khartoum.

———. 1994. "Sudan: The Criminal Act 1991." *Arab Law Quarterly* 9, no. 1: 32–80.

———. 2004. Provisional Decree, Child Act, 2004. Khartoum.
http://www.africanchildforum.org/clr/Legislation%20Per%20Country/Sudan/sudan_children_%202004_en.pdf

———. 2005. The Interim National Constitution of the Republic of Sudan.
<http://www.refworld.org/pdfid/4ba749762.pdf>

———. 2009. Draft National Child Act 2009. Khartoum.

———. 2010. Child Act, 2010. Khartoum.
http://www.africanchildforum.org/clr/Legislation%20Per%20Country/Sudan/sudan_children_2010_en.pdf

Saddlesmania. 2009. "Trouser Wearing Woman Jailed in Sudan." YouTube video, 1:15. Posted 7 September. <http://www.youtube.com/watch?v=bGq5UrDJdNA>.

Salah, Walaa. 2015. "Amendments to Sudanese Criminal Law." *Opendemocracy*, 30 April.
<https://www.opendemocracy.net/arab-awakening/walaa-salah/new-amendments-to-sudanese-criminal-law>.

Schacht, Joseph. 2013. "Li'ān." In *Encyclopaedia of Islam, Second Edition*, edited by P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel, W. P. Heinrichs. Leiden: Brill Online.
http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/lian-SIM_4665.

Scholz, Peter. 2000. "Die koranischen Delikte (*hudud*) im sudanesischen Strafrecht" [The Quranic crimes (*hudud*) in Sudan's criminal law]. *Zeitschrift für die gesamte Strafrechtswissenschaft* 111, no. 2: 431–460.

Sidahmed, Abdel Salam. 2001. "Problems in Contemporary Applications of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women." *British Journal of Middle Eastern Studies* 28, no. 2: 187–204.

SIHA (Strategic Initiative for Women in the Horn of Africa). 2015. *Third-Class Citizens: Women and Citizenship in Sudan. A Paper on Women's Struggle for Equal Citizenship in Sudan.* <http://www.cmi.no/file/3217-Third-Class-Citizens--Womens-Struggle-for-Equal-Citizenship-in-Sudan-002.pdf>

SORD (Sudanese Organization for Research and Development). 2012a. *Report of the Conference on Sudanese Personal Law.* Unpublished report.

———. 2012b. *Towards Gender Justice in Sudan: Proposed Family Law of 2012.* Khartoum

Sudan Tribune. 2010. "Sudan's Security Services Arrest Civil Society Activist after Flogging Protest." *Sudan Tribune*, 19 December. <http://www.sudantribune.com/spip.php?article37335>.

Tire, Akolda M, and Balghis Badri, eds. 2008. *Law Reform in Sudan: Collection of Workshop Papers.* Omdurman, Sudan: Ahfad University for Women.

Tripp, Aili Mari, Isabel Casimiro, Joy Kwesiga, and Alice Mungwa. 2009. *African Women's Movements: Transforming Political Landscapes.* New York: Cambridge University Press.

Tønnessen, Liv. 2011a. "Feminist Interlegalities and Gender Justice in Sudan: The Debate on CEDAW and Islam." *Religion and Human Rights: An International Journal* 6, no. 1: 25–39.

———. 2011b. "The Many Faces of Political Islam in Sudan: Muslim Women's Activism For and Against the State." PhD diss., University of Bergen, Bergen, Norway.

———. 2013. "Between Sharia and CEDAW in Sudan: Islamist Women Negotiating Gender Equity." In *Gender, Justice and Legal Pluralities: Latin American and African Perspectives*, edited by Rachel Sieder and John McNeish, 133–156 New York: Routledge.

———. 2014. "When Rape Becomes Politics: Negotiating Islamic Law Reform in Sudan." *Women's Studies International Forum* 44: 145–153.

———. 2015. "Women's Right to Abortion after Rape in Sudan". CMI Insight. Bergen: Chr. Michelsen Institute. <http://www.cmi.no/publications/file/5507-womens-right-to-abortion-after-rape-in-sudan.pdf>

Tønnessen, Liv, and Samia al-Nagar. 2013. "The Women's Quota in Conflict Ridden Sudan: Ideological Battles For and Against Gender Equality." *Women's Studies International Forum* 41, no. 2: 122–131.

UN. 1989. *Convention on the Rights of the Child.* 20 November, entry into force 2 September 1990. <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

UNICEF Sudan. 2008. *Technical Briefing Paper 3: Family and Child Protection Units.* http://www.unicef.org/sudan/Briefing_paper3-CP_Units.pdf.

Violence against Women Unit. 2010. *The National Plan for Combating Violence against Women and Children, 2010–2011.* Khartoum: Ministry of Justice.

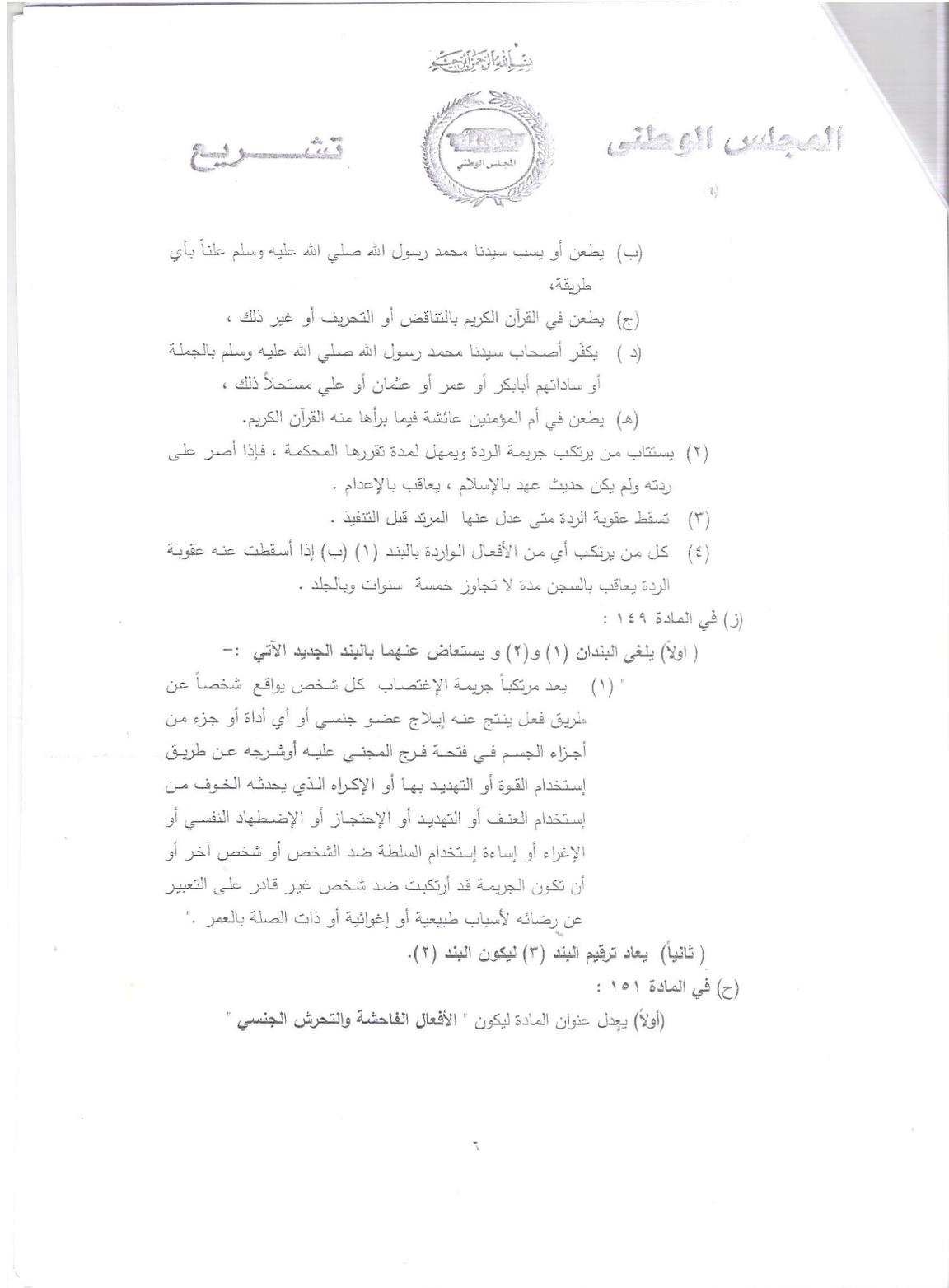
WLUML (Women Living under Muslim Laws). 2010. “Sudan: ‘Alliance of 149’ for Reform of Rape Law.” Press statement from Alliance of 149, 27 January. <http://www.wluml.org/node/5900>.

WLUML (Women Living under Muslim Laws). 2015. “Sudan’s Revised Penal Code: A Mixed Picture for Women”.
[http://www.wluml.org/sites/wluml.org/files/Sudans Revised Penal Code Mixed Picture WLUML 2015 0.pdf](http://www.wluml.org/sites/wluml.org/files/Sudans_Revised_Penal_Code_Mixed_Picture_WLUML_2015_0.pdf)

WCHR (Women’s Centre for Human Rights). 2009. *Technical Report for Law Review from a Women’s Rights Perspective* [in Arabic]. Khartoum: Ministry of Welfare and Social Security.

Zoul4Revolution. 2011. “Proposed Sudanese Family Law for Muslims Documentation.” YouTube video, 1:25. Posted 17 May. <https://www.youtube.com/watch?v=axFxHzRN5fM>.

Appendix 1: The February 2015 Reform (in Arabic)



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The project Women's Human Rights and Law Reform in the Muslim World seeks to map family and criminal law reforms in the period 1995-2015 in Afghanistan, Egypt, Iran, Lebanon, Morocco, Pakistan, Saudi Arabia, Sudan, Tunisia and Yemen. How have women activists in Muslim countries advocated for legal reform in the years since the 1995 Beijing Declaration famously stated that "women's rights are human rights"? The project is funded by the Rafto Foundation which is a non-profit and non-partisan organization dedicated to the global promotion of human rights. The project is part of an initiative taken by Rafto laureates Shirin Ebadi, Rebiya Kadeer, Malahat Nasibova, and Souhayr Belhassen, and facilitated by the Rafto Foundation to establish a Women's Network, which is an international network of high-profile and influential women to improve women's human rights and enhance gender equality in Muslim societies. In supporting local activists and civil society organizations with a common platform, the objective of the Women's Network is to raise the voices of women in Muslim societies, and to address the religious, legal, social, political and cultural mechanisms that prevent women's voices from being heard.

