Sudan’s new law on rape and sexual harassment
One step forward, two steps back?

8 March 2016

Introduction

In February 2015, Sudan passed a number of amendments to the 1991 Criminal Act, including long-awaited amendments concerning rape and sexual violence. An amendment to Article 149 (rape) changed the legal definition of rape, and a new Article 151 (3) was introduced, providing a new offence of sexual harassment. The amendments followed years of concerted advocacy by Sudanese women’s rights advocates who have called for concrete amendments to Sudan’s laws to better prevent and respond to sexual and gender-based violence. The amendments were initially heralded by some as a success: it was understood that the law had been reformed to reflect international standards on rape and that Sudanese women would no longer face charges of adultery or committing “immoral acts” for sexual crimes committed against them.1 A closer look however exposed that, whilst there were some important steps towards bringing the law in line with international standards, serious gaps remained. The recommendations of experts working with survivors of sexual violence in Sudan were not adequately reflected in the new rape law2, and without further amendments and clear guidance to law enforcement officers and judges, the criminal justice outlook for survivors of sexual violence in Sudan remains bleak. The new provision on sexual harassment within the existing law on “gross indecency” introduced ambiguity about who the victims and the perpetrators are in sexual harassment cases. It refers to acts, speech or behaviour that cause seduction or temptation, and is likely to serve as a further deterrent to women reporting sexual offences, owing to a risk they could be accused of “gross indecency”.

The rape and sexual harassment amendments were reportedly signed into law, together with a raft of other amendments to the 1991 Criminal Act, on 22 February 2015.3 Symbolic of the lack of consultation or involvement of Sudanese civil society in the process of law making in Sudan, pressure groups that had worked on the issue were not made aware of the content of the amendments until the following month.4 Over a year later, by March 2016, an official record of the legislative amendments had still not been published on the Sudanese Ministry of Justice website.

This briefing provides an overview of the changes to the law and presents our key concerns related to them. It provides recommendations to the Government of Sudan on steps that should urgently be taken to ensure effective prevention
and responses to rape and other forms of sexual and gender-based violence in Sudan.

Summary

The amendments to Article 149 (rape) of the 1991 Criminal Act expanded the range of acts deemed to constitute rape. Importantly, rape is no longer defined by reference to adultery or sodomy. The new Article 149 (1) replaced the vague reference to “sexual intercourse” found in the old text with a more precise and expansive definition of rape as sexual contact by way of penetrating any part of the body or any object into the vagina or anus of the victim. In particular, the extension of the definition to include penetration by an object is an important development. Although there is no separate prohibition of marital rape, the removal of reference to adultery in the definition of the crime also means that it should now be possible to prosecute marital rape under Article 149(1) the 1991 Criminal Act. However, the definition may remain too narrow to address some forms of rape, such as oral rape.

Despite these positive developments, the amended Article 149 unfortunately created legal uncertainty relating to the possible continuing conflation of the offence of rape with the offences of “adultery” and “sodomy” because the penalty for rape, set out under Article 149(2), remains unchanged and still refers to rape by way of those acts. This has resulted in a continuing risk that rape complainants could face prosecution for adultery or sodomy if they fail to prove a rape case, and a lack of clarity concerning the evidence standards that will apply in rape cases. Previously, onerous evidence standards that apply in cases of adultery (zina) were applied in rape cases because of the conflation of the two crimes in the law. There is also a lack of clarity about the age of consent and whether this is determined by the definition of an adult under the 1991 Criminal Act, which refers to puberty, or the 2010 Child Act, which sets out a child is any person under 18 years of age. Further, although the new legislation usefully elaborates and expands on the circumstances where a lack of consent may be demonstrated, including not only the use of physical force but also psychological coercion and incapacity to consent, it provides what appears to be an exhaustive list of circumstances where consent cannot be deemed to have been given. This list may prove too narrow to address all rape cases. The penalty for rape also falls short of international standards by failing to make provision for aggravating or mitigating factors to be taken into consideration such as abuse of office or torture.

An amendment to Article 151 (gross indecency) introduced a new offence of sexual harassment by virtue of a new Article 151 (3). The introduction of a new crime of sexual harassment would appear, on the face of it, to broaden access to justice for victims of sexual violence. However, the provision is unclear in its scope and meaning and fails to clearly prohibit acts, behaviour or speech that constitute sexual harassment, such as inappropriate touching. Instead, the new provision refers to an act, speech or behaviour “that causes seduction or temptation for another person to engage in illegal sex, or to commit indecent or inappropriate behaviour of a sexual nature”, thereby transferring the focus of the
prohibition onto the action or behaviour of the victim. There is a risk that the provision may deter women from reporting sexual violence, in particular rape, for fear that they will be accused of “gross indecency”.

**Recommendations**

The African Centre for Justice and Peace Studies (ACJPS) calls on Sudan to:

- Further revise Articles 149 and 151 of the 1991 Criminal Act, in addition to other laws pertinent to the prosecution of sexual offences such as the Evidence Act of 1994, in consultation with independent civil society groups and women’s rights experts, to ensure effective prevention and responses to acts of sexual violence in line with international and regional standards.
- Amend the 1991 Criminal Act and 1994 Evidence Act to establish specific, clear evidentiary standards in cases of sexual violence and explicitly allow medical and other evidence in such cases.
- Amend the penalty for rape to make provision for aggravating factors, such as torture and abuse of office, and to reflect the seriousness of the offence, in line with international and regional standards.
- Immediately issue clear guidance that rape complainants should not be prosecuted for adultery, sodomy, or other related sexual offence if a rape prosecution fails.
- Issue guidance concerning the age of consent and amend the definition of adult set out in the 1991 Criminal Act in line with the 2010 Child Act.

Sudan should further undertake a review of all laws and policies, together with independent civil society groups, to ensure effective criminal justice responses to all forms of sexual and gender based violence, including marital rape, domestic violence, and female genital mutilation.

**A. Amendments to Article 149 (rape)**

The amendments

Article 149 of the 1991 Criminal Act previously read:

“149 (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, where 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 constitutes the offence of adultery, or sodomy, punishable with death.”

In February 2015 the Article was amended as follows:
“In Article 149:
(First) Clause (1) and (2) shall be nullified and replaced by the following new clause:
(1) There shall be deemed to commit the offence of rape, whoever makes sexual contact by way of penetrating a sexual organ or any object or part of the body into the victim’s vagina or anus by way of using force, intimidation, or coercion by fear of the use of violence, detention, psychological persecution, temptation, or abuse of power against the person or another person, or when the crime is committed against a person incapable of expressing consent because of natural causes or luring-related or related to age.
(Second) Item No. (3) to be re-numbered and become Item (2)”

**Definition: broader scope of the crime, although still too restrictive**

The definition of the crime of rape found in the new Article 149 (1) replaces the vague reference to “sexual intercourse” with a more precise and expansive definition of rape, as sexual contact by way of penetrating any part of the body or any object into the vagina or anus of the victim. In particular, the extension of the definition to include penetration by an object is an important development and is consistent with the approach taken by several international and regional bodies. However, Sudan’s new, wider definition of rape is still not sufficiently broad to cover certain acts of sexual violence, such as oral rape.

The new definition introduces a lack of clarity by making reference to rape by way of “temptation”, “or when the crime is committed against a person incapable of expressing consent because of natural causes or luring related or related to age”. Fears have been raised that a victim could be deemed to have “tempted” a perpetrator and risk prosecution for the way they have dressed or acted.

**Conflating rape with the “crimes” of adultery or sodomy**

The earlier Article 149(1) defined rape as a form of adultery or sodomy where there was a lack of consent. Because the crime of rape was conflated with the offences adultery and sodomy, restrictive rules of evidence applicable to adultery (zina), set out in Article 62 of the 1994 Evidence Act, were applied in rape cases. Furthermore, the conflation of rape and adultery raised the risk that rape victims that failed to prove a lack of consent would be tried for the offence of adultery and face the imposition of corporal punishments. All of these concerns further deterred victims from reporting sexual offences.

In a positive step the new provision set out in the new Article 149 (1) no longer defines rape as a form of adultery or sodomy, nor does the definition refer to adultery or sodomy. The removal of reference to adultery (zina) in the definition of rape means that the provision may now be read to prohibit rape within marriage. The new definition of rape might also result in the application of different, less restrictive evidentiary rules being applied, as rape may now be treated as a ta’zir crime where other types of evidence (including victim
testimonies, DNA evidence, female witnesses, expert witnesses, and circumstantial evidence), may be admitted, subject to the discretion of a judge (see chapter 3-7 of 1994 Evidence Act). Thus, the more onerous evidentiary requirements required in adultery (zina) cases may no longer apply. Further, the removal of references to adultery and sodomy in the new definition of the crime of rape may also remove the risk that rape complainants are prosecuted for those crimes if they fail to prove a lack of consent. However, no legal guidance to this effect has been issued and there remains a risk that rape complainants could be prosecuted for adultery or sodomy if they fail to prove a rape case because:

a. The offences of adultery (set out under Article 145) and sodomy (Article 148) remain unchanged. Whilst these acts remain criminal offences in Sudan, any person who alleges rape could be prosecuted for adultery if they fail to successfully prove the offence of rape has been committed. And,

b. The penalty for rape, set out in the new Article 149(2), remains unchanged, and continues to make reference to rape by way of adultery or sodomy. The provision sets out that the punishment for rape, where the “rape constitutes the offence of adultery, or sodomy”, is death.

**Insufficient penalty and a lack of clarity concerning the evidence standards that apply**

Unfortunately, despite the positive changes made under Article 149(1), the law concerning the penalty for rape remains unchanged and continues to refer to rape by way of adultery or sodomy. Old Article 149(3), now Article 149(2), sets out the punishment for the offence of rape as being:

“(i) whipping of 100 lashes; and
(ii) with imprisonment, for a term not exceeding 10 years; or
(iii) for whoever commits rape which constitutes the offence of adultery or sodomy, punishable by death.”

Without clear guidance, victims are likely to remain reluctant to report offences of rape for fear of being prosecuted for the associated offence of adultery, which carries a punishment of death or stoning, depending on the nature of the offence. There is also a possibility that judges might apply the restrictive evidence standards related to the crime of adultery (zina). Guidance should be issued and legislation should be amended to establish specific, clear evidentiary standards in cases of sexual violence and explicitly allow medical and other evidence in sexual violence cases. The Sudanese authorities should also immediately issue clear guidance that rape complainants should not be prosecuted for adultery, sodomy, or other related sexual offence if a rape prosecution fails.

Further, no provision is made for aggravating or mitigating factors to be taken into consideration in relation to the punishment for rape, for example abuse of office or torture, contrary to international and regional standards. Also, arguably,
the punishment of imprisonment for a maximum of 10 years (when the offence of rape is not associated with adultery or sodomy) is not commensurate with the seriousness of the offence of rape and, again, is therefore with international and regional practice, where maximum sentences of life imprisonment are commonplace.

**A lack of clarity concerning the issue of consent**

Under the old Article 149 (1), the circumstances where there would be deemed a lack of consent, set out in Article 3 of the 1991 Criminal Act, were restrictive. Article 3 of the Act defines “consent” as:

“acceptance, and it shall not be deemed consent which is given by:

(i) a person under the influence of compulsion or mistake of fact, where the person doing the act knows that consent was given as a result of such compulsion or mistake; or

(ii) a person who is not an adult; or

(iii) a person unable to understand the nature or consequence of that to which he has given his consent by reason of mental or psychological instability.”

The previous Article 149(2) also provided that consent would not be “recognized, where the offender ha[d] custody, or authority over the victim”.

The new Article 149(1) removes reference to consent and instead explicitly sets out circumstances in which an individual may be deemed not to have consented (where there is use of “force, intimidation, or coercion by fear of the use of violence, detention, psychological persecution, temptation, or abuse of power against the person or another person”) or been unable to consent (“when the crime is committed against a person incapable of expressing consent because of natural causes or luring-related or related to age”). The definition therefore appears to widen and clarify circumstances where sexual conduct is non-consensual and, importantly, includes not only the use of physical force but also psychological coercion and a lack of capacity to consent. However, by providing what appears to be an exhaustive list of circumstances of coercion or incapacity where consent cannot be deemed to have been given, there is a risk the new law may prove too narrow to address all cases of rape. Language referring to an inability to consent owing to “natural causes” or “luring related” or “related to age” is ambiguous and should be refined.

Furthermore, the law remains ambiguous on the age of consent. The definition of consent under Article 3 of the Criminal Act refers to “an adult” which is defined in the same article as a “a person whose puberty has been established by definite natural features and has completed fifteen years of age. Whoever attains eighteen years of age is an adult even if the features of puberty do not appear”. It is unclear whether this test will be applied under the new Article 149 when interpreting whether someone is incapable of giving consent due to “reasons
relating to age”. In contrast, Article 4 of Sudan’s 2010 Child Act defines a child as “every person who is not above the age of eighteen years”, in line with Sudan’s regional and international commitments concerning child rights. Article 3 of the 2010 Child Act sets out that the provisions of the Act “shall prevail over any other provision in any other law”. Guidance should be issued on this matter and reforms to the 1991 Criminal Act introduced with a view to removing any inconsistency. The lack of clarity concerning the age of consent may make it difficult to successfully prosecute sexual offences involving minors.

**B: Amendment to Article 151 (gross indecency), introducing the crime of sexual harassment**

Article 151 of the 1991 Criminal Act (gross indecency) was amended in February 2015 to introduce a new clause (3) prohibiting sexual harassment. The new clause sets out:

“[t]here shall be deemed to commit the offence of sexual harassment whoever commits an act or speaks or behaves in a way that causes seduction or temptation for another person to engage in illegal sex, or to commit indecent or inappropriate behaviour of a sexual nature that psychologically harms them or makes them feel unsafe, shall be punished with imprisonment for a term not exceeding 3 years and whipping”.9

The introduction of a new crime of sexual harassment would appear, on the face of it, to broaden access to justice for victims of sexual violence. However, the provision is unclear in its scope and meaning and fails to clearly prohibit acts, behaviour or speech that would be recognised as sexual harassment in other jurisdictions, such as inappropriate touching. Instead, it opens the possibility for victims of sexual violence to be prosecuted for “gross indecency”.

The new provision refers to an act, speech or behaviour “that causes seduction or temptation for another person to engage in illegal sex, or to commit indecent or inappropriate behaviour of a sexual nature”, thereby transferring the focus of the prohibition onto the action or behaviour of the victim. There is a risk that the provision may deter women from reporting sexual violence, in particular rape, for fear that they will be accused of having behaved “in a way that causes seduction or temptation for another person to engage in illegal sex”.

Article 151(3) ultimately extends the scope of Article 151 ("gross indecency"), an offence that women have previously been charged with when reporting sexual violence, or for the way they dress or act in public spaces.10 Public order offences are often prosecuted in Sudan by means of summary trials, without the right to legal representation or notification of the right to appeal.

Article 151 (3) should be re-drafted, together with independent civil society experts, to adequately reflect international and regional standards concerning the prohibition of sexual harassment. Once revised, the punishment for the new offence of sexual harassment should reflect the gravity of the crime.


This included an amendment to Article 126 (Apostasy) of the 1991 Criminal Act which expanded the scope of the crime of apostasy and further restricted the right to freedom of religion and belief in Sudan.

ACJPS obtained notification and a scanned copy of the legislative amendments, in Arabic, on 5 March 2015, from the United Nations Women (UN Women) office in Khartoum. UN Women reported that the agency had received notification from the Sudanese Government that the amendments had been signed into law by the Sudanese President on 22 February 2015, together with the text of the amendments, on 4 March 2015.

For example, under Article 152 of the 1991 Criminal Act, which prohibits vaguely defined “indecent and immoral acts” and has been used to prosecute women for their choice of clothing.

Article 62 (proof of zina) of the 1994 Evidence Act, setting out the rules of evidence applicable to the crime of adultery (zina), which remains unchanged following the legal reforms, requires the following:

(i) a confession before a court of law (not retracted before the verdict);
(ii) four male witnesses; [note this is a requirement that is near unobtainable, as such a testimony could raise questions with regard to the involvement of such witnesses themselves in the offence];
(iii) undoubted pregnancy (where the woman is unmarried), [putting women at a disadvantageous position from men accused of the same offence]; or
(iv) refusal of the accused spouse to deny the allegation in court.


Strategic Initiative for Women in the Horn of Africa (SIHA), “Sudan: Ethiopian Woman Gang Raped by Seven Sudanese Men, Denied from Making a Formal Complaint of Rape and Instead Charged with Adultery and Prostitution”, February 2014.