



# A comparative review of Somalia's controversial Sexual Offences Bills

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### Summary

There has been controversy surrounding the development of new legislation in Somalia addressing sexual offences, at a time when incidences of rape and other sexual violence have become rampant and impunity is pervasive. Two different bills on sexual offences have been drafted by different sources. However, the content and implications of each bill have not been adequately explained in public, leading to tensions fed by confusion and misapprehension rather than informed discussion.

The Ministry of Women and Human Rights on the one hand, and House of the People of Somali Federal Parliament on the other, have developed two separate bills focusing on sexual offences. The original bill, the Sexual Offences Bill 2018, was introduced by the Executive and approved by the Council of Ministers in 2018. The bill had been developed following five years of wide-ranging consultations with women, civil society, religious leaders, and the international community. It was rejected on 8 August 2020 by Parliament, on the tabling of a new parliamentary bill known as the Sexual Intercourse and Related Offences Bill 2020. The bills contain some significant differences, including: how each defines rape; proposed sentencing; the level of detail on the rights of victims and defendants; the conduct of investigations; and the role of different investigating bodies.

This brief outlines the content of each bill and draws out the key comparisons and differences. It recommends harmonizing the two bills, conducting wider public awareness activities on the proposed legislation, aligning the legislation to Somalia's Penal Code, and strengthening the judiciary, police, and prosecution institutions.

### About Somali Public Agenda

Somali Public Agenda is a non-profit public policy and administration research organization based in Mogadishu. Its aim is to advance understanding and improvement of public administration and public services in Somalia through evidence-based research and analysis.

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### Introduction

A series of amendments made to the Sexual Offences Bill 2018 – which were tabled in the federal parliament in August 2020 as a new parliamentary bill entitled Sexual Intercourse and Related Offences – has become the subject of much controversy and public confusion. Women's leaders and some civil society actors have said the new bill undermines the legal protection of women and girls from rape, sexual abuse and violence, and promotes child marriage. They have said certain provisions contravene the Somali federal constitution and international human rights law.

Public utterances around the issue have been highly charged. Many people, often on social media, claimed that the original Sexual Offences Bill perpetuates immorality and encourages homosexuality. These critics referred specifically to Article 4 of the bill that says: rape occurs when anyone (i) *intentionally inserts anything into the vagina, anus, or the sex organ of another person*; (ii) *the other person does not agree to it*. There remains much room for misunderstanding given that the content of either bill has not been widely shared. In addition, Somalia has seen a worrying rise in sexual violence and the legislation will have a major impact on shaping society in the future. This analysis aims to clearly explain the complexities and ramifications of both bills.

### The Sexual Offences Bill 2018

The Sexual Offences Bill was submitted to the Council of Ministers in mid-2017 by the federal Ministry of Women and Human Rights. The cabinet approved the bill in May 2018. The bill was submitted to the House of the People of the Somali Federal Parliament, but was never tabled in parliament and was therefore not debated or adopted.

The current Speaker of the House of the People, Mohamed Mursal, stated in parliament in September 2020 that a parliamentary committee together with Somali religious scholars and lawyers had reviewed and corrected the original bill and called on the Minister of Women and Human Rights to re-submit it to the Council of Ministers for approval. He added that the standing committee of the House of the People had convened and proposed taking the lead in overhauling the bill to present a new draft. The Speaker said that he discussed the subject with former Prime Minister Hassan Ali Khaire who suggested that parliament could decide the fate of the bill. The new bill was tabled in Parliament for deliberation in August 2020, meaning that Parliament had effectively opted to replace the original Sexual Offences Bill.

The original Sexual Offences Bill 2018 drafted by the Ministry of Women and Human Rights and approved by the Council of Ministers consists of 9 sections and 63 articles:

1. Section one (articles 1-3) defines the terminologies used in the bill.
2. Section two (articles 4-20) discusses the different types of sexual offences.
3. Section three (articles 21-34) outlines sexual offences against children.
4. Section four (article 35) stipulates the violation of powers.
5. Section five (articles 36-53) discusses investigations and the roles of different institutions in the investigation process.
6. Section six (articles 54-58) outlines punishment for each sexual offence.
7. Section seven (article 59) illustrates the sexual offenders' registrar.
8. Section eight (articles 60-61) defines implementation of the sexual offences bill.
9. The last section (articles 62-63) concludes the bill and illustrates the process of repealing the law.

### Key features of the Sexual Offences Bill 2018

#### Sexual offences

Some of the sexual offences that the bill addresses include rape, sexual exploitation, forced marriage, sexual abduction and sexual harassment. Article 4 defines rape as occurring when anyone (i) *intentionally inserts anything into the vagina, anus, or the*

*sex organ of another person; (ii) the other person does not agree to it.* This definition created heated debate in the House of the People of the Somali Federal Parliament, as well as among sections of the public. This article, due to its ambiguity, raises some sensitivities including:

1. The definition suggesting that women can also commit the crime of rape as it states 'anyone' (thus all genders).
2. The only condition for a sexual act to be considered as rape, according to the definition, is the lack of consent from the other person. This was interpreted by religious scholars to mean that the bill allows and/or encourages sexual intercourse of unmarried persons. The Speaker of parliament read out this article in a House of the People session in September 2020. He vehemently rejected the bill and stated that it contravened the Islamic religion and Somali culture.

Moreover, Article 5 also discusses group rape. It states that someone commits an act of gang rape if they a) commit an act of rape, and b) become part of a group that jointly rapes another person.

Articles 4 and 5 outline the punishments for rape and attempted rape. Anyone who commits rape or group rape should be sentenced to 10-15 years in prison. Attempted rape or group rape would be punishable by 7-10 years imprisonment.

The bill also addresses sexual exploitation. According to Article 8, sexual exploitation occurs if one is induced to have sex through the use of:

- a) A threat, force, or assault;
- b) Taking advantage of compelling circumstances;
- c) Keeping identity or travel documents;
- d) Demanding the payment of an illegal loan;
- e) Forcing them to do work against his /her will; or
- f) Using any other physical or mental duress.

The issues highlighted in Article 8 are evident in Somalia. Some girls may be susceptible to exploitation due to their circumstances. Some women have complained that they are sexually exploited when they look for employment or are offered employment in exchange for sexual favours. The bill prohibits such exploitation. Article 8 proposes that any person who commits sexual exploitation should be punished by imprisonment of 5-12 years. Similarly, the article proposes imprisonment of 5-7 years for attempting to commit such an offence.

One of the sexual offences that the bill addresses is forced marriage. Article 12 states that anyone who marries another person without consent commits the crime forced marriage. Moreover, the bill criminalizes the facilitation and arrangement of a forced marriage (Article 12 [2]) without the consent of one of the parties. The article does not provide sufficient details to differentiate between an unmarried girl or woman and the case of a widowed or divorced woman. This is one of the situations where the incompatibility of civil law and Islamic Sharia law is important. Islamic Sharia allows a father to marry off his daughter to a man in some circumstances. For instance, if the father shares with his daughter his decision to marry her off and she keeps silent, this silence may be regarded as tacit approval. If she refuses openly, Sharia law does not allow the father to marry her off to a man that she does not want. However, for the marriage of divorced or widowed women Sharia requires their explicit verbal approval.

Forced marriage is a common occurrence in Somalia, and girls are mostly the victims. Girls may sometimes accept the marriage fearing a "curse" from their parents (primarily their fathers). Although Article 12 did not distinguish between unmarried or divorced/widowed women, it suggests imprisonment of 5-7 years for facilitating or arranging a forced marriage. An attempt to do this results in imprisonment of 2-3 years.

The bill also identifies as a sexual offence sexual abduction, which is defined as intentionally kidnapping or holding another person hostage in order to have sex with him or her. The punishment for such acts is between 5 and 7 years imprisonment. Attempting to commit such a crime would attract a sentence of 3 to 5 years imprisonment. The kidnapping of children has been on the rise in Somalia, especially in Mogadishu of late. Although there may not be evidence that these people, who are mainly children, were kidnapped for sexual purposes, they become vulnerable to abuses including sexual offences.

Articles 17, 18, 19, and 20 discuss sexual offences that relate to technology and social media. According to Article 17, recording, sharing, or disseminating pornographic images or videos is punishable by imprisonment of 2-5 years. Article 18 outlines the display of unethical videos, which results in imprisonment of 5-7 years. Trading and distributing sex materials (Article 19) is punishable by 3-7 years imprisonment. Buying or possessing sexually explicit videos or images (Article 20) is also prohibited, and is punishable by 1-2 years imprisonment.

Although the sexual offences mentioned in Articles 17-20 are not rampant in Somalia (in comparison with global standards), such offences are on the rise due to the increasing number of Somalis using social media and having access to the internet. For example, individuals have been known to record voices or videos and blackmail the recorded person for money or sexual favours, threatening that they will release the recordings publicly.

Other sexual offences named in the bill include sexual slavery (Article 9), sex tourism (Article 10), intentional intoxication (Article 14), sexual harassment (Article 13), and illegal detention for sex and slavery purposes (Article 16).

### **Sexual offences against children**

Article 21 states that child rape happens when someone intentionally inserts their male sex organ or any other instrument into the child's body or the sex organ of another person. The perpetrator of this act may be sentenced to life imprisonment if the victim is a child under the age of 11. The sentence would be 15-25 years of imprisonment if the victim is a child between the ages of 16 and 18 years. Similarly, group rape of a child (Article 22) may result in life imprisonment.

The bill also defines child marriage as a sexual offence. According to Article 25, one commits an act of child marriage if: (a) they intentionally arrange a marriage for a child, and (b) one of the parties to the marriage is a child. The sentence for child marriage is 10-15 years imprisonment. However, the article does not explain who qualifies as a child in this context. Adulthood and childhood are not explicitly defined in Somalia and are contested terms.

Article 21 describes the rape of a child as the rape of someone under 11 years of age. It is not clear if this implies that those aged above 11 are not children. All other sexual offences against adults were outlined in the sexual offences against children section of the bill. The only difference is that the punishments are higher compared to sexual offences against adults.

### **Investigations and evidence of criminal offences**

Investigations related to sexual offences are detailed in Articles 36-53. The bill defines the roles and responsibilities of the police force (Article 37), the Attorney General's office (Articles 38-39), and judicial procedures of the courts such as the Civil Court (Article 41), judicial access in the country (Article 42), and access to justice outside the country (Article 43). Furthermore, there is an elaboration on the rights of victims and witnesses such as the right to free health care (Article 44), right to privacy (Article 45), children's rights (Article 46), general rights, and other measures for access to assistance (Article 47), rights of persons with disabilities (Article 48), rights of survivors of trafficking for sex purposes (Article 49), and the right to initiate civil litigation (Article 50).

The investigations and rights section also clearly outlines a defendant's rights (Article 51). Importantly, it defines the evidence that can be used (Article 52) and evidence that cannot be used (Article 53).

## The Parliamentary Sexual Intercourse and Related Offences Bill 2020

### Overview of the bill

This bill on sexual offences was drafted by the House of the People of the Somali Federal Parliament. It consists of 6 sections and 39 articles. The following is an overview of the bill:

1. Section one (Articles 1-6) defines the terminologies and meaning of sex as well as the purpose of the bill.
2. Section two (Articles 7-26) discusses sexual offences such as sexual abuse, rape (attempt to rape, rape, and group rape), sexual slavery, sexual harassment, forced marriage, and child marriage, among others.
3. Section three (Articles 27-29) outlines investigations of offences against vulnerable communities, protecting and reporting vulnerable people.
4. Section four (Articles 30-34) stipulates the rights of parties, such as the rights of vulnerable people, victims, defendant's rights, and civil rights.
5. Section five (Articles 35-37) discusses evidence and proof of criminal offences.
6. The last section (Articles 38-39) outlines the national plan for rape cases and also enforcement of the law.

### Key features of the parliamentary bill

#### Sexual offences

Articles 8-10 discuss rape. Article 8 states that anyone who attempts an act of rape has committed a crime and should be punished according to the Somalia Penal Code. According to Article 9, rape is a sexual act that a person commits with another person, without consent. As stated in Article 9 (2), rape is a direct and intentional act of sexual misconduct, which occurs when two members of the opposite sex have sexual intercourse or when the male sex organ is inserted into an orifice of the victim. Any person who commits such an offence will be punishable in accordance with Sharia law.

The sentencing for rape under this bill is not made clear. The article only states that the punishment would be increased if the victim of the rape is not sane, is disabled/vulnerable, or a child. Moreover, what qualifies a child in this context is not clear. Biological maturity is often different from one person to person. If the person is 15 years old or less but has biologically matured, does that person still qualify as a child? These are some technical questions that the article does not elaborate on.

Article 10 discusses group rape. This happens when two or more people jointly engage in an act of rape by one or more persons, using force, weapons, or punishments. The article outlines that punishment for a group rape increases if the rape is committed against a vulnerable person such as a child, someone who is insane, or with special needs. It adds that the punishment will also increase if the rape causes infection with HIV/AIDS.

Article 18 describes a sexual offence as the scenario where a person forces another person into a marriage without the knowledge of his or her family. The bill says such persons are subject to the penalties imposed by Sharia law and the Somalia Penal Code for forced marriage. Equally, a person who assists another person in a forced marriage commits the crime of violating the rights of (and committing a crime against) the person being forced.

The bill provides generic explanations on the issue of forced marriage. The bill neither details what qualifies as a forced marriage, nor how forced marriage can be prevented.

A related subject, child marriage, is discussed in Article 26. This states that the marriage of a minor is allowed by Islamic Sharia, but that the man has to wait until the young person can have sexual intercourse, and must also be aware of the possible health repercussions. The article states that one is not allowed to have sex with a person who is incapable of sexual intercourse, and whoever has sexual intercourse with that person is liable to injury, which according to Sharia is called *ta'siir* or public flogging.

Given the predominantly conservative culture of Somalia, the bill conveniently avoids mentioning the age of the person who qualifies as a child when it comes to marriage. This issue has created heated debate in Somalia in recent times. The United Nations Convention on the Rights of the Child defines a child as anyone under 18 years of age. However, adulthood in Somali culture is often measured by the apparent biological maturity of the person and is therefore relative. Girls from 12 years old, or even below, may often be considered to be mature. The bill has an exclusive section (Articles 21-34), which discusses sexual offences against children.

Article 19 of the parliamentary bill proposes that if someone is found guilty of sexual harassment, the victim of such an act may request from the court a distancing order which, if violated, is punishable as a criminal offence under the Somalia Penal Code. The bill describes sexual harassment as when a person intentionally seeks to have illegal sexual intercourse with someone else and to take advantage of his or her situation, such as in a job offer, or promotion, or delivery of something valuable to the person being harassed. The article describes sexual harassment as characterized by excessive intimacy, physical exploitation, and excessive sexual pestering harassment that is not acceptable according to Sharia and ethical behavior.

Sexual harassment is seen as a challenge in many workplaces in Somalia. Unemployment is high and a woman desperately looking for a job may be asked for sex in exchange for employment. Sexual harassment occurs in workplaces where female employee may be asked for sex in order to gain a promotion or a salary increase. Many such incidents are not reported by the victim.

In response to the challenges arising with the increased internet and social media use, Article 23 prohibits the dissemination of articles and videos, or photos of any kind of sex on social media. Someone found guilty of such offences will be punished according to Islamic Sharia by 80 lashes and will be required to pay compensation for the moral and psychological damage inflicted on the victim. Anyone who distributes a personal voice, film, or photograph taken or recorded during sexual intercourse is guilty of homicide/unlawful killing and deemed to be immoral according to the norms of Somali culture. They will be punished according to the Somalia Penal Code.

#### Investigations and evidence of criminal offences

Article 27 states that the Somali Police Force (SPF), and the Attorney General's Office are responsible for investigations of rape cases. The responsibility for the protection of victims is given to the police force, the Attorney General's Office, and the local government that administers the location where the crime occurred. Moreover, Article 29 adds that anyone who neglects to protect the victim or fails to report a sexual offence is punishable under the provisions of the Somalia Penal Code.

Article 35 lists the evidence required for the law to categorize a rape case:

- a) Reports from a certified physician specialized in health assessment, who prepares a comprehensive report on the injury level of the victim.
- b) A sworn and reliable witness at the scene.
- c) Evidence of a police criminal investigation using professional investigative tools.

Circumstances that may lead to a harsher sentence for the perpetrator are:

- a) The social relationship between the victim and the accused.

- b) Defendant's position or social responsibility and the victim's vulnerability.
- c) The skill or technique used by the defendant against the victim.
- d) His use of (further) violence during the sexual offence.

### Comparative critique and analysis of the two bills

There are similarities between the original Sexual Offences Bill 2018 and the parliamentary Sexual Intercourse and Related Offences bill. These include:

1. The sexual offences addressed in both bills are the same: rape, group rape, sexual exploitation, forced marriage, child marriage, sexual harassment, sexual abduction, sex slavery, sex tourism, intentional intoxication, illegal detention for sex and slavery purposes, and sexual offences that relate to digital technology and social media.

2. Neither of the bills specifies who qualifies as a child in the context of a sexual offence. Although the Sexual Offences Bill penalizes those who commit a sexual offence against a child under 11 years of age to life imprisonment, it does not define the age limit for a child. Similarly, the parliamentary bill does not discuss the definition of a child.

On the other hand, there are some key differences between the two bills, including:

1. The definition of rape differs in the two bills. The definition of rape in Article 4 of the Sexual Offences Bill is “intentional penetration of anything into the body orifices (genital organs, anus) using genital organs or any other thing.” The wording generated a heated debate among parliamentarians and motivated a negative perception towards the bill. This may have motivated the drafting of a revised bill by the parliamentary speaker and committee.

2. The difference in detail is evident in the number of articles in both bills. The Sexual Offences Bill consists of nine sections and 63 articles, while the parliamentary bill consists of six sections and 39 articles. The original bill therefore contains 24 more articles and hence covers a more comprehensive range of issues and scenarios.

3. The Sexual Offences Bill devotes an exclusive section (Articles 21-34) to sexual offences against children, addressing all sexual offences as they apply to children. The parliamentary

bill addresses child-related sexual offences in just one article (Article 26).

4. While the Sexual Offences Bill specifies the years of imprisonment applicable for each sexual offence, the parliamentary bill refers to Sharia law and the Somalia Penal Code for any punishments without specifying sentences. This difference may stem from the background of the respective authors. According to the parliamentary Speaker, the bill tabled in August 2020 was co-authored by parliamentarians and some Somali religious scholars. This could explain why the Sharia and the Somalia Penal Code were referred to for all penalties related to the sexual offences in the bill drafted by parliament.

5. The rights of victims and defendants, investigations, and the role of different investigating bodies differ in each bill. The Sexual Offences Bill discusses in detail (in 17 articles) the roles and responsibilities of the Police Force, the Attorney General's Office, and judicial procedures of the courts, as well as the rights of victims, witnesses, and defendants. On the other hand, the parliamentary bill states that the responsibility for the protection of victims is given to the Police Force, the Attorney General's Office, and the local government that administers the location. However, the later bill also lists evidence required to categorize a case as a rape case, such as reports from a certified physician, acceptable and sworn witnesses, and results of police investigations. The first bill does not state specifically the evidence required. However, the parliamentary bill of evidence requirement is problematic: i.e. a rape with no witnesses would not be able to be prosecuted.

6. The original Sexual Offences Bill punishes rapists with 10-15 years imprisonment. The punishment for rape under the parliamentary bill is not clear. The later bill only states that the punishment would be increased if the victim of the rape is not sane, is disabled/vulnerable, or a child.

### Policy considerations

A law on sexual offences will be an important piece of legislation that should protect the rights of victims of sexual offences in Somalia and act as a deterrent against such crimes. The following policy recommendations could be considered.

1. The Ministry of Women and Human Rights and Parliament could sit together and conduct a careful review to identify precisely which elements of each bill are valid, important and have the potential to be consolidated. The substance of the two bills, especially on the identified sexual offences, is similar, although the details differ. Harmonizing the two bills by assigning legal experts and engaging civil society during the harmonization process

could produce one bill that has the necessary detail, the buy-in and input of important actors including religious leaders, and is in line with the tenets of Islamic religion on sexual-related crimes and with consideration of Somali cultural values and norms.

2. The public's understanding of the scope and content of both the original and the amended bill on sexual offences is weak. Sensitivities have therefore been easily aroused and public uproar has drowned out constructive discussion. There is a need for a large scale awareness-raising campaign on the key issues involved in developing effective sexual offences legislation. It is important to increase awareness among policymakers and practitioners, as well as to engage the public in discussion around the seriousness of such crimes, in order to achieve broad acceptance of a law with the potential to reduce sexual offences against women and girls in Somalia. The awareness-raising exercise can be spearheaded under the auspices of the proposed Gender Based and Sexual Violence Commission, which will operate under the Human Rights Commission as per article 111B of Somalia's 2012 Federal Provisional Constitution.

3. The 1962 Somalia Penal Code contains some elements that need to be harmonized with the sexual offences bill. Reviewing and updating the Somalia Penal Code (drafted in the early 1960s) and including within it penalties and issues related to sexual offences and other criminal procedures is equally important.

4. Proper investigation and punishment of perpetrators of sexual offences is not possible without a capable and professional police, prosecution service, and judiciary. The capacity of (and access to) the judiciary and prosecution officers, as well as the police mandated to investigate crimes, constitute a cornerstone of implementing sexual offences legislation. Strengthening these institutions should be prioritized in order to ensure due process with fair hearing and the enforcement of court decisions.

5. Forced marriage can be reduced by raising awareness and educating communities so that they come to appreciate free will and individual choice, and enforcing criminal prosecution for forced marriage and its perpetrators.

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