

When Rape Becomes Politics: Negotiating Islamic Law Reform in Sudan

Abstract

Under Sudan's Criminal Act (1991), rape is defined as *zina* (adultery and fornication) without consent. This means that the strict rules of evidence used for *zina* are also applied to rape. Women activists have contested this legal position, despite government repression of those advocating reform. Data from 50 interviews in 2011, 2012, and 2013 show that criminal law reform on rape/*zina* is politicized and polarized, with little dialogue between the government and women activists. The 2005 peace agreement and the Interim National Constitution sparked a review of Sudan's laws, while the outbreak of armed conflict in Darfur and the International Criminal Court indictment of President al-Bashir focused attention on sexual violence in Sudanese society. These developments have furthered debate on legal reform of rape/*zina* provisions, including the controversial topic of marital rape. But in this highly politicized environment, reform advocates find their space for maneuver is small.

Keywords: rape, zina, Islamic law reform, women's rights, Sudan, women's activism

Introduction

Safiya Ishag, a young female student activist, 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.¹ She received overwhelming support from women activists, opposition figures, 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 put on trial. Safiya was forced to flee the country in fear for her life.

According to the interpretation of Islamic law in Sudan’s Criminal Act of 1991, *zina* is defined as unlawful sexual intercourse, that is, intercourse between individuals who are not married to each other. Since rape is categorized as *zina* without consent, the strict rules of evidence used for *zina* are also applied to rape. Moreover, rape victims can be convicted of *zina* and punished. These provisions constitute a serious legal obstacle for rape victims like Safiya.

Over the last several years, the reform of criminal law on rape/*zina* has become a priority for Sudanese women activists, despite government repression of those advocating extensive reforms. The peace agreement between the north and south of Sudan in 2005 opened the door for a discussion of legal reform. Meanwhile, the outbreak of armed conflict in the western province of Darfur, with rampant sexual violence, focused attention on rape as a war crime under international law. These developments have triggered an extensive debate, spearheaded by women activists, on legal reform of rape/*zina* under Sudanese law. There are significant divergences between the government’s definition of rape and that of women

activists, particularly with respect to marital rape. The entire topic has become politicized and polarized, with little or no dialogue between the government and women activists.

In general, literature on rape/zina is scarce, especially with respect to Sudan (Sidahmed, 2001; Abdel Halim, 2011). With the exception of a book by Ziba Mir-Hosseini and Vanja Hamzić (2010) titled *Control and Sexuality: The Revival of Zina Laws in Muslim Contexts*, most of the literature on the subject deals with Pakistan. It largely focuses on the legal discrimination inherent in the law and its implementation as well as on the role of feminists in advocating reform, including the use of Islamic arguments (Khan, 2004, 2006; Imran, 2005). Situating the topic within the existing literature, this article provides new empirical data from Sudan on reform of zina/rape provisions in criminal law.

It is difficult to conduct fieldwork in such a highly polarized political environment without putting informants at risk of arrest and intimidation. Fieldwork for this study was conducted in Khartoum, Sudan, in May and September 2011, October 2012, and March and June 2013. Fifty interviews were conducted in English and Arabic with interviewees in a range of civil society organizations (mostly women's organizations), United Nations (UN) agencies, and government institutions, including the police, as well as with scholars and journalists. The interviewees were recruited through a network of contacts that the author has developed through years of field visits to Sudan, beginning in 2006. For the reasons stated above, the interviewees must remain anonymous.

The article is divided into three parts. The first unpacks the rape/zina stipulations in Sudan's Criminal Act. That law's definition of rape as zina without consent not only makes it difficult for rape victims to bring their attackers to justice because of the strict rules of evidence, but also threatens to incriminate rape victims themselves. The second part elaborates on the politicization of rape in the wake of the Darfur conflict and the indictment by the International Criminal Court (ICC) of Sudan's president for allowing systematic rapes

in that region. The third part deals with initiatives for reform of laws pertaining to rape/zina following the peace agreement in 2005 and the interim constitution, which includes a bill of rights on gender equality. The article highlights the polarized debate on legal reform, including the major disagreements between the government and women activists on what constitutes rape.

Legal Discrimination against Women: The *Hudud* and Sudan's Criminal Act

Criminal justice in Islamic law covers three main areas: *qisas*, *tazir*, and *hudud*. *Qisas* refers to retribution and covers offenses such as bodily harm and homicide. *Tazir* refers to offenses for which punishments are not stipulated in the Quran or Sunna and that are therefore left to the discretion of judges. *Hudud* (singular, *hadd*, meaning limit, restriction, or prohibition) are regarded as the ordinances of Allah, and they have fixed punishments derived from the Islamic sources. *Hudud* offenses assume a central place in the call for Sharia by contemporary Islamists, who consider these to be crimes against Islam itself.

In Sudan, the introduction of *hudud* was embedded in a larger call for Islamization: first under President Nimeiri, who enacted the so-called September Laws in 1983, and later under the Islamists, who came to power in a military coup in 1989.² President Omar al-Bashir and his circle of supporters instigated a process of comprehensive Islamization based on the assumption that Islam, as well as the Arabic language, represented the foundation of the country's national identity and should define its legal, political, cultural, and economic systems.

As it instituted control measures typical of authoritarian governments, the regime provided religious justifications for silencing critics and indoctrinating citizens. Opponents of the new government were framed not only as hostile to the state, but as enemies of Islam and God. The Islamists introduced what they called the "civilization project" (*al-Mashru al-*

Hadari). An intrinsic part of this project was the Islamization of Sudanese law, with the *hudud* penalties incorporated in the Criminal Act. Greater control of women's bodies and movements and the protection of their morality and honor were central to the Islamization project.³ According to Abdel Halim (2011, p. 230),

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

Among the offenses for which *hudud* penalties are prescribed is zina. In Islamic jurisprudence, zina is defined as sexual intercourse between a man and woman outside a valid marriage contract. The punishment is the same for female and male offenders, but it differs depending on whether the offenders are married to other people. There are two categories of offenders: *muhsan*, defined as free men and women, of full age and understanding, who enjoy lawful wedlock; and non-*muhsan*, who do not fulfill these conditions. The penalty for zina between *muhsan*, that is, between two people married to others, is death by stoning; for zina between non-*muhsan*, or unmarried people, it is 100 lashes.⁴

Sudan's Criminal Act (1991) follows classical Islamic jurisprudence. Article 145 in the section on Offences of Honour, Reputation and Public Morality sets out the definition of zina ("adultery" in the English translation of the law)⁵:

(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 details the punishment for zina:

(1) Whoever commits the offence of adultery shall be punished with:

(a) execution by stoning where the offender is 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.⁶

The Criminal Act goes on to define rape as sexual intercourse outside lawful wedlock—that is, zina—“without consent.” Article 149 states:

(1) There shall be deemed to commit the offence of rape whoever has sexual intercourse by way of adultery or homosexuality with any person without consent.

(2) Consent shall not be recognised where the offender has custody or authority over the victim.

(3) Whoever commits the offence of rape shall be punished with a hundred lashes and with imprisonment for a term not exceeding ten years, unless rape constitutes the offence of adultery or homosexuality, then it is punishable with death.

It should be noted that according to the law, a person who is not an adult cannot give consent. This means that children have better protection under the law than adults.

The definition of rape as zina without consent in the Criminal Act means that rape must be proved according to the rules of evidence applying to zina (Sidahmed, 2001; Abdel Halim, 2011). According to article 62 of the Evidence Act of 1994, the offense of zina must be proved by any one of the following: (a) confession before the court, unless retracted prior to execution of the sentence; (b) the testimony of four adult men; (c) pregnancy of the woman if she is unmarried; (d) refusal of the wife to take a *lian* oath, if the husband has taken the oath.⁷

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). When applied to rape, however, “The evidentiary threshold has contributed to impunity for rape as a conviction can realistically only be secured where the perpetrator confesses to the crime” (REDRESS/KCHRED, 2008a, p. 10). As the 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, p. 203). The evidentiary rule, therefore, effectively “renders the prosecution of rape difficult if not impossible” (REDRESS/KCHRED, 2008b, p. 23).

Furthermore, if a woman reports a rape and starts a court case, she risks being charged with the crime of zina, because her allegation of rape is considered to be in itself a confession of zina. If the confession is retracted, in theory it is no longer valid and the victim can no longer be punished for the *hadd* crime. There are nonetheless cases in which Sudanese courts have refused to accept the retraction of the “confession” (Sidahmed, 2001; REDRESS, 2008).

Article 48(1) of the Criminal Procedure Act of 1991 requires that police responding to a violent crime fill out a document called Form 8, detailing injuries, recent loss of virginity, bleeding, or presence of sperm.⁸ Even if the perpetrator is not accused of zina, he can still be punished for a *tazir* crime of gross indecency (article 151 in the Criminal Act).⁹ Form 8 can be used as evidence in court, but it is only allowed in rape cases if evidence of zina is there to start with. This means that DNA proof is not permissible unless zina is established first, with the virtually impossible burden of proof noted above. But if the victim shows no signs of force having been used on her, or if this is not noted in Form 8, she also risks being charged with gross indecency (article 151) or the lesser crime of indecent and immoral acts (article 152).¹⁰ Because of these risks, the lawyers interviewed advise their clients against reporting rape.¹¹

Even in situations where the rape is not reported to the police and no court case is initiated, an unmarried woman who becomes pregnant because of rape is at risk for charges of zina. Sudan follows the Maliki school of Islamic jurisprudence, in which pregnancy in an unmarried woman is considered evidence of zina. 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). The woman is the one who has to bring evidence that (a) the man has committed zina and that (b) she did not consent. Failure to prove both (a) and (b) means that the man walks free from the *hadd* punishment, but she is still subject to it (Sidahmed, 2001). The consequence, in the words of an activist, is that “if you cannot prove rape, you become the perpetrator.”¹² According to Asma Abdel Halim (2011, p. 233) the “law starts from the premise that a rape victim is a liar.”

Although women have been sentenced to death by stoning for zina, this punishment has never been carried out in Sudan, according to Carolyn Fluehr-Lobban (2012, p. 125). By contrast, the punishment of lashes is frequently enforced for zina and other breaches of public morality.¹³ Any childbirth in a government hospital where there is no father to put his name on the birth certificate must be reported to the police, who will apply 100 lashes for an unmarried woman (Fluehr-Lobban, 2012, p. 125).

According to the Sudanese scholar Abdel Salam Sidahmed (2001, p. 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.

[...] This 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.

Female victims of rape thus suffer grave injustices in Sudanese courts (Köndgen, 2010, p. 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, p. 198).

The Darfur Conflict and the Politicization of Rape

The armed conflict between the government and rebel groups in Darfur, principally the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), erupted into massive violence in 2003. The government started to arm and provide military leadership to local Arab militias, known as *janjaweed*. Their attacks, including sexual assault, were directed at the region’s African ethnic groups, including the Fur, Tunjur, Masalit, and Zaghawa.¹⁴ The conflict attracted widespread international attention in the following years. On July 14, 2008, the chief prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, indicted President Omar al-Bashir 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). According to the indictment, Bashir bears individual criminal responsibility for the systematic commission of rapes in Darfur. An arrest warrant for Bashir was issued on March 4, 2009.

It was against this backdrop that legal reform of the rape/zina provision in Sudan’s Criminal Act emerged on the agenda of Sudanese women activists. In the words of one, “We never thought of sexual violence as an issue. Darfur changed that.”¹⁵

The recent attention by Sudanese activists to sexual violence and the advocacy for reform of Sudan’s laws on rape has also coincided with growing international awareness of rape in armed conflict over the last 15 years. Sexual violence has been recognized as a “weapon in war” and as a threat to international peace and security in numerous UN Security Council resolutions.¹⁶

According to women activists interviewed for this study, the Darfur conflict opened up space for sexual violence to be debated in the public sphere. Victims of rape in other parts of Sudan, outside of Darfur, have been encouraged to tell their stories despite the risks. During the Arab Spring–inspired demonstrations in 2012 and also more recently, stories of sexual assault have surfaced; the account of Safiyya, detailed above, is the most widely publicized to date. While sexual violence was previously discussed among activists in private, the level of attention in public debate is unprecedented.

Reports of widespread rapes in the Darfur conflict, reinforced by well-publicized individual cases such as that of Safiyya, triggered campaigns by women’s and human rights organizations calling for legal reforms. The author’s interviews with police and lawyers confirmed that there have been numerous cases of rape in the capital, Khartoum, as well as in conflict zones such as Darfur. In the words of a female lawyer: “We need legal reform. [...] There is a huge number of cases. You hear about it every day.”¹⁷ Women activists in a network known as the Section 149 Alliance put the issue on the political agenda. The Salmamah Women’s Resource Centre has led the campaign to educate the public on the legal implications of article 149 of the Criminal Act in Sudan (Gayoum, 2011). Sudanese activists point to positive experiences in other Muslim countries—for example, in Pakistan, where women activists successfully pushed for legal reform to differentiate between rape and zina in 2006—and call for similar reform in Sudan. Under the changes in Pakistan, zina is still an offence but now judges can try rape cases in criminal rather than Islamic courts which allows convictions to be made on the basis of forensic and circumstantial evidence. Sudanese activists points to the reform in Pakistan in order to both highlight the problematic aspects of applying the strict evidence for zina in rape cases and the importance of allowing forensic evidence. According to a lawyer; “We need a legal reform. We need to be allowed medical evidence inside the court in rape cases”.¹⁸

The government, however, remains determined to resist reforms and to suppress such activism. In the words of an activist in Khartoum:

Although the rape issue and Darfur has led women activists to question 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.¹⁹

Journalists and activists who have criticized the Criminal Act and called for reforms have been arrested and put on trial.²⁰ The prosecutor of the Press and Publications Court initiated proceedings against several women activists, journalists, and editors for publishing articles in Sudanese newspapers about the Safiya case.²¹ Omar al-Garay, a prominent member of the opposition, was charged with defamation against the government for writing the article “Rape under Sharia Law” (al-Garay 2011). The article criticized Sudanese law on rape as un-Islamic and called for an investigation of the Safiya case.

Activists are putting the issue of rape within the larger context of law reform, democracy, and human rights. Like al-Garay, they point to the un-Islamic nature of the current government’s codification and practice of Islamic law. According to a woman 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.²²

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

is now recognized as a war crime makes the issue particularly politicized, given that the Sudanese president has been indicted for war crimes in Darfur by the ICC.²³

While women activists in Khartoum are allowed to operate, albeit under severe constraints, activists in Darfur have been much more constrained, particularly since the ICC indictment. Half an hour after ICC judges handed down a warrant for President Bashir's arrest, the Sudanese government expelled 13 of the main international nongovernmental organizations (NGOs) operating in Darfur and deregistered three national NGOs.²⁴ The NGOs, including the Sudanese ones, were accused of providing information to the ICC. Many of them had worked with issues related to sexual violence. One of the expelled organizations, Médecins Sans Frontières, which had been at the forefront of reporting and advocacy against sexual violence in Darfur, was accused of "publishing false information, undermining Sudanese society, and spying" (Hashim, 2009, p. 234). In the words of a Darfurian woman 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."²⁵

What Constitutes Rape? Law Reform and Polarization between Women Activists and Women in Government

There have been many legal reform initiatives in Sudan since the Comprehensive Peace Agreement (CPA) of 2005 officially ended the conflict between the north and south of the country, Africa's longest civil war. The accord represented a major opportunity for positive change and sustainable peace. It also opened up some space for the national opposition and for women's movements 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.

Although the peace agreement was largely gender-blind, the interim constitution included clauses on gender equality and affirmative action (Itto, 2006). Article 32 on the rights of women and children provides that “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.”

Women activists have been advocating for legal reform since the interim constitution was adopted in 2005. The Regional Institute of Gender, Diversity, Peace and Rights at Ahfad University for Women organized a workshop on legal reform in 2006 (Badri & Tier, 2008). Scholars, lawyers, and activists debated the reform of both the Criminal Act of 1991 and the Muslim Personal Status Law of 1991, often referred to as the Muslim family law, which regulates marriage, divorce, inheritance, and custody. Two booklets from Ahfad University (2006a, 2006b) critically assess the Muslim family law and the Criminal Act from a feminist perspective in order to identify gaps and recommend reforms. This builds on previous work by Samia al-Hashmi, leader of an NGO of lawyers called Mutawinat, who compiled reform suggestions in a 1997 report titled *Review of Sudanese Legislation Discriminating against Women* (Mutawinat, 1997). The proposed revisions place law reform within the broader framework of women’s rights and human rights pointing to the international conventions that Sudan has ratified like the. Sudan is one of just a few countries worldwide that have not ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and CEDAW is high on the agenda of women activists in post-CPA Sudan.²⁶

One strategy used by proponents of reform is to showcase the differences between the Islamic law schools. Concerning the Criminal Act, they point out the injustice of including pregnancy as evidence of zina in the Maliki law school when the other three law schools do not do this. Exercising preference among the different law schools is known as *takhayyur*. They say, further, that the conflation of zina and rape stands in fundamental conflict with

classic Islamic jurisprudence. In arguing for legal reform, advocates refer to alternative Islamic interpretations and practices in the region, both presently and historically.

For activists, the provisions in the Muslim family law and the Criminal Act are inherently interlinked, especially when it comes to marital rape. In addition to insisting on a clear distinction between zina and rape, activists have called for marital rape to be included in the Criminal Act as a crime. According to a woman activist, “A man should not force his wife to have sex. This is rape.”²⁷ She goes on to say, “Challenging the law is crucial. It [rape] is legalized by the family law, and no woman can claim that she has been raped by her husband.”²⁸ Interviews conducted for this study reveal that there are major disagreements between the government and women activists on what constitutes rape. In the words of a UN employee, “One thing is to differentiate zina and rape; the other is to agree on what is rape and what is not rape.”²⁹

The Criminal Act is silent on marital rape.³⁰ This is related to articles 91–95 of the Muslim family law, which stipulate a wife’s obedience to her husband. Article 91 states 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 provides her with suitable housing with all basic furniture in a good neighborhood.” If these conditions for obedience are met, the wife is not allowed to deny her husband sexual intercourse, and therefore the concept of marital rape does not exist within the law. Disobedience (*nushuz*) by a wife may be grounds for a divorce, according to Islamic law, but not rape by the husband. An Islamist informant explains the prevailing perspective:

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 provide 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.³¹

Activists argue that this does not follow the interpretation of classical Islamic jurists or even previous Sudanese law. According to Abdel Halim (2011, p. 235), “Consent is [...] paramount in Islam and without it a sexual act loses its legitimacy.” Activists further contend that not all marriages are based on genuine consent. Under the Muslim family law, both parties must consent to marriage. However, the age of consent for marriage, according to the law, is puberty, which has been interpreted to apply to girls as young as 10 years of age. Moreover, the woman needs a male guardian (a father, brother, or uncle) to contract the marriage (article 25). This follows the practice of the Maliki school, revoking a judicial circular from 1960 based on the precepts of the Hanafi school, according to which a woman can contract marriage herself without a male guardian. The debate on marital rape, therefore, is closely linked to the discussions of both child marriage and male guardianship (*wali*) in relation to a girl’s or woman’s marriage contract.

The Sudan Organization for Research and Development (SORD) has advocated for an end to child marriage. In the alternative law presented by Asha El-Karib of SORD, the articles in the current law that give authority to the male guardian are completely removed.³² In the opinion of SORD activists, it is imperative to challenge the current family law, as it is based on “the philosophy [...] that women are less than men.”³³

Parallel to the initiatives by women activists, the government has taken some limited steps to address the issue of women’s status and rights. In 2007 the government hosted several workshops on combating violence against women and on the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.³⁴ The seminars were held in collaboration with the UN Mission in Sudan, and participants called for reform of Sudan’s laws on rape. In addition, a National Plan for Combating Violence against Women and

Children was developed in 2010. One of its main objectives was to “review policies and legislations pertaining to women and children [and] enact strict legislations for combating violence against women and children” (Violence Against Women Unit, 2010).

Women activists, however, were largely excluded from these initiatives. The activities were led by the government’s Violence against Women Unit, established in 2005.³⁵ It is headed by a conservative woman who is considered to be among the hard-liners in the government. The unit is controversial, and some activists see its creation as the government’s “attempt to whiten their face so that they could [appear to] take the lead in handling the problem of sexual violence” in the wake of the Darfur conflict.³⁶ But in the eyes of the opposition, human rights activists, and women activists, the government is to blame for the sexual violence in the Darfur conflict in the first place. Despite the name of the unit, its leader has on several occasions stated that there is no violence against women in Sudan.

Instead of admitting government responsibility for the atrocities in Darfur, the leaders of the Violence against Women Unit place the blame for sexual violence on Muslim men who have betrayed their religion. If true Islamic practice is restored, they say, then violence against women will be eradicated. This is in keeping with the “civilization project,” which stresses stricter and more faithful adherence to Islam as the solution to society’s ills. A quote from the National Plan for Combating Violence against Women and Children illustrates this perspective:

Violence is, in general, one of the negative and unacceptable phenomena in communities, [even more so when it is] directed towards women and children. One of the reasons that caused prevalence of this phenomenon is that people have [shunned] religious teachings urging lenity towards women and children. (Violence against Women Unit, 2010)

The Violence against Women Unit, according to Suliman Baldo (2010, p. 3), has been part of government strategies to “discredit the ICC and derail its investigations of the crimes that occurred in the course of the [Darfur] conflict.”

There have also been other initiatives within the government, distinct from those of the Violence against Women Unit. In 2009 the Women Centre for Human Rights in the Ministry of Welfare and Social Security formed a committee to review the status of women in Sudan’s laws in light of the 2005 interim constitution. Amira al-Fadil was minister at that time. Before becoming minister she headed the National Council for Child Welfare, and during her time there she attempted (but ultimately failed) to criminalize female genital mutilation (FGM) in the National Child Act of 2010 (Tønnessen & al-Nagar, 2013).

These women in charge of these two government initiatives do not communicate with each other. They represent two conflicting tendencies within the current regime—on one hand, moderates urging reform from within, coupled with a critique of the president, and on the other hand, conservatives or hard-liners supporting the status quo. In addition to divisions at higher levels, lower-level officials implementing the projects may also have their own views. A policewoman stated in an interview that “the issues of violence against women and rape are politicized because the politicians at the top are narrow-minded and think only within a religious point of view.” She went on to say that Sudan needs a domestic violence bill.³⁷ There is thus a diversity of views within the government on the issue of violence against women, a reflection of the more general processes of factionalization and erosion of support for the president’s authoritarian leadership.

The Committee on Criminal Act Reform, established by Amira al-Fadil and the Women Centre for Human Rights, has identified legal problems in the Criminal Act and recommended reforms of articles 149 and 3. In relation to article 149, the committee’s report states that “rape is a crime that includes both a victim and a perpetrator. It needs to be proven

as a common crime clearly differentiated from *zina*, which relies on evidences specified in Islamic scriptures” (Women Centre for Human Rights 2009). In other words, the report tries to delink rape from the *hudud*, consistent with the campaign by women activists to differentiate between rape and *zina* in the Criminal Act. However, the report is completely silent on the issue of marital rape. One member of the committee stated in an interview that although “there was a big debate among the members about marital rape, it was not mentioned in the recommendations [...] They say it does not exist in Sudan.”³⁸

This report took the 2005 constitution as the main legal framework, but it also considered national laws and international human rights conventions that Sudan has ratified. Of particular importance are the national Child Act of 2010 and the international Convention on the Rights of the Child, both of which define a child as a person below 18 years of age. This becomes clear in the reform suggested for article 3 of the Criminal Act, which relates to the definition of a child. As the law stands now, it does not stipulate a specific age of adulthood, but merely makes reference to the physical signs of puberty. The legal uncertainty in the definition of a child causes confusion in judges’ interpretation of the law. To illustrate the problem, the report refers to the case of a 16-year-old girl who was raped by an adult man in 2012. He was sentenced to death by the State Court, which considered the victim to be a child. But the Appeals Court considered the girl an adult because she showed signs of puberty. Since the girl could not prove lack of consent, the case was treated as *zina*.³⁹ According to the law reform committee, the Criminal Act should define a specific age of adulthood—which is also the age of consent—in order to remove this uncertainty. The report states that “article 3 in the Criminal Act should specify age of adulthood as 18 years, taking the Child Act, 2010, the African Protocol, and the interpretation of Abu Hanifa School as references.”

The authors of the report are careful to argue within the bounds of a religious perspective, but they nonetheless challenge gendered injustices in classical interpretations of Islamic law. Sanction of child marriages in the Islamic law schools is based on religious sources that assert that the prophet Muhammad married Aisha when she was nine years of age. According to an Islamist woman closely involved in the law review process in Sudan, this precedent is “misunderstood” and must be viewed in the historical context it arose from. She states:

We cannot take the Islamic law schools as the ultimate truth. [Their jurisprudence] builds on the Quran, but it is human interpretation at the end of the day. [Religious scholars] 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.⁴⁰

Interviews with Islamist women make clear that they do not necessarily propose reforms aimed at gender equality along the same lines as the reforms sought by women activists. Some, however, favor minor reforms within the paradigm of *qawama*, or male guardianship. The Islamist gender ideology builds strongly on this concept, in which women and men have different and complementary roles and responsibilities within the family because they are born biologically different. In the Muslim family, the ideal man is the protector and provider, while the ideal woman is the nurturer and caregiver (Tønnessen, 2011). The Islamic principle of *nafaqa* specifies that once a marriage has been consummated, the husband becomes responsible for providing for his wife and children. The concept of male guardianship builds on this precept. According to Barbara Stowasser (1998, p. 33), 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 women’s marriage and the wife’s duty to obey her male guardian. While women

activists are striving to eradicate the principle of *qawama* to allow for the criminalization of marital rape, Islamist women, even moderates, continue to defend it.

There is agreement between women activists and women in government on the need to clearly differentiate rape from zina. But there seems to be no political will at the moment, at least at the top level of decision-making, to deal with the recommendations of the report from the law reform committee established by the Women Centre for Human Rights and the Ministry of Welfare and Social Security. The report was sent to the Ministry of Justice and the National Assembly almost four years ago.⁴¹ A female minister in the current government bluntly admits that “the law is politicized to the point that the government does not want to touch it, just because they do not want to please the opposition and [satisfy] their demands.”⁴²

Since the secession of South Sudan in July 2011, the space for relative political freedom enjoyed after the peace agreement has diminished. Although the government has announced a process for a new constitution, there is little scope for genuine dialogue. Both pervasive economic crisis and armed violence at the border between the two new states have heightened the tensions. Opposition politicians and human rights activists, including women activists, have been harassed, while members of the Girifna youth group are facing charges of terrorism.⁴³ Girifna was one of many groups that demonstrated against the government last year in an unsuccessful attempt to emulate the pro-democracy uprisings in Egypt and Tunisia. Many demonstrators were arrested, tortured, and subjected to sexual violence by the security police. It appears that the government successfully suppressed an “Arab Spring” in Sudan. President Bashir admonished protesters, “Those who expect an Arab Spring will not see it because Sudan has a hot summer that will burn its enemies and grill them”.⁴⁴ But widespread discontent persists, not only among the political opposition but among some Islamists, who are becoming increasingly vocal in criticizing the president in public (El Gizouli, 2012).

While women activists face arbitrary arrest and harassment, moderate women inside the government who favor reforms are finding that their room for maneuver, already small, is also shrinking.⁴⁵ A woman activist noted, “Some inside the government recognize that there are some problems in the law which should be dealt with, but their hands are tied and they are likely to lose their position if they act upon it.”⁴⁶ Moderate voices within the government are marginalized, including those of women who have led advocacy for moderate reforms. Both Amira al-Fadil and the former head of the National Council for Child Affairs have recently been replaced by conservative counterparts.

Moderate women are concerned about the growing political influence of Salafism, a conservative Wahhabi-inspired Islamic trend emphasizing religious piety and public morality. While the post-CPA period opened space for the mobilization of women to advocate law reform, it also saw the emergence of Salafists, who have used this new space to advocate measures that would limit rather than expand women’s rights. They mobilized against Amira al-Fadil when she tried to criminalize genital cutting in the national Child Act (2010), and they successfully lobbied the president to remove the article at the last minute. President Bashir has turned to the Salafists for support amid increased national and international pressures on his regime (Tønnessen & al-Nagar, 2013). Both the opposition and moderates within the government are worried about this development and its effect on the status of women’s rights.⁴⁷ According to an Islamist woman closely involved in the legal review processes, “The extremists, the Salafists, are against the concept of law reform. They say Islamic law is the Quran and Sunna and it cannot be changed.”⁴⁸

Conclusion: Prospects for Law Reform

The peace agreement and Interim National Constitution of 2005 sparked a review of Sudan’s laws codified by the current Islamist regime during their 23 years in power. Many provisions

in these laws stand in contradiction with the gender equality clauses in the interim constitution. Two of the laws that have taken center stage in these debates are the Criminal Act and the Muslim family law, both enacted in 1991.

The outbreak of armed conflict in Darfur put rape and sexual violence on the agenda of women activists, highlighting the conflation of rape and zina in the current Criminal Act and the impact of this on rape victims. Criminal law reform on rape/zina, however, remains a politicized and polarizing issue in Sudan. The ICC's indictment of Sudan's president in connection with the systematic practice of rape in Darfur further politicized the debate and the work on criminal law reform. The indictment has proved to be a double-edged sword. It made it possible to put sexual violence, beyond the Darfur conflict, on the political agenda and stirred 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 calls for reform are framed as a direct threat to the current government. The room for maneuver is small, and activists operate under severe constraints.

There is little or no dialogue between women in government and women activists outside government on these issues. My interviews revealed that the two groups did not even know about each other's initiatives for law reform on rape/zina. Although both groups agree on the need to clearly differentiate between rape and zina in the law in order to reduce the high burden of proof for rape, they disagree sharply on what constitutes rape and on whether there is such a thing as marital rape. There are conflicting claims regarding women's legal rights under Islam on the key issues of consent and obedience. Women activists advocate that marital rape should be criminalized in the Criminal Act and that the requirements for female obedience and male guardianship in the family law should be abolished. Women in government argue for the continuation of *qawama* (male guardianship), which requires that a woman have the permission of her guardian to marry. Moreover, because the wife has to be

obedient to her husband, she cannot deny him sexual intercourse. By this logic, the concept of marital rape does not exist.

The politicization of rape in the wake of the ICC indictment has curtailed the political space not only for women activists, but also for moderates within the regime. At least two conflicting tendencies are emerging within the government: moderates call for reform and criticize President Omar al-Bashir, while conservatives defend the status quo and the president. These tendencies are associated with competing legal reform initiatives and conflicting views on women's rights. Because the issue of rape is so politicized and is directly linked to the ICC process, moderates who favor legal reform on this issue are increasingly sidelined, which makes the debate appear even more polarized and law reform even less likely to take place.

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¹ "Rape of a Sudanese Activist by the Sudanese National Security Forces," available at <http://www.youtube.com/watch?v=PXQeOZTCLYY>.

² Although most Muslim-majority countries have not codified *hudud*, a number of countries have taken steps to introduce Islamic criminal offenses and sanctions in their codified laws. Examples are Pakistan (1979), Iran (1979, after the Revolution), Sudan (1983 and 1991), and Yemen (1994), as well as Kelantan State in Malaysia (1993), several states in Nigeria (1999–2000), and Aceh Territory in Indonesia (2009).

³ For more on the Islamization project and its effect on Sudanese women, see Nageeb (2004).

⁴ The lashes have a Quranic basis. There is one verse in which the prescription for punishment is set out: "The woman and the man guilty of adultery or fornication—flog each of them with a hundred stripes" (Surah al-Nur 24:2, cited in Mir-Hosseini and Hamzic 2010, pp. 30–31). Stoning does not have a Quranic basis and is solely based on the Sunna, that is, the collection of the Prophet Muhammad's actions and teachings. Jurists of all schools rely on three *hadith* to build their legal arguments for stoning. See Sidahmed (2001, p. 191).

⁵ Quotations from Sudan's Criminal Act are taken from the English translation of the law in *Arab Law Quarterly* (1994).

⁶ Widowers, widows, and divorcees do not fall under the definition of *muhsan*, and Sudanese law differs from classic Islamic jurisprudence on this point. See Peter Scholz (2000) and Olaf Köndgen (2010).

⁷ In Islamic law, *lian* is an oath that enables the husband to accuse his wife of zina without legal proof and without becoming liable to the punishment prescribed for this (the punishment for accusing someone of zina without evidence is 80 lashes). It also gives him the option to deny paternity of the child if the wife is pregnant (Schacht, 2013). *Lian* basically functions as an avenue for divorce.

⁸ This form has to be completed before the victim is referred to a hospital; without it, a person can be denied medical treatment in government health facilities.

⁹ Article 151 of the Criminal Act stipulates that “(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 offense 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.”

¹⁰ Article 152 of the Criminal Act stipulates that “(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.”

¹¹ Interview with woman activist and lawyer, Khartoum, September 14, 2011.

¹² Interview with woman activist, Khartoum, May 25, 2011.

¹³ Article 152 of the Criminal Act (see note 10) has come under special scrutiny by women activists. In recent years it has also received international media coverage, notably in

2009 when Lubna Ahmed al-Hussein, a Sudanese journalist, was arrested for wearing trousers and charged with a breach of public morality. Al-Hussein was arrested with 12 other trouser-clad women: 10 of them pled guilty and were given 10 lashes each, as stipulated by article 152 of the Criminal Act, and then released. Al-Hussein insisted on a trial, which she publicized and used as a platform to argue for a reform of article 152, pointing to its un-Islamic origin. Arrests and floggings of women for “indecent” attire are frequent in Sudan. The most recent case to receive international attention concerns the activist Amira Osman Hamed, who was arrested in 2013 and charged with breaching public morality because she refused to wear the *hijab* (headscarf).

¹⁴ For more information on sexual violence in Darfur, see the report of the UN office of the High Commissioner for Human Rights (OHCHR, 2005).

¹⁵ Interview with woman activist, Khartoum, October 8, 2012.

¹⁶ They include, among others, resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), and 1974 (2011).

¹⁷ Interview with woman activist and lawyer, Khartoum, May 21, 2011.

¹⁸ Interview with woman activist and lawyer, Khartoum, May 21, 2011.

¹⁹ Interview with woman activist, Khartoum, May 15, 2011.

²⁰ Interview with one of those undergoing trial, Khartoum, September 12, 2011.

²¹ Some of those journalists and media contributors are Faisal Mohamed Salih, Omar al-Garay, Abdalla Al-Shaik, Mohamed Latif, Faiz Al-Selaik, Mohamed Osman, Amal Habbani, and Dr. Nahid Al-Hassan (African Centre for Justice and Peace Studies, 2011).

²² Interview with woman activist and lawyer, Khartoum, September 14, 2011.

²³ Interview with woman activist and local UN staff, Khartoum, May 22, 2011.

²⁴ The 13 international NGOs are Action Contre la Faim, CARE International, Cooperative Housing Foundation International, International Rescue Committee, Médecins

Sans Frontières Holland, Médecins Sans Frontières France, Mercy Corps, Norwegian Refugee Council, Oxfam GB, Planning and Development Collaborative International (PADCO, which describes itself as a development firm and not an NGO), Save the Children UK, Save the Children US, and Solidarités. The national NGOs are Amal Centre for Rehabilitation of Victims of Violence, Khartoum Centre for Human Rights and Environmental Development, and Sudan Social Development Organization (SUDO).

²⁵ Interview with Darfurian activist, Khartoum, October 14, 2012.

²⁶ CEDAW was adopted by the United Nations in 1979 and is the most comprehensive international agreement on the basic human rights of women. Countries that have not yet ratified the convention include Iran, Nauru, Palau, Somalia, Sudan, , Tonga, and the United States. For more on the debate on CEDAW in Sudan, see Tønnessen (2011).

²⁷ Interview with woman activist, Khartoum, May 23, 2011.

²⁸ Interview with woman activist, Khartoum, May 23, 2011.

²⁹ Interview with activist and local Sudanese UN staff, Khartoum, May 19 2011.

³⁰ It should be noted that while the Criminal Act of 1991 does not address marital rape at all, the Criminal Acts of 1925 and 1974 explicitly state that the provision on rape is only valid outside of marriage, not inside it. The failure to recognize marital rape as a crime did not, therefore, begin with the Islamization of law initiated by Islamists in 1989. Nor is this view on marital rape unique to Sudan. According to Lisa Hajjar (2004, p. 1), marital rape is “uncriminalizable” under dominant interpretations of Islamic law.

³¹ Interview with woman Islamist, Khartoum, May 22, 2011.

³² In 2009, SORD started advocacy for an end to child marriage. This effort succeeded in persuading the political parties to make child marriage an issue in the 2010 election campaigns. Subsequently, the organization spearheaded an initiative, launched in 2012, to present an alternative family law. As part of that process, they made a documentary film titled

Adeela (meaning straight, appropriate, good), aimed at showing the negative implications of the current family law. Clips from the documentary are available online

(<http://www.youtube.com/watch?v=axFxHzRN5fM>).

³³ Interview with woman activist, Khartoum, May 25, 2011.

³⁴ The protocol on women's rights is also known as the Maputo Protocol.

³⁵ The Violence against Women Unit was established under the Ministry of Justice and is now under the Council of Ministers.

³⁶ Interview with woman activist from Darfur, Khartoum, October 14, 2012.

³⁷ Interview with female police officer, Khartoum, May 22, 2011.

³⁸ Interview with a female member of the law review committee, Khartoum, May 26, 2011.

³⁹ This was consistent with interviews with police in Khartoum state in 2011. Whereas rapes of girls under the age of 10 are reported, an interviewee at the Child and Family Protection Unit said that girls over the age of 10 feel shame and stigma, and families are afraid that the girl will be accused of zina if they report the rape to the police.

⁴⁰ Interview with Islamist woman working in the Ministry of Welfare and Social Security, Khartoum, May 18, 2011.

⁴¹ Although there has been no legal reform of the zina/rape provisions thus far, the Ministry of Justice has issued several circulars regarding Form 8. The first two stipulate that not filling out Form 8 should not prevent victims of violence from obtaining medical care in hospitals. However, the circulars are only valid in Darfur, and interviews with humanitarian actors (2013) and other reports indicate that so far it has not been implemented (Okonje 2010, p. 37).

⁴² Interview with a female minister, Khartoum, May 25, 2011.

⁴³ See “Sudanese security agents break into home of opponent in capital” (2013) and “Sudanese activists to stand trial on terrorism-related charges” (2012).

⁴⁴ See “Protesters hoping Arab Spring will face hot summer in Sudan – Bashir” (2012).

⁴⁵ Interview with Islamist woman, Khartoum, June 25, 2013.

⁴⁶ Interview with woman activist, Khartoum, October 10, 2012.

⁴⁷ Interview with Islamist male politician, March 6, 2013.

⁴⁸ Interview with Islamist woman, Khartoum, February 28, 2013.