

**COMMUNITY EMPOWERMENT FOR PROGRESS ORGANIZATION**



**REVIEW OF LEGAL RESPONSE TO RAPE**

**SMALL SCALE QUALITATIVE RESEARCH**

**2013-2014**

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## **Background information**

There is no certain way to prevent rape. Rape is a crime of violence and aggression that often leaves the victims life shattered. When people hear the words domestic violence, emotional abuse, and sexual abuse they often tend to lose sight of what the word really means. Women are being raped and only three in ten rape cases are reported. In criminal law, rape is an act of sexual intercourse with a woman without her consent or with a minor.

This small-scale survey is within CEPO's regular engagement on tracking cases of Sexual Gender Based violence and is a follow up of the training on accurate reporting of Gender and Sexual Violence by journalists and media houses. This survey mainly intends to review the legal response to rape specifically in Yei, Wau, Rumbek, Torit and Yambio for the reason that a lot of reports on rape are being received from these locations.

## **Goal of the survey**

- a) To generate data for establishing regular study on rape to generate accurate and reliable information to inform response.

## **Specific objectives**

- a) To review selected number of rape cases for understanding the legal response.
- b) To generate information for advocacy on improvement of legal responses to rape and professional police investigation trainings.
- c) To strength information gathering on rape case.

## **Rational of the survey**

To better understand the legal constraints and gaps within the police service during investigation and how rape case are being addressed. The information generated in this small-scale survey aims gathering information aimed at improving the legal response and police investigation skills on cases of rape.

## **Methodology**

Participatory approach was used in the survey where sample cases in the judiciary and police officers were considered. The survey extensively employed the following methods;

**Tracking cases:** This is where a rape case is consistently followed until the final action or decision is reached. The life style of the rapist and survivor is followed and monitored on regular basis. The legal officers and police personnel involved in the case are followed also for further interviews focusing on issues associated with the case in terms of fair trial or lack of evidence to prosecute the case.

**Reviewing legal provision:** reviewing of legal provision and legal decision on selected case were conducted for the whole year of 2014, examining the legal actions or judgment on the selected

cases of the rape was used as a method of interactive dialogue between the judges, rapist, survivors and the society.

## **1.0. Literature Review on Rape**

The crime of rape generally refers to non-consensual sexual intercourse that is committed by physical force, threat of injury, or other duress. Common law defined rape as unlawful intercourse by a man against a woman who is not his wife by force or threat and against her will. However most states have refined and broadened the statutory definition of rape so that marriage, gender, and force are not relevant. The victim's lack of consent is the crucial element. A lack of consent can include the victim's inability to say "no" to intercourse, due to the effects of drugs or alcohol. Rape can occur when the offender and victim have a pre-existing relationship (sometimes called "date rape"), or even when the offender is the victim's spouse. To convict an offender for rape, some form of sexual penetration, however slight, must occur. Each instance of penetration can serve as a count of rape, as well. The most common form of rape is forcible rape, in which an offender uses violence or threats of violence to force a victim into sexual intercourse. In most states, however, rape can also occur in a number of other ways, including posing as a public official and threatening to arrest or punish the victim.

### **1.1. Statutory rape**

Statutory rape refers to sexual intercourse with a minor (someone below the "age of consent"). People below the age of consent cannot legally consent to having sex. This means that sex with them, by definition of the strict liability statute, violates the law. Statutory rape laws vary by state, with states setting the age of consent differently, as well as using different names to refer to this crime. Many states punish statutory rape under laws addressing sexual assault, rape, unlawful sexual intercourse or carnal knowledge of a child. In many states, statutory rape is a felony only if one of the participants (usually a male) is at least three years older than the other; otherwise, it is a misdemeanor. There are very few federal laws dealing with statutory rape

### **1.2. Rape and the Law**

Rape and sexual assault are crimes and women have the right to pursue justice through the legal system. Women who have experienced such crimes also have the right to what protection the law. Sexual intercourse without consent (the expression "carnal knowledge" is used to describe the act of penetration in sexual intercourse - this includes anal intercourse).

1.2.1. Penetration of a person's vulva, vagina or anus to any extent with a thing (for example, an object, like a stick or bottle) or any body part (e.g. a finger) without consent.

1.2.2. Oral penetration to any extent of a person by a penis without their consent.

1.2.3. Consent is defined in the QCC, section 348, as "consent freely and voluntarily given with the cognitive capacity to give consent."

**1.3. Consent** is not considered real consent if it is obtained by force, intimidation or by deception. Women often choose not to resist a rape in order to survive. This does not mean however that she consented to what happened. **Consent** is also negated if it is obtained by deception. For example, a doctor pretends that it is necessary to insert an instrument into a woman's vagina when in reality it's for his sexual gratification. Women can also be coerced by the exercise of authority, for example an employer who requires an employee to have sex in order for her to keep her job. The term "cognitive capacity" recognizes that a person must have the ability to understand the nature and effect of giving consent. Historically, the notion of rape as a "crime" originated as a means to protect men's "property" (meaning: "their wives and daughters") from damage, not out of a sense of moral outrage at the violation of women's bodies. Hard fought for legal reforms have worked to make the legal system more responsive to the needs and rights of women, however for most women the experience of reporting to police and going to court is still pretty difficult. Women often describe the experience of going to court as one of feeling that they themselves were put on trial. In court, it is likely that the defense lawyer (the lawyer representing the accused) will attempt to discredit a rape survivor's story and denigrate her character. She may even be left feeling somehow to blame for what happened. While recent law reforms have helped protect the rights of rape and sexual assault survivors in court, community prejudices or myths about rape still flow into the workings of the legal system. Jurors, judges and other criminal justice personnel are all members of the community and may internalize society's myths and prejudices. These internalized beliefs about women and rape are possibly the most powerful obstacle to successful prosecution.

#### **1.4. The Issue of Consent**

The central issue in most rape cases is that of consent, or the accused's argument that the woman gave her consent. The prosecution must prove the charge of rape by establishing that there was absence of consent beyond reasonable doubt. In order to establish this, the rape survivor's actions and words at the time may be brought up in court and their meaning questioned. It is not uncommon for defense lawyers (those defending the accused) to insinuate that a woman led the rapist to believe she consented. For example, they might exploit myths like;

- a) A woman's provocative appearance or behavior was an invitation for consensual sexual intercourse.
- b) A woman provoked a rape because she was drunk or because she was wearing a low cut dress, or accepted a lift in a car.

Alternatively they might argue that a woman's word could not be trusted, by calling on myths such as:

- a) Women lie about rape for their own vengeful or fraudulent ends;
- b) Most reports of rape are false;
- c) Women mean "yes" when they say "no";
- d) Women enjoy being raped and;
- e) Women are prone to sexual fantasies or;
- f) Men can't be blamed for losing control in a confusion of sexual signals.

### **1.5. Principles underpinning the legal system**

consider some of the principles that underpin the criminal justice system and the consequences for rape victims/survivors:

### **1.6. A person is presumed innocent until proven guilty**

The accused person (the defendant) is presumed innocent until proven guilty and has the right to remain silent, which means it is the victim/survivor (the complainant) who is questioned and cross-examined. The jury determines whether the prosecution has proved that the accused rapist is guilty beyond reasonable doubt. This means, that it is not enough for a jury to believe that it was more likely than not that he did it: they are instructed to be certain. If a jury has reasonable doubt about whether a rape occurred, they cannot convict the defendant. The verdict of the jury must be unanimous (all agreed) if a jury cannot reach agreement (a hung jury), a court may or may not order a retrial.

### **1.7. The convicted have the right of appeal**

Anyone convicted of a crime, that is, found guilty by a jury has the right to appeal their conviction and their sentence. Once the accused has been acquitted - that is found 'not guilty', the case is at an end and the decision cannot be changed even if more evidence is found later. A person cannot be put on trial more than once for the same crime. If we imagine a person who has been robbed undergoing the sort of cross-examination that a rape survivor does, we may better understand why most rape survivors choose not to press charges.

### **1.8. Within South Sudan legal framework (CHAPTER XVIII of Penal Code Act, 2008)**

#### **1.8.1. RAPE, OTHER SEXUAL OFFENCES AND OFFENCES AGAINST MORALITY**

**Legal provision: 247. Rape.**

(1) Whoever has sexual intercourse or carnal intercourse with another person, against his or her will or without his or her consent, commits the offence of rape, and upon conviction, shall

be sentenced to imprisonment for a term not exceeding fourteen years and may also be liable to a fine.

(2) A consent given by a man or woman below the age of eighteen years shall not be deemed to be consent within the meaning of subsection (1), above.

(3) Sexual intercourse by a married couple is not rape, within the meaning of this section.

### **Act 9 Penal Code Act2008**

#### **Legal provision: 248. Unnatural Offences.**

(1) Whoever has carnal intercourse against the order of nature with any person and whoever allows any person to have such intercourse with him or her commits an offence, and upon conviction, shall be sentenced to imprisonment for a term not exceeding ten years and may also be liable to a fine.

(2) If the intercourse referred to in subsection (1), above, is committed without consent, the offender shall be sentenced to imprisonment for a term not exceeding fourteen years and may also be liable to a fine; provided that, a consent given by a person below the age of eighteen years to such intercourse shall not be deemed to be a consent within the meaning of this section.

#### **Explanation—**

*Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

## **2. THE PROBLE**

### **2.0. Family role in securing legal evidence for justifying rape**

The survey confirms that most families are not informed about their role in securing pieces of evidence for proper legal response to rape cases. According to the Laws of South Sudan, the principle evidence for rape is results of medical examination carried within **24** hours upon the occurrence of the incident. Other evidence includes blood spots on the attire of the victim and photo of the victim taken immediately after the incident.

The survey reviewed ten (**10**) cases, out of which two (**2**) were treated to secure evidence though not in a consistent manner. It was friends of the family who pressured the survivor's family to conduct medical test and gather other pieces of evidence such as taking photo and keeping the survivor's attires. The remaining **8** cases depend on the physical evidence of the survivor's body. On May 10<sup>th</sup> 2013, a ten-year-old girl was raped to death in Munuki. The parents of the deceased destroyed her clothes and did not take her for medical test. The only

evidence was the physical body of the deceased. The photo of the deceased was taken and it establish the best evidence for court hearing before the judge for securing competent court of law ruling. Majority of the families in the rural communities treat rape as man/woman attitude that failed to win love.

Therefore, rape is forceful manner of winning love. It is this concept in the rural communities that makes rape case to end in marriage. Beside, the rural communities treat “**public talk about rape**” as taboo. This makes survivors of rape to end being married in either forced or early marriages. Out of the ten cases reviewed in the survey,5 cases constituted forced and early marriage.

The urban communities also have similar challenges as the rural communities although they have access to information about rape more than the rural communities.

The survey realized that the culture of treating “**public talk about rape as taboo**” is high in the urban communities and it is risky as it makes survivors to suffer under silence and this contributes in spreading HIV/AIDs across the communities. The same culture hinders establishment of evidence on rape case and this often make perpetrators to walk free from the court of law. The towns, which regard public talk about rape as a taboo, include Yei in Central Equatoria and Yambio in Western Equatoria and both towns always appear in national medical reports as leading towns that register high rate of HIV/AIDs in the country.

The weak family role in tackling rape cases from 2011 to 2014 was not consistent and this can be qualified by media reports on rape, which was on increase in Yei. The main sources of information to the media are Police, County Gender Inspectors, Women Association and Non-Governmental Organizations. There is evidence in the media that majority of the families end up facilitating rape case into marriage in Yei and Torit quoting. Below are some media articles.

**Yei quote“GENDER OFFICER ACCUSES PARENTS OF SETTLING RAPE CASES FOR MONEY (Easter Radio, Monday, June 2, 2014 - 09:56” (Yei River County Gender Deputy Chairperson accused some parents of settling rape cases and early marriages at family level to get money, neglecting legal procedures.”**

*Ayine James on Friday urged parents to follow legal procedures so that perpetrators account for the abuses committed, Easter Radio reported. He observed that some parents report cases to police after violators fail to pay charges they agreed. The Deputy Chairperson said reporting abuses to police was vital because it would ease investigations and provision of psychosocial support to the victims. South Sudan Law Society Legal Aid Officer Data John Losukwa urged parents to consult concerned institutions and other government levels for legal advice on how to deal with perpetrators. He called on citizens to report rape cases within 72 hours to ease collection of evidence. The officials spoke during a Gender-based Violence Advisory Group meeting on Friday in Yei.*

- See more at: <http://catholicradionetwork.org/?q=node/14481#sthash.lZNz5ORq.dpuf>

**Torit quote” POLICE BLAMES PARENTS FOR SETTLING CHILD SEXUAL CRIMES (Emmanuel radio, Saturday, June 22, 2013 - 17:26)**

*Police officers are blaming parents for settling sexual crimes against their children at home denying chances to prosecute suspects in courts. Eastern Equatoria Police Commissioner Henry Danima said settling rape cases and other sexual crimes at domestic level do not help solve the problem, Emmanuel Radio reported. He added that settling child abuses locally encourages perpetrators to continue committing crimes that damage innocent lives. Major General Danima was responding to concerns raised by journalists on increasing cases of child sexual abuse in the state. The Police Commissioner advised parents to make culprits of child abuse to face the law and be punished to stop other people from committing similar crimes. Major General Danima said by taking money and animals to settle sexual crimes against children, parents encourage the rich to continue violating the rights of the children. The Police Commissioner encouraged community policing to enable the people and law enforcement officers understand the situation of child abuse and approaches that they can use to handle the problem. He described traditional settlement of sexual related crimes against children as unfortunate and discouraging. Magwi County recorded highest figures of sexual crimes against children settled by parents in traditional ways without the courts.*

*- See more at: <http://catholicradionetwork.org/?q=node/10755#sthash.rF0hZ7OA.dpuf>*

In March 2015, media article appeared telling the public that Yei has registered high rate of HIV/AIDS in the country.

## **2.1. Police with rape investigation process**

The survey revealed that weak family role in securing evidence and treating rape as taboo has contributed to weak and delayed investigation of cases. The survey depicted the fact that investigation process takes long time. In the **10** cases reviewed, only one (**1**) case took three months with the rest taking at least one full year. This can be justified by the fact that, the case of the 10 years old girl who was raped to death in Munuki has not been brought to court of law due to the untimely investigation process which is presumed not have been completed. The Police speed in making rape investigation process timely is totally dependent on the availability of pieces of evidence against the rapist.

The survey realized that the Police who investigate rape cases have less knowledge and skills for investigating Sexual Gender Based Violence with rape in particular. Majority of the police are confined to the general principles of investigation as stipulated in the law.

## **2.2. Judiciary role in tackling rape case**

The survey discovered that delay of trial of rape cases is mainly depending on the judiciary level of response to the rape cases. Five serious scenarios of rape being referred by formal court to customary court across the country were registered in this survey. Two occurred in urban formal court level and three scenarios in rural formal court of law. The problem with formal court judges in some parts of the country is, they compare traditional and cultural beliefs that label rape as civil/domestic case that can be resolved at family by the traditional judges.



Improving formal court of law to handle rape cases is a key strategy for tackling rape with the intention of reducing its occurrence in within the of South Sudan.

The survey unfolded family influence on the formal courts of law in regards to legal response to rape. Families prefer settling rape case in two ways; either the rapist is made to pay fine and walk free or he marries the victim resulting into forced or early marriage.

### **2.3. Informal court of law or customary courts in responding to rape**

The survey realized that out of ten cases of rape that were handled by the tradition courts, five cases end up in marriage, two in imbalance judgment and at least two or one are referred to formal courts for trial. The customary law and its practices are much more favoring male than female in all aspects of human life. Female in customary law perspectives is viewed as subordinate of male hence femalcases against male also require the customary court judge to cross-examine properly because of the customary court assumption on female. However, the survey has come across positive practice of some customary courts, which deny handling rape case in their courts, and also rejects any appeal from the family to handle cases at family level. The customary courts judges in Equatoria region refer cases to formal proceedings this is due to the continuous Human Rights Protection and rule of law trainings either from UN agencies, international Non-Governmental Organizations or Civil Society.

### **2.4. The other impact of rape**

The survey focus on reviewing ten cases of rape selected in Yei, Wau, Rumbek and Yambio towns. The review shows the following findings ;( *due to respect of matters of consent and confidentiality we are not allowed to be specific about locations by the information providers*)

- a) Three rapists are HIV/AIDs positive and result to three survivors contracting HIV/AIDS.
- b) Two survivors end up in prostitution because of public –peer group rejection (social frustrations)
- c) Two rapists who were publically named become aggressive to their wives and sisters and one of them ends up as drunker who later committed suicide.
- d) Two survivors of rape committed suicide.
- e) One rapist after court trial ends up as murdering two persons who reported him.
- f) One survivor left her parents and came to Juba and end up as sex worker.
- g) Three unwanted children were given birth to.
- h) Two survivors under girl child age dropped out of school

The survey verified that there is direct link between rape with spread of HIV/AIDs, birth of unwanted children that end up in street life, murder, prostitutions, girl child school dropped out and suicide.

## 2.5. Principle findings

1. The public is not well informed about how to deal with rape cases upon occurrence
2. Public information on rape is very low among the communities
3. The role of the family in securing evidence against rape is very low
4. Poverty has made parents to solve rape cases at family level where they negotiate for dowry and such cases end up in marriage simply the parent of the girls want cash due to poverty. Marriage that are connected to occurrence of rape cases end up as early and forced marriage.
5. There is direct link between rape with spread of HIV/AIDs, unwanted pregnancy, which often results into birth of children who end up in street life, prostitution and committing of suicide.

## 2.6. Recommendations (Action oriented)

- a) Introduction of sensitization program on rape in the media (radio, television, newspapers) stations, schools, places of worship and print and online media
- b) Dissemination of public messages on rape in public places such as markets, shop, public transport, places of worship, restaurants and bars
- c) Training of police officers on investigative skills on rape cases.
- d) Establishment of ***“Rape Research and Data Center-RRDC”***
- e) Continuous orientation of formal and informal judges on management and trial of rape cases.
- f) Tracking rape cases from both rapist and survivors.
- g) Increase access to survivors mental and health services.

## 2.7. Conclusion

The issue of rape occurrence without proper legal response to is posing threat to future society of human. Rape cases are still being compromised with in greater numbers. This made individuals with criminal mind towards rape to feel free and continue with the act since they often walk unpunished. This survey calls for serious and consistent focus on handling rape cases by the concern authorities across the country at their various capacities. CEPO is keenly in taking advocacy action for proper administration of rape cases across the country. Among the key advocacy on rape will be the campaign **“LET US STOP RAPE”**. This campaign will be officially launched by CEPO on 10<sup>th</sup> May, 2015 marking the memory of the 10 year’s old girl who was raped to death in Munuki residential area. This small-scale survey is informative as it gives a picture of rape in South Sudanese society. Various actors should execute the recommendations presented.