



# **Consultation Paper on Sexual Offences in the Somaliland Penal Code**

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## Introduction

Comprehensive laws are essential for an effective response to sexual offences. Currently, these crimes are addressed in Part IX of the Somaliland Penal Code (PC) under the heading “*Crimes against Morals and Decency*.” Articles 398 to 401 deal with rape and other acts committed “*out of lust*.” These provisions include outdated concepts, such as “*carnal violence*” and do not adequately define the offences of rape and sexual assault, and do not include a range of other sexual offences. Nor does the PC ensure that the gravity of the offence is reflected in the punishment, in particular the sentences provided in the PC fail to take into consideration several important aggravating factors. The sexual offences provisions in the PC, therefore, require significant reform.

Moreover, through reform of the PC, Somaliland has the opportunity to consolidate its laws regarding sexual offences. It is in the process of drafting and eventually enacting new law dealing with sexual offences (titled the “Rape Act” and referred to in this paper as the “draft Sexual Offences Bill”). The draft Sexual Offences Bill includes several provisions regarding sexual offences which are far more detailed than sections of the PC. Reform of the PC’s provisions on sexual offences will allow for a detailed consideration of the draft bill and ensure a consistent and comprehensive approach to sexual violence and abuse.

This Consultation Paper identifies the problems with the current sexual offences in the PC and conducts a comparative analysis of how sexual offences are dealt with in other jurisdictions—particularly those which rely to some extent on Sharia law—and makes recommendations for the purposes of consultations with the Law Reform Commission (LRC) and other relevant stakeholders. The overall objective of the consultations is to reach a consensus on provisions regarding sexual offences for the purposes of commencing the drafting phase of the reform process.

### 1. Reform in line with the Constitution, Sharia and Human Rights

Any reform of the PC must be consistent with the Somaliland Constitution. Article 5(2) requires all laws to be “*grounded on and not be contrary to Islamic Sharia*.” The Constitution also protects the rights of women. Article 36(2) provides: “*The Government shall encourage, and shall legislate for, the rights of women to be free of practices which are contrary to Sharia and which are injurious to their person and dignity*.”

Article 21(2) of the Constitution requires respect for fundamental rights and freedoms, as contained in international conventions. The footnotes accompanying the Constitution state that Somaliland goes further than the Republic of Somalia in accepting international conventions.<sup>1</sup> Accordingly, any review of the PC must ensure respect for the rights contained

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<sup>1</sup> Footnote 44 to Article 21(2): “*This links the interpretation of these rights to the relevant international human rights conventions, and is not confined to the few Siyad Barre’s Somali Democratic Republic acceded to, which were the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights (CCPR) and its Optional Protocol (all acceded to in the last dying days of the dictatorship on 24 April 1990; The Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment (CAT) acceded to on 23 February 1990, and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) acceded to on 25 September 1975. Somaliland*

in international and regional conventions such as the International Covenant on Civil and Political Rights, the Convention against all forms of Discrimination against Women, and the African Charter on Human and Peoples' Rights.

With regard to international human rights law, the Committee on the Elimination of All Forms of Discrimination against Women has identified gender-based violence, including rape and sexual violence, as a form of discrimination. It has stated that gender-based violence “*impairs and nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions*” and amounts to discrimination.<sup>2</sup> The Committee has recommended that States ensure that “*laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.*”<sup>3</sup> This recommendation is consistent with Article 36(2) of the Somaliland Constitution which guarantees protection for women against practices that are harmful to their “*person and dignity.*”

Accordingly, Sharia and human rights principles must feed into any review and reform of the PC. There should be a discussion on Islamic jurisprudence to allow for interpretations that are consistent with international human rights. Indeed, the Somaliland Constitution requires laws to adhere to both.

## **2. Somaliland Law and Comparative Analysis**

### **2.1. Rape**

*Current Law:*

Article 398 of the PC deals with rape, which is currently referred to as “*carnal violence*”. Article 398 1) provides: “*Whoever with violence or threats has carnal intercourse with a person of the other sex, shall be punished with imprisonment [] for five to fifteen years.*” Article 398(2) states: “*The same punishment shall be imposed on anyone who has carnal intercourse with a person of the other sex who is incapable of giving consent or “with a person who has been deceived by the offender personating as another person.”* Under Article 398(3) encompasses “*a public officer who, by abusing his power, has carnal intercourse with a person of the other sex who is under arrest or detained in custody under the said officer by reason of his office or entrusted to him in execution of an order of the competent authority.*” Article 398(4) provides that “*penetration of the male sexual organ shall constitute carnal intercourse.*”

Article 398 encompasses very limited circumstances. In order for a victim to prove the offence of “*carnal violence*,” it must be established that “*carnal intercourse*” took place in one of the following circumstances:

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*considers itself bound through succession by these conventions and is prepared to go beyond that and has already indicated that it will comply with a number of other UN conventions, as signified by this constitutional provision. Also as Somaliland is an African, Arab and Muslim nation (see Article 10(6) of the Constitution), this constitutional commitment includes regional human rights conventions.”*

<sup>2</sup> General Recommendation 19, (11<sup>th</sup> Session, 1992), Committee on the Elimination of All Forms of Discrimination against Women, para. 7.

<sup>3</sup> Id, para. 24.

- (i) The carnal intercourse was accompanied by violence or threats;
- (ii) The victim was incapable of giving consent;
- (iii) The offender impersonated another person; or
- (iv) The offender was a public officer, such as a law enforcement official, and the victim was under his arrest or custody.

First, by referring to “*carnal violence*,” instead of “*rape*,” Article 398 (1) of the PC places an unnecessary emphasis on the requirement of “*violence*” and is an outdated term. Reference should instead be made to the offence of “*rape*” to bring the PC in line with modern concepts of the crime.

Second, while the provision includes victims who are coerced into sexual intercourse with violence or threats of violence, as well as victims who are incapable of giving consent perhaps due to a physical or mental disability, or incapacity caused by drugs, alcohol or other substance, it fails to encompass victims who are capable of giving consent but are nonetheless coerced. For example, a victim who is not incapacitated may be coerced into sexual intercourse through intimidation, harassment, or psychological abuse, even though there is no violence or threats of violence.

The Horizon Institute has recommended that rape be defined as follows: “*A person commits the offence of rape if, he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs. The other person does not consent to the penetration, the consent is obtained by force, coercion or intimidation of any kind.*”<sup>4</sup>

*Consent:*

It is important that the offence of rape be more broadly defined with an emphasis on the lack of consent. This would bring the PC in line with the definition of rape in many other jurisdictions. For example, in Section 1 of the UK Sexual Offences Act (2003), rape is where a person (A) “*intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,*” “*B does not consent to the penetration*” and “*A does not reasonably believe that B consents.*”

There are also several Sharia law jurisdictions or countries with a predominantly Muslim population, which define rape as sexual intercourse without consent. For example, Section 375 of the Malaysian Penal Code defines rape as sexual intercourse with a woman under any of the following circumstances:

- (i) against her will;
- (ii) without her consent;
- (iii) with her consent when that consent has been obtained by putting her in fear of death or hurt to herself, or any other person or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
- (iv) with her consent when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is, or believes herself to be, lawfully married or to whom she would give consent;

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<sup>4</sup> Horizon Institute’s Policy Brief on Somaliland Rape Law.

- (v) with her consent when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;
- (vi) with her consent, when that consent is obtained by using his position of authority over her or because of a professional relationship or other relationship of trust in relation to her;
- (vii) with or without her consent, when she is under 16 years of age.<sup>5</sup>

The Egyptian Penal Code also defines rape as “*sexual intercourse with a female without her consent*” (Article 267). The Maldives has adopted a new penal code in 2014, which is to come into force this year. The draft penal code was based on the work of the University of Pennsylvania’s Law School (Penn Law) which produced a new penal code for the Maldives.<sup>6</sup> It is yet to be confirmed whether the penal code was adopted in the exact terms as recommended by Penn Law. However, the Report produced by Penn Law with a draft new penal code is extremely instructive for Somaliland. There are similarities between the Maldives and Somaliland as both legal systems rely on Sharia and traditional laws. The Penn Law draft penal code for the Maldives deals in detail with the offence of rape. Draft Section 131 (a) states that “*A person commits an offence if he engages in sexual intercourse without consent.*”

Some countries have included in their criminal law, a broad definition of “*sexual assault*” rather than referring expressly to the offence of “*rape.*” For example, Article 102 (1) of the Turkish Penal Code includes a very broad offence of any “*person who attempts to violate sexual immunity of a person*” without referring to “*rape.*” The Turkish Penal Code then goes on to specify several aggravating factors. The reason for the broad offence is to encompass a full range of sexual violations experienced by women, rather than focusing on proof of penetration.<sup>7</sup>

Horizon Institute has recommended that consent be defined as follows: “*To agree to and/or to give permission for an act to be done to oneself and the same can manifest in free will to participate in an act. Consent is not free or voluntary if obtained by force. It is important to note that children and persons with mental incapacity cannot consent to acts under this law.*”<sup>8</sup>

#### *Definition of Sexual Intercourse:*

Article 398(1) currently refers to “*carnal intercourse*” rather than the modern term of “*sexual intercourse.*” Article 398(4) defines “*carnal intercourse*” as “*penetration of the male sexual organ.*” However, this fails to encompass several other situations and does not specify the forms of penetration which may constitute the crime of rape. Section 4(1)(3) of Somaliland’s draft Sexual Offences Bill, referring to child rape, includes penetration of the vagina, anus or mouth. Since the draft Sexual Offences Bill has included this specific definition, it is recommended that the PC include a definition of sexual intercourse which is consistent with this.

<sup>5</sup> Sections 375 and 376 of the Malaysian Penal Code.

<sup>6</sup> Final Report of the Maldivian Penal Law and Sentencing Codification Project: Text of Draft Code (Volume 1) and Official Commentary (Volume 2).

<sup>7</sup> UN Handbook for Legislation on Violence against Women, UN Women 2012, pp. 24-25.

<sup>8</sup> Horizon Institute’s Policy Brief on Somaliland Rape Law.

Other jurisdictions also provide a detailed definition to avoid any ambiguity and to ensure that a wide range of sexual violations may amount to rape. For example, similar to Article 4(1)(3) of Somaliland's draft Sexual Offences Bill, rape under Article 1(1)(a) of the UK Sexual Offences Act (2003) includes penetration by the penis of "*the vagina, anus or mouth*". The draft penal code produced for the Maldives also provides a detailed definition. Draft section 131(c) states that "*sexual intercourse*" means "*any penetration, however slight, of the sex organ or anus of one person by an object, appendage, or penis of another person; emission is not required.*"<sup>9</sup>

The Turkish Penal Code includes a less explicit but, nonetheless, broad definition which would encompass a wide range of acts of sexual violence. Article 102(2) states: "*In case of commission of offense by inserting an organ or instrument into a body....*"

Some jurisdictions have not included a definition of sexual intercourse in their penal codes, such as Egypt. Others define sexual intercourse as penetration but provide no further details, such as Malaysia. However, failing to include a detailed definition of what amounts to sexual intercourse can result in uncertainty and possibly inconsistent interpretations. It also has the potential effect of excluding serious sexual violations that should be treated as rape.

#### *Persons of the Same Sex:*

Article 398 does not encompass persons of the same sex. Instead, acts against persons of the same sex are included in a separate provision under Article 400 for "*Unnatural Offences Committed with Violence*" and treated as an aggravating factor. Article 400 provides: "*Where any of the acts referred to in articles 398 and 399 is committed against a person of the same sex or a person of a different sex, against nature, the punishment shall be increased.*"

While the PC should specify aggravating factors for the purposes of sentencing, it is recommended that rape of a person of the same sex should be encompassed by the offence of rape, rather than treated as an aggravating factor.

#### *Marital Rape:*

Currently, the PC is silent on marital rape. Notably, it does not expressly provide for marriage as a defence to rape. Since there is no exemption for husbands, they may be convicted under the PC. However, the practice in Somaliland may be very different.

Marital rape deserves special consideration as many countries have still not recognised that rape is possible in marriage. In December 1993, the UN Human Rights Commission published the Declaration on the Elimination of Violence against Women in which marital rape was understood as a human rights violation. Failure to recognise marital rape also runs contrary to Article 36(2) of the Somaliland Constitution which requires the Government to legislate to ensure women are free from practices that are injurious to their person and dignity.

Nevertheless, several Sharia law countries have advocated that there is no place for marital rape in Islam. For example, Malaysia does not recognise marital rape as a crime. It provides: "*Sexual intercourse by a man with his own wife by a marriage which is valid under any*

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<sup>9</sup> Final Report of the Maldivian Penal Law, Chapter 130, Section 131 (c).

*written law for the time being in force, or is recognised in Malaysia as valid, is not rape.”* Exceptions to this rule are where a husband and wife are separated or a wife has obtained an injunction against her husband.<sup>10</sup>

However, there is a move internationally towards recognising the concept of marital rape. By 2011, 52 countries had explicitly outlawed marital rape in their criminal codes.<sup>11</sup> Although Sharia law countries have asserted that there is no basis in Islam for marital rape, this runs contrary to principles in the Qur’an and Hadith. Indeed, there has been scholarly discussion on how Sharia requires sexual intercourse between married couples to be consensual and some predominantly Muslim countries, such as Turkey, now recognise marital rape as a crime. In the Maldives, which also relies on Sharia law, marital rape is recognised in the new draft penal code. However, it creates a rebuttable presumption that there is consent where the sexual intercourse is between husband and wife. It is, nonetheless, a recognition of marital rape. Other countries in Africa have gone as far as to ensure that their legislation expressly excludes reliance on marriage as a defence. The Namibian Combating Rape Act (2000) states: *“No marriage or other relationship shall constitute a defence to a charge of rape under this Act.”*

Accordingly, it should be discussed whether the PC should remain silent with respect to marital rape, or whether it should expressly provide that marriage cannot be a defence to the charge of rape. The following is a strong argument for recognising the concept of marital rape: *“Women are human beings with equal dignity under Islamic law. They do not sacrifice their dignity nor their capacity to control their bodies by marrying. No difficulties in proving or disproving consent to intercourse will arise within a marital relationship that will not arise in a similar claim among non-married parties. Forced sexual intercourse, is a terrible crime, regardless of the victim’s marital status. When a marriage has descended to the point of one spouse brutalizing the other, the law should not refuse to interfere.”*<sup>12</sup>

## **2.2. Other Sexual Offences**

*Current Law:*

Article 399 of the PC refers to *“Acts of Lust Committed with Violence”* and provides: *“Whoever by, employing the means or under the condition specified in the preceding article, commits upon a person of the other sex acts of lust other than carnal intercourse, shall be punished with imprisonment from one to five years.”*

Article 399 encompasses acts other than rape, committed in the same circumstances as in Article 398. Accordingly, Article 399 suffers from the same problems regarding the issue of consent, that is, it does not encompass other situations where sexual intercourse takes place without consent, such as where consent is coerced due to intimidation, harassment or abuse.

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<sup>10</sup> *“A woman - (a) living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; or (b) who has obtained an injunction restraining her husband from having sexual intercourse with her, shall be deemed not to be his wife for the purposes of this section”. It also explains that “A Muslim woman living separately from her husband during the period of ‘iddah, which shall be calculated in accordance with Hukum Syara’, shall be deemed not to be his wife for the purposes of this section.”*

<sup>11</sup> 2011-2012 Progress of the World’s Women in Pursuit of Justice, UN Women.

<sup>12</sup> Penn Law Public Law and Legal Theory Research Paper Series, Research Paper No. 09-38, Final Report of the Maldivian Penal Law & Sentencing Codification Project, Explanatory notes to Section 131, p. 71.

In addition, the provision does not define what constitutes an “*act of lust*”. It is, therefore, unclear which acts would be covered.

Article 401 deals with “*Abduction for Purposes of Lust or Marriage*” and states:

1. “*Whoever, with violence, threat or deceit, abducts or detains a person for purposes of carnal violence [398 P.C] or lust [399 P.C] shall be punished with imprisonment [96 P.C] from two to five years.*”
2. “*Whoever, with violence, threat or deceit abducts or detains for purposes of marriage an unmarried person, shall be punished with imprisonment [96 P.C.] from one to three years.*”
3. “*Whoever abducts or detains a person who is incapable of giving consent [47 P.C.] for purposes of carnal violence [398 P.C] or lust [399 P.C.] or marriage, shall be subject to the punishments prescribed respectively in the two preceding articles.*”

Article 401 does not refer to the act of “*carnal violence*” or rape. Instead, the emphasis is on abduction or detaining for the purposes of “*carnal violence*”. It appears that the requisite intention of the perpetrator must be to commit “*carnal violence*”, “*lust*” or “*marriage*” but that the requisite act is the abduction or detention of the victim. It seems the act of “*carnal violence*” or an act of “*lust*” are not requisite elements of the crime. Article 401 (2) deals with abduction or detention for the purposes of marriage but again, does not require any sexual act to have been committed.

While abduction and detention of a victim may be considered aggravating factors, it is unclear why they are treated as sexual offences if there is no requirement that a sexual act take place. Offences of abduction and detention may be better dealt with under Offences against Individual Liberty and where a victim of a sexual offence has been abducted or detained, these can be treated as aggravating factors.

#### *Sexual Assault:*

The PC does not currently define sexual offences other than “*carnal violence*” and “*acts of lust*”. It is unclear which sexual violations are covered by “*acts of lust*”. In order to bring it in line with modern concepts, the PC should instead refer to “*sexual assault*” and clearly define what this means. For example, in the UK, section 2 of the Sexual Offences Act (2003) deals with “*Assault by Penetration*” which means penetration of the “*vagina or anus*” with a part of the “*body or anything else.*” This, therefore, encompasses penetration by a body part other than the penis. Although this offence is classified as “*sexual assault*”, it carries the same penalty as for rape (life imprisonment). Section 3 of the Sexual Offences Act deals with other forms of sexual assault which do not involve penetration where the perpetrator “*intentionally touches another person*”, “*the touching is sexual*” and there is no consent or reasonable belief of consent.

Another example of a very specific definition of sexual assault is the definition in section 132A of the draft Maldivian penal code produced by Penn Law. It includes a very specific definition of “*criminal sexual contact*” and states: “*A person commits an offense if he causes sexual contact with another person without consent for the purpose of producing sexual arousal or gratification.*” *Sexual contact means “(1) touching another person’s sex organs, anus or breast; or (2) causing another person to touch the sex organs, anus or breast of any*

*person, including himself; or (3) causing any transfer or emission of semen upon any part of the body of the victim.”*

Some penal codes adopt a broad provision, such as the Turkish Penal Code (“*any person who attempts to violate sexual immunity of another person*”), which allows for a wide range of sexual offences to be included.

In deciding whether a broad or specific offence of sexual assault should be included in the PC, it is essential that full protection is provided to victims of a range of sexual violations. It is also important to consider whether sexual assault will include acts of psychological or emotional violation or forcing or manipulating someone to witness or participate in any sexual acts.

#### *Other Sexual Offences:*

In order to ensure a comprehensive approach to sexual offences, consideration should also be given to whether the PC include a range of other sexual acts, such as:

- (i) Indecent exposure;
- (ii) Sexual exploitation;
- (iii) Sexual harassment (this could include harassment through the phone or internet);
- (iv) Causing a person to engage in sexual activity with another person;
- (v) Indecent photographs without consent.

### **2.3. Provisions Regarding Evidence**

#### *Introduction:*

The PC does not include provisions regarding evidence. General matters of evidence are instead addressed in the Somaliland Criminal Procedure Code. In order to ensure a consolidated approach to sexual offences, it is important consider the inclusion of certain evidentiary matters. The types of issues that could be addressed in the PC are: (i) when evidence of a complainant’s past sexual history may be admitted; and (ii) what type of evidence may lead to a presumption of a lack of consent.

#### *Victim’s Past Sexual History:*

With regard to sexual offences, Article 197(d) in Book 3 of the Criminal Procedure Code provides that where “*a man is prosecuted for: i) a crime or attempted crime of sexual violence, or ii) a crime or attempted crime against modesty or sexual honour, on a woman over 16 years of age, evidence may be given to show that the woman was of generally immoral character.*” This is an extremely broad provision allowing for questions which may humiliate the victim and potentially deter victims from coming forward to complain of sexual violence or abuse. The provision is therefore also contrary to Article 36(2) of the Somaliland Constitution which protects the rights of women and in particular, their dignity. Evidence of a woman’s previous conduct should only be admitted where relevant to the case, namely, where relevant to proving consent or a reasonable belief of consent.

Under international law, evidence of a complainant’s past sexual history is generally to be excluded. Rule 70(d) of the International Criminal Court’s Rules of Procedure and Evidence

requires the Court to disregard prejudicial attacks on a victim's credibility as a witness through the use of evidence of that person's previous sexual history. It also requires the Court not to infer from previous sexual history evidence that a victim or witness is "*predisposed to be sexually available*."

In the context of national jurisdictions, some countries have specifically legislated for very limited situations when evidence of a complainant's past sexual behaviour may be admitted. For example, in the UK and the USA, evidence of the complainant's past sexual behaviour is generally inadmissible.<sup>13</sup> Such evidence may be admitted with permission from the court where it is:

- (i) Evidence of past sexual behaviour with persons other than the accused which is relied upon by the accused to prove he was not the source of injury or semen with respect to the alleged victim;<sup>14</sup>
- (ii) Evidence of past sexual behaviour with the accused relevant to the issue of whether the alleged victim consented to the act or acts with which the accused is charged;<sup>15</sup>
- (iii) Evidence of a distinctive pattern of sexual behaviour which tends to prove consent.<sup>16</sup>
- (iv) Evidence of past sexual behaviour relates to any evidence adduced by the prosecution about the complainant's past sexual behaviour and the court is of the opinion that it would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by the accused.<sup>17</sup>

#### *Presumptions Regarding Consent:*

The PC could also include rules on evidence which leads to a presumption that the complainant did not consent to the sexual act. For example, in the UK, there is a presumption of no consent where there is evidence of any of the following:

- (i) that the perpetrator used violence against the complainant or caused the complainant to fear that immediate violence would be used against him or her or against another person;
- (ii) the complainant was unlawfully detained at the time of the relevant act;
- (iii) the complainant was asleep or otherwise unconscious at the time of the relevant act;

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<sup>13</sup> USA Federal Rules of Evidence, Rule 412 (a)(1) and (2), UK Youth Justice and Criminal Evidence Act (1999), sections 41 (1) and (2).

<sup>14</sup> USA Federal Rules of Evidence, Rule 412 (b)(1)(A).

<sup>15</sup> USA Federal Rules of Evidence, Rule 412 (b)(1)(B). In the UK, the court may only grant leave in very limited circumstances where the evidence of past sexual behaviour is relevant to consent. Section 41 (3) of the Youth Justice and Criminal Evidence Act (1999) requires that such evidence may only be admitted where the sexual behaviour to which the evidence relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or the sexual behaviour of the complainant to which the evidence relates is so similar to (a) any sexual behaviour of the complainant which (according to the evidence adduced by the accused) took place as part of the event which is the subject matter of the charge against the accused or (b) any sexual behaviour of the complainant which (according to the evidence adduced by the accused) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.

<sup>16</sup> USA Federal Rules of Evidence, Rule 412 (b)(3).

<sup>17</sup> Section 41 (5) of the UK Youth Justice and Criminal Evidence Act (1999).

- (iv) the complainant had a physical disability at the time of the relevant act;
- (v) the complainant had involuntarily consumed a substance which was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.<sup>18</sup>

It is therefore worth considering whether the PC should include similar presumptions.

## 2.4. Sentencing and Aggravating Factors

Under the PC, the sentence for rape (as defined in Article 398) is imprisonment for five to 15 years. For other sexual offences (“*acts of lust*” as defined in Article 399), the punishment is imprisonment from one to five years. Article 400 of the PC provides the only situation where the maximum sentences of 15 and five years’ imprisonment may be increased, that is, where the sexual acts are against a person of the same sex or “*against nature*.”<sup>19</sup>

The sentencing provisions for sexual offences in the PC require considerable reform. They do not consider several aggravating factors which may justify a much higher maximum sentence and, therefore, may fail to reflect the gravity of the crime.

For example, in the UK, rape attracts a maximum sentence of life imprisonment, and for sexual assault, the maximum sentence is ten years imprisonment depending on the nature of the sexual behaviour.<sup>20</sup> In Malaysia, the Penal Code provides that the sentence for rape is up to 20 years. Where there are aggravating factors, the offence attracts a higher sentence of up to 30 years.<sup>21</sup> In Egypt, the penalty for rape is 15 years to life imprisonment and for sexual assault, three to seven years. The sentence for sexual assault may be increased to 15 years where the victim is under 16 years of age.

The following are examples from other jurisdictions of aggravating factors that are taken into consideration when sentencing:

- (i) violence, or threats of violence, against the complainant or a third person;
- (ii) the accused acted with others (e.g. gang rape);
- (iii) incestuous rape or sexual assault;
- (iv) the victim is a minor;
- (v) abuse of a position of authority or trust;<sup>22</sup>
- (vi) abduction or detention of the victim;

<sup>18</sup> Sections 75 and 76 of the UK Sexual Offences Act (2003). Section 44 (1) and (2) of the Kenyan Sexual Offences Act (2006) creates a presumption in similar terms to that in the UK Sexual Offences Act.

<sup>19</sup> Article 400 is titled “Unnatural Offences Committed with Violence” and provides: “*Where any of the acts referred to in articles 398 to 399 is committed against a person of the same sex or a person of different sex, against nature, the punishment shall be increased.*”

<sup>20</sup> Sections 1 and 3 of the Sexual Offences Act 2003.

<sup>21</sup> These aggravating factors include: hurt to the victim or to any other person; putting the victim or any other person in fear of death or hurt; rape is committed in the company of, or in the presence of, any other person; lack of consent where the victim is under 16; the victim is under 12 (with or without consent); where consent is obtained by using a position of authority over the victim or a professional relationship or other relationship of trust; and at the time of the offence, the victim was pregnant. See sections 375 and 376 of the Malaysian Penal Code.

<sup>22</sup> The PC currently includes abuse of power by a public officer (Article 398 (3)) but does not treat this as an aggravating factor. A position of trust could encompass the following: a law enforcement official; an education provider; a healthcare professional or carer in a hospital or care home. See for example, Section 21 of the UK Sexual Offences Act (2003).

- (vii) the accused was aware that he was suffering from a sexually transmitted disease;
- (viii) at the time of the offence, the victim was pregnant.<sup>23</sup>

With respect to the victim being a minor, as well as determining the age of consent, the victim's age can also affect the punishment. For example, in the UK special consideration is given to victims below the age of 13 and section 5 of the Sexual Offences Act (2003) stipulates that a convicted person will be liable to life imprisonment where found guilty of raping a child under the age of 13.<sup>24</sup>

While it is recommended that the PC eventually include sentencing guidelines, the provisions regarding sexual offences should also set out aggravating factors that are specific to rape and sexual assault cases.

## **2.5. Compensation**

During a workshop held from 30 to 31 August 2014 ("Workshop") organised by the Somaliland LRC, participants considered that compensation for rape and other sexual offences needed to be addressed by the PC.<sup>25</sup> Some jurisdictions allow for victims to claim damages either from the offender, or from a compensation body. For example, in the UK, the courts have the power to issue compensation orders. However, these often have regard to the means of the offender and may not adequately compensate the victim for physical or psychological injuries. The UK also has a Criminal Injuries Compensation Scheme which is government funded and designed to compensate blameless victims of violent crime, including sexual offences. The Criminal Injuries Compensation Authority administers the Scheme and decides on all claims. There is a tariff of injuries which is set by Parliament. Although the Scheme is unlikely to fully compensate all victims of sexual abuse or violence, it can nonetheless assist with the costs of medical treatment and rehabilitation.

In Somaliland's draft Sexual Offences Bill, Article 27 (1) establishes an Anti-Rape Fund to assist victims. Sub-Article (2) provides that the Fund will consist of voluntary contributions, funds allocated by the government, and any grant from any source from within or outside Somaliland. Article 28 stipulates that the Fund is for the material support of victims and for any other matter concerning counselling and rehabilitation of the victim.

Under the "Definitions" section of the draft Sexual Offences Bill, there is reference to compensation provided by way of a court order directing the perpetrator to pay compensation and damages for physical and emotional injuries. However, the main body of the draft Act has no provision regarding the court's powers to make orders regarding compensation. While compensation paid by the offender may be limited, the court should have powers to make such orders as part of the sentencing process.

With regard to compensation, Somaliland has an opportunity through reforming the PC to take a consolidated approach to compensation. As part of the sentencing process, the PC can specify that a court has the power to issue a compensation order. While this will depend on the offender's means, it is nonetheless an important provision that will provide at least some assistance to the victim. There should also be reference to a compensation fund, as provided

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<sup>23</sup> Sections 1 and 3 of the UK Sexual Offences Act (2003), sections 375 and 376 of the Malaysian Penal Code.

<sup>24</sup> See also sections 6 to 8 of the UK Sexual Offences Act (2003) regarding children under the age of 13.

<sup>25</sup> Report of the Workshop on Reform of the Penal Code hosted by the Somaliland Law Reform Commission in Association with Horizon Institute, 30 to 31 August 2014.

for in Article 27 of the draft Sexual Offences Bill, which will be of additional assistance to victims, and particularly important in cases where the offender has no means to pay compensation.

### **3. Recommendations for Consultations**

The following are recommendations for the LRC and other relevant stakeholders to discuss. It is hoped that through consultations, agreement can be reached on the following points in order to proceed to the drafting phase of the reform process.

#### **Rape:**

- Introduce the term “rape” into the PC.
- Include an emphasis on the lack of consent.
- Reach agreement on the definition of “consent”.
- Reach agreement on the age of consent.
- Reach agreement on whether the PC should include a definition of “sexual intercourse” and “penetration”. It is recommended that “sexual intercourse” be broadly defined to encompass “penetration with any body part or object of the vagina, mouth or anus”, or at least in line with Article 4 of the draft Sexual Offences Bill.
- Consider including persons of the same sex.
- Consider how to approach the issue of marital rape with input from Sharia law experts. In particular, should the PC remain silent or expressly address the issue of marital rape?

#### **Sexual Assault and Other Sexual Offences:**

- Replace the term “acts of lust” with “sexual assault”.
- Reach consensus on the definition of “sexual assault”.
- Consider which other offences of a sexual nature should be included in the PC.

#### **Evidentiary Issues:**

- Consider including a provision in the PC on when evidence of a victim’s past sexual history may be admitted.
- Consider specifying in the PC the types of evidence that may lead to a presumption that the victim did not consent to sexual intercourse.

#### **Sentencing and Aggravating Factors:**

- It is recommended that the PC include specific aggravating factors in the sections dealing with sexual offences.
- Reach consensus on the maximum and minimum penalties for rape, sexual assault and other sexual offences, in light of possible aggravating factors.

#### **Compensation:**

- Decide on whether the PC should also include provisions on compensation in line with the draft Sexual Offences Bill.

#### **4. Way Forward**

- Ensure that all relevant stakeholders are consulted with input also from religious leaders and Sharia law scholars or experts.
- Once there is a consensus among the relevant justice sector stakeholders on how sexual offences are to be dealt with in the PC, the drafting process can commence.
- A follow-on consultation should be held to discuss new draft provisions regarding sexual offences with a view to reaching agreement on the drafts.