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Seeking Reparation for Torture Survivors

CRIMINAL LAW REFORM AND HUMAN RIGHTS IN SUDAN

A PRIMER

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1. Why does criminal law matter?

Every society is faced with the challenge of how to protect individuals and groups from harm and how to ensure that life is as safe and peaceful as possible. With the development of the state system, governments were vested with the monopoly of power. This monopoly carries with it the responsibility to exercise the power for the benefit of society as a whole. Criminal laws have been an integral means of legal orders to provide for a peaceful society.

Criminal laws affect all members of society because it defines what conduct is deemed acceptable or unacceptable. Any individual may come into conflict with the law. He or she may commit crimes punishable in every society, such as stealing things. But he or she may also do something that may not be considered a crime in other countries, such as publishing critical press articles. He or she may also be accused of a crime even though the law is not very clear on what the actual crime is. He or she may also be wrongly accused, arrested, tried and even punished for a crime he or she did not commit.

Criminal laws equally affect the victims of crime. If the law does not make certain conduct a crime that carries adequate punishment and/or if it is difficult to prosecute a crime, the perpetrators may be emboldened because they know that they will not be held fully accountable. For example, it is almost impossible to convict anyone for rape in Sudan unless he confesses to the crime. Perpetrators have not faced full punishment even in cases where, for example, there was overwhelming medical and witness evidence that the individual has brutally raped a small girl. The law also fails to provide protection to victims where it does not ensure that officials are held to account for crimes such as torture. Immunity legislation has shielded officials from facing prosecutions and trials in which it could have been determined whether they have committed particular crimes. This denies the victims of such crime of their right to justice and reparation.

These examples show that criminal laws are a double-edged sword because they may restrict liberties or even result in violations of fundamental human rights. Criminal laws may fail to protect vulnerable individuals and groups and may criminalise legitimate conduct. The laws may also fail to ensure that all perpetrators of serious crimes, including officials, are held to account. The state of criminal laws is an important indicator of respect for the rule of law. This means that all laws governing crimes as well as their prosecution and punishment should strike the right balance between the need for a safe and peaceful society and respect for the rights of the individual. Ultimately, criminal laws should be based on notions of legality, equality and fairness so as to be capable of achieving the objectives of criminal laws: to punish those that deserve punishment following a fair process and to protect those that are at risk of crime, and, where they have suffered crime, to provide justice.

- **What are the principles of criminal law meant to protect individuals against arbitrary law-enforcement?**

Criminal laws are based on some fundamental principles designed to protect individuals from being unjustly prosecuted and punished. A key principle is the notion of **legality**. Criminal laws must be clear so that individuals know what is lawful and unlawful and can act accordingly. It may be just to punish someone for committing an act that he or she knew was unlawful at the time. However, it is not just to punish someone for something that he or she did not know was prohibited because the law is not clear or because the crime was introduced later on. For this reason, there should be no punishment without a legally prescribed offence, as recognised in the Bill of Rights of the Interim National Constitution of Sudan: “No person shall be charged of any act or omission which did not constitute an offence at the time of its commission” (Article 34 (4)). The only exception to this rule is international crimes such as genocide, war crimes and crimes against humanity. These crimes should be punishable under international law binding on Sudan, no matter whether they are recognised as specific offence in criminal laws or not.

The **presumption of innocence** is fundamental to protect individuals from arbitrary prosecution and punishment. The state has drastic powers inherent in criminal law, such as the power to deprive someone of his or her liberty. If the state was allowed to use these powers freely, it would be likely that many innocent persons would be prosecuted and punished. For this reason, it is seen as more acceptable that a person who may be guilty is allowed to escape punishment than an innocent person being punished for something he or she did not do. The presumption of innocence is recognised in the Bill of Rights of the Interim National Constitution of Sudan: “An accused is presumed to be innocent until his/her guilt is proved according to the law” (Article 34 (1)). Several rules follow from the presumption of innocence: the prosecution must prove the guilt of the accused beyond reasonable doubt; the suspect/accused has the right to remain silent; he or she should not be compelled by unlawful means, such as torture, to confess or give evidence; and he or she should have the right to defence.

The right to liberty and fair trial are meant to protect the individual from arbitrary and unnecessary arrest and detention. Suspects and accused should also have equal means to defend their rights when faced with a prosecution and trial. Anyone suspected of having committed a crime has certain rights that protect his or her liberty and right to defence. This is recognised in the Sudanese Bill of Rights: ”Every person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his/her liberty except for reasons and in accordance with procedures prescribed by law” (Article 29), and: “Every person who is arrested shall be informed, at the time of

arrest, of the reasons for his/her arrest and shall be promptly informed of any charges against him/her" (Article 34 (2)).
The right to fair trial demands a public hearing before an independent tribunal and the right to defence. As provided in the Sudanese Bill of Rights: "In all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by an ordinary competent court of law in accordance with procedures prescribed by law" (Article 34 (3)). Furthermore: "Any person shall be entitled to be tried in his/her presence in any criminal charge without undue delay; the law shall regulate trial in absentia" (Article 34 (5)) and: "Any accused person has the right to defend himself/herself in person or through a lawyer of his/her own choice and to have legal aid assigned to him/her by the State where he/she is unable to defend himself/herself in serious offences."

Another key principle of criminal law is the **prohibition of undue punishment.** This rule is meant to prevent punishments that are excessive in light of the offence, or inherently inhuman. As a general rule, no-one should be punished for the same crime twice. Any punishment must reflect the seriousness of the crime, in other words, it should not be too lenient or too harsh. Punishments should not be cruel, such as corporal punishments. Where the death penalty is exceptionally imposed, it should only be applied for the most serious crimes following a fair trial. It should also not be applied against anyone who was under the age of 18 when the crime was committed. These are the international standards referred to in the Sudanese Bill of Rights (Article 27 (3)).

- ## What are the principles of criminal law when applied to crimes allegedly committed by officials?

All persons in Sudan are guaranteed the right to life (Article 28 of the Sudanese Bill of Rights), the right to liberty (Article 29) and the right to be free from torture (Article 33). The state has to respect and protect these rights by making any violations a crime. It also has to investigate, prosecute and punish any officials guilty of violations of the right to life, liberty or torture. Officials have a special responsibility and many legal systems recognise that officials who abuse their status or deliberately violate the law should be subject to more severe penalties.

- ## What are the priority areas for criminal law reform?

It is generally recognised that a number of laws need to be reformed in order to ensure that the Sudanese Bill of Rights is fully implemented. Areas of major concern are laws, or the lack thereof, that either by their nature or by virtue of their application result in violations of human rights and/or undermine fundamental precepts of criminal justice, including accountability of officials and fair trials. To this end, the laws should provide safeguards and protection against

violations. International crimes, such as genocide, war crimes, crimes against humanity and torture should be fully recognised in Sudanese criminal laws, carrying adequate punishments. Superiors should be made responsible for serious crimes committed by their subordinates. The criminal accountability of officials should not be hindered by amnesty or immunity laws.

A large number of women have suffered from sexual violence whilst the perpetrators have enjoyed impunity. There are several aspects of the current laws in relation to the crime of rape, which makes convictions in rape cases almost impossible. Rape is not clearly separated from adultery, and the evidentiary requirements, such as the rule that four adult males need to witness penetration, are almost impossible to meet. There is also a lack of adequate protection for victims and witnesses generally, and for women in rape cases in particular.

The law also contains a series of broad political, public order and religious offences. It criminalises conduct that may constitute a legitimate exercise of political rights, such as freedom of expression and freedom of assembly, and is often vague or broadly defined so that individuals may not be able to tell what conduct is lawful and may have to fear prosecution.

Vulnerable groups, such as children, should be provided with adequate protection under criminal law. Children should not be held liable for crimes before reaching the age of twelve and should not be subject to the death penalty if they were under the age of 18 when committing the crime.

2. How does law reform work in Sudan?

Law reform is a process involving many actors. It is triggered where there is sufficient interest and will to change legislation. In Sudan, the transitional period under the Comprehensive Peace Agreement and the implementation of the Bill of Rights necessitate a number of legislative changes. For these reasons, there should be a clear interest to reform the law, including criminal laws. However, in practice, there is a need to generate momentum because this interest may not be generally shared. Crucial actors to initiate, and/or push for criminal law reform are: the Government itself where members are committed to the National Interim Constitution and the rule of law; official bodies tasked with human rights protection and law reform; political parties/MP's; the Constitutional Court through its jurisprudence; civil society and the media through advocacy; and regional and international bodies through their engagement and support.

Law reform needs a lot of preparatory work for the main political actors to accept the need for reform as well as the particular contents of any reform proposed. Once it reaches the stage of concrete initiatives, the procedure of legislative

reform is laid down in the National Interim Constitution. The responsibility for enacting laws in Sudan rests primarily with the state Legislative Authority, formally known as the National Assembly. It is divided into two Chambers: a 450-member National Assembly and a 50-member Council of State. The two legislative Chambers work closely together on legislation brought before them.

The responsibility for approving all new, amended, or repeal legislation lies with Parliament. The Parliament has these powers in respect of all proposed laws, with the exception of certain financial measures. (Money Bills must be introduced in the National Assembly by the minister of finance and there are special considerations laid down in sections 110-114 of the Constitution).

The Government initiates most legislative proposals presented to Parliament. Bills are normally prepared by the Ministry of Justice or any other ministry concerned, such as the ministry of defence. If a bill is prepared by another ministry, it will be sent to the Law Reform Committee of the Ministry of Justice, which will examine the legal technical aspects of the bill, such as drafting.

According to the Constitution, several bodies can table a bill but in practice it is normally the Council of Ministers that tables the bill in the National Legislature. Members of Parliament may table private bills. This means that any Member of Parliament may draft a bill or may endorse a bill drafted by someone else. However, such bills are only accepted if the concerned committee in the National Legislature decides that the bill concerns an issue of important public interest. To date, there is no practice of private members tabling such bills.

The role of Parliament is triggered by the introduction of a proposal in one of the following four forms: as bill, provisional decrees, National Budget Bill and international agreements and treaties.

Once a bill has been tabled, it goes through various stages in the National Legislature called readings. In the course of the readings, the bill will be introduced, discussed, amended, and approved or rejected, either in parts or as a whole. The whole process can take several months.

1st reading:

Bills presented to either chamber of the National Legislature shall be submitted for the first reading by being cited by the title and thereby deemed to be tabled to the appropriate chamber.

The Speaker should then refer the bill to the appropriate committee. There are several standing committees in Parliament, such as the Human Rights Committee and the Security Committee. The bill will be referred to the Committee dealing with the subject matter, for example, a bill on the Security Forces is to be

dealt with by the Security Committee. This is a crucial stage of legislative reforms. According to parliamentary procedures, the Committee concerned has the power to invite concerned groups to submit their observations. This practice was followed during the deliberation of the Organisation of Humanitarian and Voluntary Work Act, 2006, which resulted in some amendments to the bill following NGO interventions. On the basis of its review and the consultations made, the Committee concerned will submit its report with its observations and suggested amendments.

2nd reading:

The bill is deliberated and to be approved in principle, or rejected. The Speaker or the appropriate committee may seek expert opinion on the viability and rationale of the bill; an interested body may also be invited to present views on the effect and propriety of the bill. The bill will then be sent again to the appropriate committee to prepare a report with its observations.

If the bill has been approved:

3rd reading:

The bill is deliberated in details. Amendments are to be introduced and to be approved or rejected. The third reading is dedicated to a thorough examination of the text and of its tabled amendments. The bill can be amended on the floor -- though each amendment must be found to be related, or of interest, to the bill's original subject.

Following debate, a vote is taken and if the bill receives a favourable vote, a final reading is called and the bill is referred to the Committee. The competent committee must present a report about these amendments and the final bill for the last reading.

Final reading:

There is no further discussion on the text of the bill, as amended. It is voted on section by section and then voted on as a whole. As a result, it is either passed or rejected.

More than half of the members of the National Legislature need to be present for a vote to take place. A simple majority of those present (more than 50%) is sufficient to approve or reject the text of the bill.

Bill needs assent and signature of President

A bill only becomes law if the President assents and signs it. In the thirty days following the adoption of the bill by the National Legislature, the President may either:
(i) withhold assent without giving any reasons. After thirty days, the bill will be deemed to have signed.
(ii) withhold assent giving reasons. The bill needs to be re-introduced to the National Legislature. The bill will only become law if passed by a two-third majority of the National Legislature.

- **When does a law formally become law?**

When Parliament has adopted a proposed law, the Government formally issues the law, a process known as promulgation. All laws – and also all ordinances – are published in the Gazette.

Provisional Orders

In the absence of the Assembly being in session and in case of emergency, the President of the Republic may take provisional measures having the force of law, provided that it must be submitted to the competent assembly as soon as possible (Article 109 of the National Interim Constitution). When the parliament adopted such measures, they are promulgated as law. However, if these measures are rejected by either chamber or if they are not confirmed before the end of the parliamentary period of sessions, they become lapse and are not retroactive.

These provisional measures cannot be implemented in the following fields: the peace agreement, the declaration of rights, the decentralized organization of the State, general elections, the budget, criminal law, international conventions or agreements concerning the State borders. Laws that have been abrogated or modified by lapsed provisional measures, become valid again from the moment the provisional measure loses its own effect.

Delegated legislative powers

The parliament or one of its chambers may, by the passing of a law, delegate to the President of the Republic, to the National Council of ministers or to a public institution, the power to put forward secondary regulations having the force of law, provided these provisions be presented to the competent chamber and be adopted or modified by a resolution of this chamber.

- **How to advocate for criminal law reform?**

Advocacy means making a case for law reform. It is vital for human rights protection and law reform as there is often lack of political readiness to take the necessary measures. Advocacy works best if it is strategic, co-ordinated and involves all relevant actors. This includes civil society such as NGOs, community groups, individuals, in particular lawyers and judges, the media and also official bodies, such as Advisory Council on Human Rights as well as regional and international institutions.

The broad objective of advocacy should be to promote and expedite reform of criminal laws in line with the bill of rights, international standards and best practices. The ultimate goal is to strengthen the rule of law. This means protecting individuals and communities, in particular the most vulnerable, from violations of their rights, and by ensuring accountability of all those guilty of serious violations.

The advocacy should also aim to ensure that the rights and views of individuals, communities and civil society are reflected in the law reform process and in any bills being discussed. A further goal related to advocacy is to raise awareness amongst those affected by criminal law reform about their rights and the need to engage in law reform debates.

Advocacy methods are a means to an end; they should therefore form part of a broader advocacy strategy.

An advocacy strategy needs to be based on:
- a thorough assessment of the current situation,
- the position of key actors,
- priority areas,
- the potential impact of media campaigns, and
- the capacity of those engaging in advocacy efforts, including sustainability.

The methods chosen depend on status of law reform with regard to particular issue. NGOs and other actors can work out how they can best contribute to advocacy within their own area of work.