

# Women's Right to Abortion after Rape in Sudan

In 1991, Sudan's Islamist regime expanded the circumstances under which abortions are permitted within 90 days of conception, to include rape. This reform has received great attention, especially given the rampant rape that occurred during the violent conflict in Darfur. Rape victims have been unable to take full advantage of this law, however, since a victim must overcome serious legal and practical hurdles in order to access an abortion. This became even more difficult after the International Criminal Court's (ICC's) 2009 indictment of Sudan's president because Sudan expelled many of the humanitarian organizations that were distributing post-rape kits. Nonetheless, although women and human rights activists in Sudan are not currently giving much attention to a woman's right to abortion, there are on-going efforts to reform Sudan's laws against rape. Meanwhile, medical personnel continue to risk arrest each time they perform an illegal abortion.



## Abortion law in Sudan

All countries in the Middle East and Northern Africa (MENA) permit abortion by law if the mother's life is in danger.<sup>1</sup> Some countries also permit abortion in cases of a risk to the mother's physical or mental health, fetal impairment, or rape.<sup>2</sup> Only Tunisia and Turkey allow women to have an abortion on any grounds during the first trimester.<sup>3</sup> Most abortion laws in the region are punitive, and legal services are restricted (Hessini 2007).

Interestingly, Sudan's reform occurred under the rule of an Islamizing state. When Islamists came to power in 1989, they codified a series of new laws in the name of Sharia, among these Sudan's Criminal Code of 1991. Previously, the Criminal Codes of 1925 and 1983 had prohibited abortion except to save the life of the pregnant woman. In 1983, when an Islamic penal code was first introduced in Sudan (the so-called "September Laws"), the punishment

for performing an abortion was revised to reflect the Islamic penalty of payment of blood money. A person who violated the law was subject to fines, imprisonment, and compensation. Compensation was to be paid to relatives of the fetus and/or mother, depending on the circumstances of the abortion.

Article 135 of the Criminal Code of 1991 expanded the circumstances under which an abortion is legal. The law now stipulates that a person who intentionally causes a woman to miscarry is not guilty of an offence where (a) the miscarriage is necessary to save the mother's life; (b) the pregnancy is the result of a rape that occurred not more than 90 days before the pregnant woman obtains the abortion; or (c) the unborn child has died in the mother's womb.

An unlawful abortion may be subject to up to three years imprisonment or a fine or both.

This increases to five years if the abortion was performed more than 90 days after conception. Article 136 stipulates that the person performing or causing an unlawful abortion is subject to two years imprisonment or a fine or both.

Sudan is the only country in the MENA region that currently allows a woman to obtain an abortion after rape, but religious scholars in other countries have issued fatwas (Islamic legal opinions) to support this. For example, the Egyptian Grand Sheikh of al-Azhar, Muhammed Sayed Tantawi, issued a fatwa in 1998 stating that an unmarried woman who has been raped should have access to an abortion. In Algeria, the Islamic supreme council issued a fatwa stating that abortion was allowed in cases of rape, since rape was being used by religious extremists as a weapon of war.<sup>4</sup> Neither of these fatwas has, however, translated into law (Hessini 2008). While this type of Islamic legal thinking suggests that there is an opening for Sudan's reform to spread into other regions, it is important to note that Sudan's reform came about as a result of efforts to protect a woman's honor and to secure her marriageability after rape rather than because of a commitment to human rights.

## Definition of rape in Sudan

One major obstacle for women who seek an abortion after rape rests on the very definition of "rape" in article 149 of Sudan's Criminal Code of 1991. Rape is categorized as zina (that is, sexual intercourse before and outside of marriage) without consent. At the same time, though, Sudan criminalizes zina and, building on the Islamic hudud penalties, this crime is punished with 100 lashes (if the person is unmarried) and capital punishment by stoning (if the person is married).<sup>5</sup>

This creates a dilemma for a rape victim. In order to prove rape, the victim must prove that someone has forcibly committed sexual intercourse with her. The burden of proof falls on the rape victim. Only physical injuries and bruises are regarded as evidence for the lack of consent in Sudanese courts, unless the victim of rape is a child.<sup>6</sup> If the police do not document such injuries on Form 8 (the form used to report a violent act, which is then used as evidence in court), an accusation of rape may lead to the victim's incrimination for zina. This is especially likely to occur if the victim is an unmarried woman or girl who becomes pregnant as a result of the rape, since her pregnancy will serve as clear evidence that sexual intercourse occurred.

Thus, not only is pregnancy before marriage considered shameful for the woman and her entire extended family, but it also has serious legal implications. Pregnancy in unmarried women is the evidence for zina, in addition to a confession (which is not retracted before the verdict) or the testimony of four male

eyewitnesses. If an unmarried woman becomes pregnant after rape she can thus be punished for the crime of zina if she fails to prove the lack of consent (Sidahmed 2001; Abdel Halim 2011). Cases where unmarried women and girls conceal the rape (which is not uncommon considering the social stigma) and later realizes that she is pregnant and then report the crime to the police; the concealment is considered as proof of consent as she is accused of trying to "hide" the act of zina.<sup>7</sup> In the words of one of my informants; "if you cannot prove rape, you become the perpetrator."<sup>8</sup>

Given how Sudanese concepts of adultery and fornication dilute the legal concept of rape, it is difficult – if not impossible – to implement a law that gives women the right to an abortion after rape. According to interviews with activists and medical personnel in Sudan, legal abortion after rape is not commonly granted because rape is extremely difficult to prove in a court of law.<sup>9</sup> Even if proved, the trial is unlikely to be concluded within 90 days of conception, meaning the woman will lose the opportunity to obtain an abortion in any case.

## Access to emergency contraception after rape in Darfur

Abortion care in connection with rape received heightened attention after the Darfur conflict erupted in 2003, because sexual violence and rape became widely documented. Many UN agencies and humanitarian organizations (among others, Médecins Sans Frontières) rushed to the scene, providing victims of sexual violence with so-called "rape kits" that included the "morning after pill," which prevents pregnancy if taken within 72 hours after a rape.

On 4 March 2009, the ICC issued an arrest warrant for Sudan's President Bashir, indicting him on five counts of crimes against humanity in Darfur (murder, extermination, forcible transfer, torture, and rape) and two counts of war crimes (pillaging and intentionally directing attacks against civilians). Following this, the Sudanese government immediately expelled 13 international NGOs operating in Darfur that, among other things, pro-

vided post-rape treatment.<sup>10</sup> This caused a dramatic reduction in women's access to medical treatment after rape. According to a Darfuri activist (2013 interview):

*"If you cannot prove rape, you become the perpetrator."*

*"After the expulsion of international and national health service providers, medical centers were closed down, such as the Italian hospital in Nyala. Thus, services for raped women are now only found in public hospitals, as state protocols dictate that only doctors are allowed to deal with rape cases. Many displaced women are far away from hospitals and there is no regular transportation from the camps to the hospitals."*

The Sudanese regime did not entirely stop the distribution of rape kits after the ICC arrest order, but it required the Ministry of Health to distribute them. State protocols further dictate that only doctors may provide legal abortions. The practical effect of these policies has been to restrict access to services. As a country struggling with poverty, internal displacement, and several armed conflicts, Sudan lacks medical infrastructure, particularly doctors.<sup>11</sup> In many rural areas, particularly in conflict zones like Darfur where sexual violence is rampant, midwives and nurses are the only healthcare providers. However, they are not allowed to prescribe emergency contraceptives in cases of rape. One humanitarian actor working in Darfur has explained (2012 interview),

*“Only doctors have authorization to give emergency contraceptive. In rural areas of Darfur there are no doctors. It cannot be given by a nurse. The pill has to be taken within 72 hours after the rape. Women cannot travel to urban centers to access medical centers due both to the armed conflict and lack of resources. There are a lot of children born in Darfur as a result of rape.”*

Furthermore, the Darfur region is obviously characterized by a fundamental lack of trust in government hospitals, and women are generally reluctant to seek medical treatment there.

Because of the expulsions, only UN organizations are currently bringing rape kits to Sudan. Most international humanitarian organizations have reduced their efforts within the area of sexual violence in order to avoid being barred from the country. As the UN is cooperating with the government, women's access to medical services after rape outside of state hospitals is therefore reduced. Even the UN is facing some difficulties, according to a Sudanese activists (2015):

*“These rape kits are stuck in the warehouses under the auspice of the Ministry of Health. Thus, the rape kits do not reach many hospitals. Further, doctors are instructed to not document the use of rape kits (because the government is not keen to document the occurrence of rape in Darfur) and thus hospitals run out of them”.*

In short, access to emergency contraceptives is extremely difficult in the increasingly polarized political setting of Darfur.

## Illegal abortions and medical activism

Many women seek illegal abortions because of the risk of punishment for zina and the lack of medical infrastructure. Although there are no reliable national statistics on abortion in Sudan, a 2009 study in Khartoum suggests that complications as a result of unsafe and illegal abortions are a serious problem (Kinaro et al. 2009). Sudan has a high maternal mortality ratio, estimated to be 360 per 100,000 live births, a significant proportion of

which may be attributable to unsafe abortions (WHO et al. 2013).

Where women seek abortions is often a class issue. The middle and upper classes can access private clinics and a network of medical doctors who perform safe abortions, despite the high risk of being arrested. One of them is Abdulhadi Ibrahim, who was jailed for carrying out illegal abortions. The court found him guilty of failing to report to the police and authorities that he was treating unmarried pregnant women. According to Ibrahim,

*“I don't regret what I have done for a moment. The years I spent in the prison are the price for saving the lives of thousands of girls and protecting their families. I am fully satisfied, both morally and professionally.” (RNW 2011)*

Despite the risk of arrest and suspension of their medical licenses, nurses, doctors, and trained midwives illegally provide safe abortions in mostly private clinics; however, getting an abortion is costly.<sup>12</sup> In the words of a medical activist (interview 2015):

*“Safe methods are available, but mostly to women who can afford it (economically) or know about it (education).”*

Most poor and uneducated women go to untrained midwives to illegally terminate their pregnancies. These abortions are unsafe, argues a medical activist (interview 2015). They pose “high risks on women's health and most of the time they will need medical care afterwards . . . The procedure of [an] unsafe abortion is usually conducted by inserting a metal or wooden rode (non-sterilized) into the woman's vagina and try[ing] to pull the embryo out”. Further, post-abortion treatment is a matter of luck. While some doctors provide medical care without asking too many questions, others will report a woman who has received an abortion to the police.<sup>13</sup>

The police – particularly the public order police – frequently crack down on those seeking illegal abortions. The poorer women seeking unsafe abortions by the untrained midwives are more at risk of arrest. In the words of an activist (interview 2015): “the poorer you are the more likely you are to get arrested for seeking abortion”.

This police crackdown on illegal abortions must be seen against the backdrop of an Islamist state in which sexual intercourse before marriage is not only shameful, but also a crime under Islamic law. A former leader of the ruling Islamist party (who also served as a presidential advisor and head of the majority party in parliament) stated in an interview (2012) that one of the biggest challenges facing the country is the increasing amount of single mothers – meaning that the country is descending into moral chaos. According to him, only the proper implementation of Islamic law will restore Islamic morality. This includes making sure that promiscuous women cannot get away with their crimes by seeking illegal abortions.

*“The poorer you are, the more likely you are to get arrested for seeking abortion.”*

Liberalizing the abortion law is not only regarded as contrary to Islamic law, but it is also feared as an effort that would lead to more criminal acts in the form of zina and prostitution. In the words of a Sudanese humanitarian worker (interview 2011) “They say that the prostitutes will use it and it is regarded as a form of abortion which contradicts Islam.”

## Women's activism on abortion: A taboo topic

Sudanese cultural and religious norms stigmatize abortion, so people find it difficult to speak openly about the topic. Women activists have kept legal reform of the Criminal Code's zina and rape articles on their agenda (Tønnessen 2014), but the right to abortion has not been debated much.<sup>14</sup> In fact, rape (including marital rape) is more openly debated than abortion.

Although a woman's right to abortion in circumstances of rape is stipulated in the Criminal Code, a law codified by Islamists, there is a strong belief that this right contradicts Sharia and that expanding it would cause moral corruption and sexual chaos – for example, that unmarried girls would use the morning after pill to hide their promiscuity. At the same time, however, some activists and medical personnel aim to interpret Islam in a way that liberalizes rather than limits Sudanese women's right to abortion. One activist has explained that “some of the doctors do not find religion as a barrier; some of them who look to religion as a reference claim that in Islam it is allowed to perform abortion in the first trimester”.<sup>15</sup>

It is important to note that there is a diversity of views on Islam and abortion within Sudan. Also there is a diversity of views within Islam on the topic both contemporarily and historically; some interpretations on women's right to abortion is more liberal than others (Shameen 2013).

Sudan is not an easy environment in which to put women's abortion rights on the agenda. Abortion remains a politically sensitive topic, women activists who argue for abortion rights risk being labeled as advocates for sexual chaos and single motherhood. Even some Sudanese activists (particularly those of the older generation) take a conservative position on this issue. Others try to work off the grid in secret networks in order to avoid attention and police crackdown.

## Conclusion

At first sight, Sudan's liberalization of abortion rights in 1991 would seem to be welcome step forward for Sudanese women. The Islamist state expanded the circumstances under which a woman can seek a legal abortion to include rape. At second sight, however, the law reform seems to have had little practical significance for rape victims, since it is extremely difficult to prove rape and failure to do so may result in prosecution for zina.

While emergency contraceptives were distributed in the war struck Darfur region as part of rape kits, the 2009 ICC process made it considerably more difficult for women to access them, both because of the expulsion of international NGOs distributing rape kits and because the government has insisted that only government hospitals may distribute emergency contraceptive.

Most, if not all, Sudanese women who become pregnant after rape either end up with an unwanted child or seek an illegal abortion. Although educated middle and upper class women may have the means to access private clinics and networks of medical personnel who can perform safe illegal abortions, uneducated and poor women who seek unsafe abortion performed by untrained midwives are significantly more likely to be arrested and more likely to face post-abortion complications.

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## Endnotes

<sup>1</sup> Specifically, this includes the countries of Algeria, Bahrain, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, and Yemen.

<sup>2</sup> These countries include Jordan, Kuwait, Morocco, Qatar, and Saudi Arabia (for physical health); Algeria (for mental health); Kuwait and Qatar (for fetal impairment); and Sudan (for rape).

<sup>3</sup> Tunisia's law was passed in 1973 and Turkey's law was passed in 1983. Interestingly, under Tunisia's law a woman does not have to be married or to obtain spousal consent to obtain an abortion (Hessini 2007, 79).

<sup>4</sup> In contrast, after discussions about the rape of Kuwaiti women by Iraqi soldiers during the first Gulf war, Kuwaiti muftis concluded that rape was not a justifiable cause for a legal abortion (Hessini 2007).

<sup>5</sup> While Sudanese authorities have never executed the punishment of death by stoning in a zina case, they frequently apply the punishment of lashes in cases of adultery and other breaches of public morality (Tønnesen 2014).

<sup>6</sup> Interview with judges in Khartoum in 2014

<sup>7</sup> Ibid

<sup>8</sup> Interview with a lawyer and woman activist in 2011

<sup>9</sup> Email interview with a pharmacist and woman activist in 2015

<sup>10</sup> The 13 international NGOs were Action Contre la Faim, CARE International, Cooperative Housing Foundation, International Rescue Committee, Médecins Sans Frontières Holland, Médecins Sans Frontières France, Mercy Corps, the Norwegian Refugee Council, Oxfam, the Planning and Development Collaborative International (PADCO), Save the Children UK, Save the Children US, and Solidarités.

<sup>11</sup> For example, from 1990 to 2004, it was estimated that there were only 22 doctors per 100,000 people in Sudan (Kinaro et al. 2009).

<sup>12</sup> An abortion can cost between 500 and 1500 Sudanese pounds (approximately US\$ 100 to 300). The high cost is related to the fact that abortion pills are difficult to obtain, as well as the fact that some medical personnel seek commercial profit from performing abortions.

<sup>13</sup> Email interview with a pharmacist and woman activist in 2015

<sup>14</sup> This is a general trend in the region as a whole (Hessini 2007).

<sup>15</sup> Email interview with Sudanese activist 2015.

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