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He Said, She Said: Assessing the Post-Colonial Legacy on Somalia's Rape Laws

Natalia W. Nyczak

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HE SAID, SHE SAID: ASSESSING THE POST-COLONIAL LEGACY ON SOMALIA'S RAPE LAWS

Natalia W. Nyczak*

ABSTRACT

Most jurisdictions have adopted changes in legislation within the past fifty years that reflect the evolution and advancement of women's legal rights. Somalia, however, has not undergone a significant change in its legal regime since the 1960s. Somalia's penal code and criminal procedure code are based on laws that were written in the late 1800s to early 1900s. When it comes to rape, judges harbor the beliefs that women must "put up a fight" against their assailants and doubt the inherent trustworthiness of women. These prevailing gender myths prevent women from accessing justice and infringe on their rights to equality and non-discrimination in the courtroom. Many of these gender myths are supported by outdated colonial laws and are a result of Italy and Great Britain's legal legacies in Somalia. This article is the first of its kind to examine colonial influences on gender myths in the Somali courtroom. It commences with an introduction into Somalia's legal past and limitations in case law that are attributable to its longstanding civil war and frail infrastructure. Part II continues with a brief background into international human rights standards for victims of gender-based violence—the principles that set the standard against which the treatment of women under laws should be compared. Part III highlights how Somali cultural norms have contributed to preconceptions about women that are reflected in the courtroom. Part IV and V shed light on how fascist-era Italy and British India not only defined Somali criminal laws but also shaped the current Somali legal system's treatment of women as unreliable victims and witnesses. Both the resistance standard and cautionary rules like the corroboration requirement and immoral character provision are legacies of Somalia's colonial past. These rules hinder a Somali woman's access to justice because they are only applied in rape cases where the victim is a female. Moreover, they require a higher evidentiary standard than

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any other crime. In conclusion, this article draws attention to the dangers of legal stagnation and the importance of legal reform.

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INTRODUCTION

In 2020, a criminal court in Mogadishu acquitted a suspected rape offender in part by concluding the victim should have done a better job of defending herself.¹ The court was looking for proof of resistance, such as bruises on the victim’s or defendant’s body.² Because there was no forensic evidence and the defendant denied the charge, the court commented that the victim must have consented to the sexual encounter.³

Gender-based violence (GBV) is a gross and widespread human rights violation, but it continues to be downplayed, overlooked, and tolerated due to a global culture of silence and impunity. GBV refers to harmful acts directed at an individual based on their gender.⁴ The types of GBV crimes include rape, sexual assault, physical assault, forced marriage, denial of resources, opportunities or services, psychological and emotional abuse.⁵ The terms “gender-based violence” and “sexual and gender-based violence” (SGBV) are used

¹ Gender Based Violence Case Data, case dated Oct. 8, 2020 (information obtained from the Federal Attorney General’s Office in Mogadishu, Somalia in February 2021) [hereinafter Mogadishu GBV Case Data]. Somalia does not have a formal case management system; therefore, cases from Mogadishu GBV Case Data will be cited to their publication date, e.g., “case dated Oct. 8, 2020”. Additional information about the cases is on file with the author.

² *Id.*

³ *Id.*

⁴ *Gender-based Violence*, U.N. HIGH COMM’R OF REFUGEES, <https://www.unhcr.org/en-us/gender-based-violence.html> (last visited 2022).

⁵ *GBV Classification Tool*, GENDER-BASED VIOLENCE INFO. MGMT. SYS., <https://www.gbvims.com/gbvims-tools/classification-tool/>.

interchangeably, but SGBV has a specific sexual component.⁶ Men and boys are also affected by SGBV, but due to a weaker socio-economic status in society, women and girls are more vulnerable and are more targeted.⁷ This is especially the case in countries that are afflicted by conflict or political and economic instability,⁸ like Somalia. The primary focus of this paper will be on gender-based violence against women and girls (GBVAW) in Somalia, although cases that involve male victims will be used in aggregate data.

During the onset of the COVID-19 pandemic, the Federal Attorney General in Mogadishu saw an exceptionally large spike in reported SGBV cases. The International Development Law Organization reported that case files for the SGBV Unit quadrupled in April 2020 following the implementation of lockdown measures to curb the spread of the coronavirus.⁹ Additionally, two 2021 United Nations (U.N.) reports reported an “alarming” and “appalling” eighty percent increase in sexual violence in Somalia.¹⁰ The reports linked sexual violence to the prevailing conditions of insecurity in Somalia, including the COVID-19 pandemic.¹¹ This was marked by political tensions in the run-up to national elections, inter-communal clashes related to land-based disputes, and a surge in attacks by the extremist militant group Al-Shabaab.¹²

Additionally, a culture of impunity for rape cases fuels national anger. One case in particular has sparked attention—the case of a twelve-year-old girl who

⁶ *Accessing Access to Justice: Somalia’s Alternative Dispute Resolution Centers*, INT’L DEV. L. ORG. 10 (Jan. 20, 2021), <https://www.idlo.int/publications/accessing-justice-somalias-alternative-dispute-resolution-centers>.

⁷ *See generally Women’s Human Rights and Gender-Related Concerns in Situations of Conflict and Instability*, OHCHR & WOMEN’S HUM. RTS. & GENDER EQUAL., <https://www.ohchr.org/en/women/womens-human-rights-and-gender-related-concerns-situations-conflict-and-instability#:~:text=Heightened%20gender%2Dbased%20violence%20in,sexual%20violence%20and%20forced%20marriage> (last visited Aug. 14, 2022).

⁸ *Id.*

⁹ *The Shadow Pandemic: Addressing gender-based violence during COVID-19*, INT’L DEV. L. ORG. (Dec. 3, 2020), <https://www.idlo.int/news/story/shadow-pandemic-addressing-gender-based-violence-during-covid-19#Somalia>.

¹⁰ The U.N. Assistance Mission in Somalia (UNSOM) verified cases of conflict-related sexual violence perpetrated against 400 girls, twelve women, and seven boys, primarily attributed to clan militias and Al-Shabaab. While the Somali Police Force was implicated in sixteen cases, another twenty-five incidents involved the Somali National Army. The Jubilant security forces and Puntland forces bore responsibility for nine and five of the recorded cases, respectively. The remaining cases were attributed to unknown armed actors. Rape and attempted rape were the most frequently reported forms of sexual violence. Reports of sexual violence increased significantly compared with the previous reporting period, fueled by intensified clashes among clans related to land-based disputes and the fragile security situation in settlements for internally displaced persons. U.N. Secretary-General, *Conflict-Related Sexual Violence*, U.N. Doc. S/2021/312 (Mar. 30, 2021).

¹¹ *Id.*

¹² *Id.*

was abducted from a marketplace, raped, mutilated, and left for dead.¹³ Two of the three men were executed by firing squad in February 2020, while the third man was released after paying seventy-five camels to the victim's family as compensation for the victim's rape and murder.¹⁴ In response, Somali women's rights activists expressed anger and called on Somali authorities to enforce formal justice mechanisms that address sexual violence.¹⁵ When GBVAW crimes are settled out of court, it is a major violation of the victim's rights.

However, victims' rights within the formal justice sector face similar obstacles. The treatment of rape in Somali courtrooms is coming under scrutiny as many women who have claimed to have been sexually assaulted are unable to bring sufficient proof of their assault or resistance. In some cases, the court finds that the woman participated in *zinā* (consensual sex outside of marriage) simply because there is no proof of coercion (no bruises on the body or no eyewitnesses, for instance).¹⁶ There is no consideration as to the woman's own sexual volition, or put another way, there is no analysis or consideration given to women's ability to consent.

One of the reasons why women have a difficult time providing sufficient proof is due to the way the law is written. The Somali Penal Code is based on the 1930s-era Italian Penal Code,¹⁷ and the Somali Code of Criminal Procedure is based on British Victorian-era law, namely the Indian Evidence Act of 1897.¹⁸ Neither criminal code has been amended since 1963.¹⁹ The article that defines rape specifies that rape must be a violent act and leaves out the possibility that it can be coerced through verbal or economic threats.²⁰ When adjudicating a rape case, judges often interpret the lack of bruises on the victim's body as consent.²¹

Another issue female victims face in rape cases is the corroborative evidence requirement. Corroboration requirements are provisions or practices that prohibit convictions solely on the basis of a victim's testimony and require

¹³ Mohammed Omer, *Anger as Somali Rapist and Murderer Pays 75 Camels to Escape Death*, REUTERS (Feb. 27, 2020), <https://www.reuters.com/article/us-somalia-women-crime-idUSKCN20L2I2>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Mogadishu GBV Case Data, *supra* note 1, case dated June 10, 2020.

¹⁷ MARTIN R. GANZGLASS, *THE PENAL CODE OF THE SOMALI DEMOCRATIC REPUBLIC, WITH CASES, COMMENTARY, AND EXAMPLES* 445 at xiii. (1971).

¹⁸ Paolo Contini, *Integration of Legal Systems in the Somali Republic*, 16 INT'L & COMPAR. L. Q. 1089, 1093 (1967) [hereinafter Contini - *Integration of Legal Systems*].

¹⁹ *See generally* The Penal Code of the Federal Republic of Somalia (1962) [hereinafter SPC]; Criminal Procedure Code of the Federal Republic of Somalia, art. 135 (1963) [hereinafter CPC].

²⁰ SPC, *supra* note 19, art. 398(1).

²¹ *See* Mogadishu GBV Case Data, *supra* note 1; *see also* GANZGLASS, *supra* note 17, at 445.

corroborating evidence, such as forensic evidence or the testimony of additional witnesses, that supports the victim's testimony.²² This is linked to the cautionary rule in some jurisdictions, which requires the judge to treat the victim's testimony with caution—reinforcing the idea that a GBVAW victim is unreliable and untrustworthy. Traditional corroboration requirements and cautionary rules only apply to crimes of sexual violence.²³

Many jurisdictions have recently abolished the requirement, but others still impose it, depending on the nature of a country's legal system. Somali judges implement the corroborative evidence requirement in cases of sexual assault,²⁴ and this has been in practice since the 1960s.²⁵

The corroborative evidence standard is hard to meet. If the prosecution only produces the victim's testimony and a medical report that indicates recent sexual activity, the judge will request "corroborative evidence."²⁶ In other words, the judge requires either DNA evidence linking the accused to the crime, a confession from the accused, or testimony from two adult eyewitnesses to convict.²⁷ Forensic capabilities in Somalia are extremely limited; therefore, forensic evidence is rarely used in the prosecution's *prima facie* case.²⁸ As a result, conviction rates in Somalia are extremely low.²⁹

The corroborative evidence requirement places an undue burden on the victim. Because rape is a crime, the victim of rape should be treated like any other victim—and not have to substantiate her testimony with eyewitness testimony or a confession by the defendant when forensic evidence is unavailable. The victim's word should be sufficient evidence to meet the prosecution's burden of persuasion.

However, the victim's word is not enough. Often the judge has preconceived notions about the victim due to her sex, even before the victim is allowed to speak.³⁰ Somali judges have been known to acquit defendants based on arbitrary decision-making and bias.³¹ References to the victim's background and

²² UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK FOR THE JUDICIARY ON EFFECTIVE CRIMINAL JUSTICE RESPONSES TO GENDER-BASED VIOLENCE AGAINST WOMEN AND GIRLS 91 (2019).

²³ *Id.*

²⁴ See Mogadishu GBV Case Data, *supra* note 1.

²⁵ GANZGLASS, *supra* note 17, at 445.

²⁶ See Mogadishu GBV Case Data, *supra* note 1.

²⁷ Interview with S. Mohamed, Somali Prosecutor, Fed. Att'y Gen. Off. (Aug. 21, 2021).

²⁸ *Id.*; see Mogadishu GBV Case Data, *supra* note 1.

²⁹ Interview with S. Mohamed, *supra* note 27.

³⁰ See generally Mogadishu GBV Case Data, *supra* note 1.

³¹ See generally Mogadishu GBV Case Data, *supra* note 1.

character are common in the Somali case files.³² This type of discrimination not only re-victimizes the injured party, but it is also a complete miscarriage of justice.

Moreover, in a rape trial, the defense is allowed to introduce evidence about the victim's "immoral character."³³ This legal provision originated in many former British colonies and is based on colonial ideologies of imperial subjects, especially women, being unreliable and oversexed.³⁴ Many former colonies have undergone legal reforms that reflect a victim-centered approach to adjudicating rape trials.³⁵ Somalia has not. An ongoing civil war, the collapse of formal government institutions, and the emergence of the terrorist organization Al-Shabaab have severely hindered legal development in this East African nation. Somalia's legal regime is still reflective of laws that were created to control imperial subjects and protect European colonizers.

Using Somalia as a case study, this paper explores the way colonial influences devalue a female rape victim's testimony in the Somali courtroom. It delves into Italy's and Britain's lingering influence on Somalia's criminal codes. It discusses the implications of gender inequality—and the violence that is often associated with such inequality—both for development and for peace. This paper commences with an introduction into Somalia's colonial past and limitations in case law that are attributable to its longstanding civil war and frail infrastructure. Part II continues with a brief background into international human rights standards for victims of gender-based violence—the principles that set the standard against which the treatment of women under laws should be compared. Part III highlights how Somali cultural norms have contributed to the myth that women must defend their own chastity and that they are inherently untrustworthy. Parts IV and V shed light on how fascist-era Italy and British India not only defined Somali criminal laws but also shaped the current Somali legal system's treatment of women as unreliable victims and witnesses. Both the resistance standard and cautionary rules like the corroboration requirement and immoral character provision are legacies of Somalia's colonial past. These rules hinder a Somali woman's access to justice because they are only applied in rape cases where the victim is female. Moreover, they require a higher evidentiary standard than any other crime. In concluding, this article sheds light on the dangers of legal stagnation and the importance of legal reform.

³² *Id.*

³³ CPC, *supra* note 19, art. 197.

³⁴ CPC, *supra* note 19, art. 197; *see infra* The Immoral Character Rule: Impeaching the Victim.

³⁵ *See infra* Moving Away from Corroboration.

I. SOMALIA'S LEGAL PLURALISM REGIME AND LIMITATIONS IN CASE LAW

A. *Colonialism Produced Legal Pluralism in Somalia*

For many years, the Somali people had been divided by arbitrary boundaries carved out by various colonial rulers, including Italy and the United Kingdom. Italy obtained control of Somalia in 1889 and incorporated it as a state in Italian East Africa in 1936.³⁶ *Somalia Italiana* (Italian Somalia) encompassed most of present-day Somalia; it extended south from Cape Asir to the boundary of Kenya, then known as British East Africa.³⁷ Meanwhile, the United Kingdom took control of British Somaliland in 1884.³⁸ During World War II, the United Kingdom invaded Italian Somalia and retained control of it until it became a U.N. trust territory under the Italian administration in 1950.³⁹ From 1950 to 1960, Italian Somalia was known as “the Territory” and Italy as “the Administrator” because it was tasked by the U.N. General Assembly with advancing the Territory’s development towards peace and independence.⁴⁰ As such, Italy was given the power to apply “Italian laws as are appropriate to the conditions and needs of the Territory and as are not incompatible with the attainment of its independence.”⁴¹

Britain and Italy relinquished control of their Somali territories in 1960, at which point the two separate Somali colonies united to form the Somali Republic.⁴² Present-day Somali law was primarily promulgated in the immediate aftermath of Somalia’s independence from Italy. In 1962, the newly formed Somali National Assembly delegated power to the government to enact new legislation within a period of six months, including a Penal Code and Criminal Procedure Code.⁴³ The government established a Consultative

³⁶ *Italian Somaliland*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Italian-Somaliland> (last visited 2022).

³⁷ *Id.*

³⁸ *Id.* British Somaliland is a territory that lies west of Italian Somalia and encompasses present-day Somaliland. The British first became interested in Somalia in 1839 when they needed supplies to feed their Arabian colony. And so, they crossed the Red Sea from their protectorate in Aden to buy sheep from the Somalis. Slowly, the British started to occupy the Somali shores and took formal control of the area from Egypt in 1884. GÉRARD PRUNIER, *THE COUNTRY THAT DOES NOT EXIST: A HISTORY OF SOMALILAND* 6 (2021).

³⁹ See U.N. Trusteeship Agreement for the Territory of Somaliland Under Italian Administration, Dec. 2, 1950 [hereinafter Trusteeship Agreement] 118 U.N.T.S. 255, 356.

⁴⁰ *Id.* art. 3.

⁴¹ *Id.* art. 7.

⁴² *Somalia: Colonial Legacy*, CENTER JUST. & ACCOUNTABILITY, <https://cja.org/where-we-work/somalia/related-resources/somalia-colonial-legacy/> (last visited Aug. 14, 2022).

⁴³ PAOLO CONTINI, *THE SOMALI REPUBLIC: AN EXPERIMENT IN LEGAL INTEGRATION* 45 (1969) [hereinafter CONTINI – THE SOMALI REPUBLIC]; see also *Somaliland Criminal Law*, SOMILILAND LAW (Sept. 2020), http://www.somalilandlaw.com/criminal_law.html.

Commission for Integration, a group of lawyers tasked with drafting new laws for Somalia.⁴⁴ Paolo Contini, an Italian lawyer and the former U.N. Advisor to the Republic of Somalia, was part of this group. Mr. Contini wrote that to produce an integrated Penal Code and Criminal Procedure Code within six months was “a herculean endeavour [sic]” because it was “obviously impossible to produce *ex-novo* two original codes within the allotted time.”⁴⁵ The first question was whether to use the Somaliland law or the Somalia law. Mr. Contini elaborated that, in the end, the Somali government opted to use the Italian Penal Code “[a]s most of the ministers and government officials were Italian-trained.”⁴⁶ However, the British Criminal Procedure Code was retained from Somaliland because the Somali ministers were “impressed with the expeditious handling of criminal cases during the British military administration of [Somalia] in the [1940s].”⁴⁷ All new legislation was written in English and Italian due to the absence, at the time, of a standardized writing system for the Somali language.⁴⁸

During the drafting of the Somali Penal Code, special consideration was given to Islamic legal principles and how they could be assimilated into the criminal system.⁴⁹ Shari’ah law was incorporated into the Penal Code with a vague interpretation.⁵⁰ In other words, Shari’ah law can be incorporated into legal decisions based on the judges’ discretion.⁵¹ The Provisional Somali Constitution, which came into effect in 2012, states that all laws must be compliant with Shari’ah.⁵² However, not all articles in the Somali Penal Code comply with Shari’ah since the 1962 Somali Penal Code has not been updated or harmonized with the 2012 Provisional Somali Constitution.⁵³

⁴⁴ CONTINI – THE SOMALI REPUBLIC, *supra* note 43.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 46.

⁴⁸ *Id.* at 45.

⁴⁹ Contini - *Integration of Legal Systems*, *supra* note 18, at 1099.

⁵⁰ *Id.*

⁵¹ *Id.*; see also Mehari Taddele Maru, *The Future of Somalia’s Legal System and Its Contribution to Peace and Development*, 4 J. PEACEBUILDING & DEV. 6 (2008).

⁵² PROVISIONAL CONSTITUTION OF THE FEDERAL REPUBLIC OF SOMALIA, Aug. 1, 2012, art. 2 [hereinafter Somali Constitution] (Som.). Other articles in the Constitution that include the harmonization of Shari’ah law with Somali law include Article 3 (1)(C), Article 4(1), Article 40(4). Puntland’s constitution also includes this in Articles 3(3), 9(3), 9(4), 19(3). *Id.*

⁵³ For example, under Shari’ah, the punishment for rape is death. In the Somali Penal Code, the punishment is five to fifteen years imprisonment. See generally SPC, *supra* note 19; Somali Constitution, *supra* note 52.

In addition to codified law, Somalia retains a form of customary justice called *xeer* (agreement),⁵⁴ which is the most predominant form of mediation used amongst Somalis.⁵⁵ Its existence has spanned several centuries, and it originated amongst the pastoral nature of Somali nomads. Under the *xeer* process, clan elders adjudicate between arguing parties until an agreement is reached.⁵⁶ The custom is based on voluntary acceptance of the system by all parties, thus facilitating compliance.⁵⁷ The process relies on a series of precedents and varies from clan to clan. *Xeer* is not a static legal system. Rather, it evolves over time to reflect new agreements among clans and emerging practices on the ground.⁵⁸ *Xeer* is a reflection of societal beliefs. As a result, deeply rooted gender inequality prevails within the *xeer* system.⁵⁹

Today, Somalia has a pluralist legal regime, which is a legacy of four legal traditions—*xeer* customary law, Shari’ah law, Italian civil law, and British common law. The legal system retained the Italian practice “of basing judicial decisions on the application and interpretation of the legal code.”⁶⁰ Meanwhile, “the courts were enjoined . . . to apply English common law and doctrines of equity in matters not governed by legislation.”⁶¹ Somali judges do their best to ensure that all rulings and laws are compliant with Shar’iah, although they have little guidance on what this means.⁶² In rape cases, the Somali law is clear that the codified criminal codes are applied to crimes of sexual assault. However, the case data and interviews with prosecutors reveal that judicial decisions can often be arbitrary.⁶³

B. Methodology and Limitations in Legal Data Collection

Obtaining case file evidence from Somalia is a challenging feat. Available legal data in Somalia is often limited due to the lack of capacity of newly

⁵⁴ INT’L DEV. LAW ORG., ACCESSING ACCESS TO JUSTICE: SOMALIA’S ALTERNATIVE DISPUTE RESOLUTION CENTERS 8 (2021) [hereinafter IDLO ADR REPORT].

⁵⁵ *Id.* at 7.

⁵⁶ *Id.* at 8; see also PACT AND THE AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE, ALTERNATIVE DISPUTE RESOLUTION INITIATIVES IN SOMALIA, THE EXPANDING ACCESS TO JUSTICE PROGRAM 2 (2020) [hereinafter ABA ADR INITIATIVES IN SOMALIA REPORT].

⁵⁷ IDLO ADR REPORT, *supra* note 54.

⁵⁸ ABA ADR INITIATIVES IN SOMALIA REPORT, *supra* note 56.

⁵⁹ IDLO ADR REPORT, *supra* note 54, at 8.

⁶⁰ See generally SOMALIA: A COUNTRY STUDY 160 (Helen Chapin Metz, ed., Washington: GPO Libr. Of Cong., 4th ed. 1992).

⁶¹ *Id.*

⁶² The laws give too much discretion to judges with regards to how they can apply Shari’ah law. See Maru, *supra* note 51.

⁶³ See generally Mogadishu GBV Case Data, *supra* note 1.

established institutions operating in a conflict zone. The information used to inform this article is based on the author's firsthand experience in Mogadishu as a Legal Advisor to an international development organization tasked with enhancing the formal justice sector in Somalia, including providing trainings to judges in the fields of criminal law, international human rights standards, terrorism, and women's rights. Consultations and research were conducted throughout 2021 and the beginning of 2022, including case data from the Federal Attorney General's Office (AGO), an anonymous questionnaire that was distributed to judges in Mogadishu,⁶⁴ and interviews with judges, prosecutors, and legal practitioners.

This report draws on sixty-seven SGBV case files from the AGO in Mogadishu for the year 2020.⁶⁵ The AGO did not release personal information regarding any of the people involved in these cases, so victims and judges retain full anonymity. Forty-eight of the case files included charges of rape, which is known as "carnal violence committed with violence"⁶⁶ in the Somali Penal Code. Eighteen cases had charges for same-sex rape or "unnatural offense committed with violence."⁶⁷ One file included the charge of sexual assault, or "acts of lust committed with violence."⁶⁸ Out of sixty-seven cases studied, seven concluded with convictions and eighteen with acquittals. Thirteen cases were dismissed by the judge for lack of evidence. Sixteen cases were withdrawn by the victim because the matter had been settled out of court through customary justice. Thirteen cases had undergone a preliminary trial hearing but had not reached final judgement. Nonetheless, the files for these cases provide the facts of each case and the prosecution's evidence, which were helpful in assessing the prosecution's legal strategy and its required burden of proof.

The following are some of the challenges that the author faced in collecting additional data.

⁶⁴ Sixty-two percent of the judges volunteered and completed the questionnaire. The responses revealed that judges have some positive perceptions towards gender roles and GBVAW victims, but none of twenty-three judges surveyed scored in the higher category of the test results, indicating an overall low score on GBVAW sensitivity [hereinafter Judicial Stereotyping Questionnaire].

⁶⁵ The Federal AGO is located in Mogadishu and therefore, the data reflects rape and sexual assault cases that took place in Mogadishu. There are other AGOs across Somalia, one in each Federal Member State. *Id.*

⁶⁶ SPC, *supra* note 19, art. 398.

⁶⁷ *Id.* art. 400.

⁶⁸ *Id.* art. 399.

1. *Lack of Resources*

Lack of resources and a proper case file management system hinders the ability to conduct desk reviews of cases. The case file management system within the Office of the Chief Justice is not electronic; therefore, files often go missing. The information obtained for this article came from the Federal AGO. The case data that informed this report was collected from the year 2020—no data exists for the years prior.⁶⁹

2. *Lack of Trust in the Formal Justice System*

The number of cases reported to the Federal AGO on a yearly basis does not accurately reflect the amount of GBVAW crimes that take place in Somalia. An estimated eighty to ninety percent of crimes are settled through *xeer*, which are not recorded.⁷⁰ *Xeer* outcomes will not be discussed in this article because *xeer* is outside the formal justice system.

3. *Withdrawal of Cases and Preference to Settle Disputes with Elders*

Victims will often report a case to the police and the prosecutor's office but then withdraw the case if the families settle out of court and *diya* is paid.⁷¹ *Diya*, also known as blood money, is financial compensation that is paid directly to the victim's family in cases of murder, bodily harm, or property damage.⁷² *Diya* settlements do not take into account the fact that a sexual assault is a crime against society and still criminally punishable. When *diya* compensation is paid, the victim will often withdraw the case.⁷³ Without a victim, the AGO cannot continue its investigation. Of the sixty-seven cases from 2020, twelve were withdrawn by the victim or the victim's family and transferred to the informal justice sector.⁷⁴ As a result, legal analysis for these cases was unattainable.

⁶⁹ The author reached out to the Federal AGO to request for updated SGBV data for the year 2021. The Federal AGO was able to provide statistics on how many rapes occurred in 2021 but did not provide case files. There was a total of 142 rapes recorded in the Mogadishu area.

⁷⁰ IDLO ADR REPORT, *supra* note 54, at 8.

⁷¹ Interview with S. Mohamed, *supra* note 27.

⁷² *What is "Diya"*, IGI GLOBAL, <https://www.igi-global.com/dictionary/experiences-and-employability-of-nigerien-migrants-in-algeria-and-libya/93698>; IDLO ADR REPORT, *supra* note 54, at n.5.

⁷³ Interview with S. Mohamed, *supra* note 27.

⁷⁴ Mogadishu GBV Case Data, *supra* note 1.

4. *Limited Reporting of Domestic Violence Cases in the Formal Justice Sector*

Most cases that are reported are cases of rape and sexual assault, not domestic violence cases or other forms of GBVAW.⁷⁵ Victims may not report domestic violence cases as it is believed to be a “family matter” and not criminal in nature.⁷⁶ As a result, this article focuses by necessity on cases of rape and sexual assault.

5. *Outdated Laws*

The Somali Penal Code is based off the Italian Penal Code from the 1930s.⁷⁷ The Somali Penal Code was written in 1962 and has not been updated since.⁷⁸ Therefore, rape, which is classified as “carnal violence” under Article 398, only applies to crimes committed against the opposite sex.⁷⁹ Same-sex crimes are not classified as rape under Somali law and are, instead, charged with the crime of “unnatural offense” under Article 400.⁸⁰ Although gender-based violence is committed against men, this article will primarily focus on crimes committed against women. Similarly, the Somali Code of Criminal Procedure is based off the Indian Code of Criminal Procedure and the Indian Evidence Act of 1872.⁸¹ The Somali Criminal Procedure Code was enforced by legislative decree in 1963 and has not been updated since.⁸²

6. *Limited Legal Literature on Somalia*

Legal scholarship on Somalia is almost non-existent. The most comprehensive resource on Somalia’s criminal legal system is Martin Ganzglass’s 1971 book, *The Penal Code of the Somali Democratic Republic, with Cases, Commentary, and Examples*. Mr. Ganzglass’s analysis draws on his experience in Somalia from 1966 to 1968 when, under the auspices of the United States Peace Corps, he acted as Legal Adviser to the Somali National Police

⁷⁵ Mogadishu GBV Case Data, *supra* note 1.

⁷⁶ See IDLO ADR REPORT, *supra* note 54, at 10, 38.

⁷⁷ See GANZGLASS, *supra* note 17, at xiii.

⁷⁸ *Somalia: Penal Code*, 3 April 1964, <https://www.refworld.org/docid/4bc5906e2.html>.

⁷⁹ SPC, *supra* note 19, art. 398; *cf. Somaliland Criminal Law*, *supra* note 41 (On August 25, 2020, the Somaliland House of Representatives passed, by twenty-five votes, the Rape, Fornication and Other Related Offences Bill (Law No. 78/2020). Somaliland is an autonomous region and other parts of Somalia do not apply Somaliland laws). The Somaliland law is not applicable in this article because this article is limited to case files within Somalia, and Mogadishu specifically. *Id.*

⁸⁰ SPC, *supra* note 19, art. 400.

⁸¹ *Somaliland Criminal Law*, *supra* note 43.

⁸² *Id.*

Force and Legal Assistant to the Ministry of Justice and Religious Affairs.⁸³ Today, Mr. Ganzglass's book is used inside the Somali courtroom by English-speaking Somali lawyers.⁸⁴

Another authority on Somali literature is Paolo Contini, an Italian lawyer and the former United Nations Advisor to the Republic of Somalia. In his 1967 article, *Integration of Legal Systems in the Somali Republic*, Mr. Contini wrote about the challenges he faced creating a unified legal system for Somalia after its independence.⁸⁵ The challenges arose because Somalia was a bifurcated country, influenced by local customs, colonial legislations, Shari'ah law, and a patchwork of Italian, British and Indian statutes.⁸⁶ In 1969, Mr. Contini also wrote the book *The Somali Republic: An Experiment in Legal Integration*.⁸⁷ Mr. Contini's work is still a reference guide for legal practitioners and international development organizations working in Somalia. His work informs this article's understanding of Italy's and Britain's colonial legacy.

The article will make references to Indian and Pakistani court cases because the Somali Code of Criminal Procedure is based on the criminal procedure of the British Raj, namely the Indian Evidence Act of 1872.⁸⁸ Therefore, with limited case data, Indian and Pakistani cases can give insight into how similar evidentiary laws might be applied in Somalia. In sum, gathering data in a war-torn state with a weak legal system is difficult but not impossible. The cases that were studied from the year 2020 provide readers with a snapshot into an outmoded, complex, and developing legal system.

II. JUDICIAL OBLIGATIONS AND GENDER STEREOTYPING

In order to properly assess how a judge applies laws to GBVAW cases, it is important to understand their obligations to the justice system as a whole and towards victims. International human rights law governs the obligations of States and state officials towards citizens and other individuals within their

⁸³ See GANZGLASS, *supra* note 17, at xiii.

⁸⁴ The author was given a copy of Ganzglass's book from a Senior Legal Advisor to the Attorney General, who used it frequently in overseeing cases. See also *Somaliland Criminal Law*, *supra* note 43.

⁸⁵ Contini - *Integration of Legal Systems*, *supra* note 18.

⁸⁶ Contini - *Integration of Legal Systems*, *supra* note 18, at 1098–99.

⁸⁷ *Id.*

⁸⁸ *Somaliland Criminal Law*, *supra* note 43.

jurisdiction.⁸⁹ Human rights cannot be taken away by States or by those acting on behalf of the State.⁹⁰

The obligation of States under international legal frameworks has been interpreted by courts and other authorities as requiring States to ensure that State officials themselves do not participate in GBVAW but also to take appropriate measures to prevent the propagation of GBVAW by individuals, to investigate and punish such actions, and to provide protection and support for the survivors of GBVAW.⁹¹ The most comprehensive international treaty to enumerate these obligations is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and in particular, its General Recommendations (1992).⁹² CEDAW establishes a definition for discrimination against women and sets a framework for national action to bring an end to it.⁹³ As such, CEDAW has become a critical tool in addressing discrimination against women and girls around the world.⁹⁴

A. *The Right of Equality and Non-Discrimination for Women*

The right to equality and the principle of non-discrimination, explicitly set out in international and regional human rights treaties, are central to human rights. The right to equality obliges States to ensure observance of human rights without discrimination on any grounds, including sex, race, color, language, religion, political or other opinion, national, ethnic, or social origin, membership of a national minority, property, birth, age, disability, sexual orientation, and social or other status.⁹⁵ Oftentimes, States discriminate against their citizens or certain groups based on the above characteristics.⁹⁶ When this happens, human rights are violated. The right to non-discrimination is part of the principle of equality.⁹⁷

⁸⁹ *International Human Rights Law*, UNITED NATIONS: HUM. RTS., OFF. OF HIGH COMM'R, <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>.

⁹⁰ *Id.*

⁹¹ Comm. on the Elimination of Discrimination against Women, Rep. of the Comm. on its Forty-Sixth Session, U.N. Doc. CEDAW/C/46/D/18/2008, at 5, 14–15 (2010).

⁹² *Id.* at 14–17.

⁹³ *Id.* at 5, 14–15.

⁹⁴ *Id.* at 14–18.

⁹⁵ See International Covenant on Civil and Political Rights, Preamble, arts. 2, 6, 7, 9, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; African Charter on Human and People's Rights, arts. 2, 3, 4, 6, 18, 19, June 27, 1981, 21 I.L.M. 58; Convention on the Elimination of All Forms of Discrimination Against Women, arts. 1, 5, Dec. 18, 1979, 1249 U.N.T.S. 1 [hereinafter CEDAW]; Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, arts. 2, 3, 4, July 1, 2003.

⁹⁶ MANFRED NOWAK, HUMAN RIGHTS HANDBOOK FOR PARLIAMENTARIANS 5 (2005).

⁹⁷ *Id.*

Somali judges, as officials of the State, are obligated under international human rights law to protect and respect women's rights in the courtroom.⁹⁸ The judiciary should ensure that women are equal to their male counterparts before the law, that they are not exposed to discrimination within the judicial process, have access to immediate and effective protective measures, and are protected from exploitation and sexual abuse.⁹⁹ Treaties keep States accountable when States fail to recognize the danger of their failed obligations. Accountability is reinforced through reporting mechanisms to human rights bodies. Somali judges must become aware of these obligations to make informed decisions and to ensure that Somalia is meeting its requirements under human rights treaties.

B. Gender Judicial Bias: An Overview

The right to equality before the law and the principle of non-discrimination are violated when a judge sees a woman as being mistrustful and unreliable simply because she is a woman. These types of preconceived notions about a woman will have a negative impact on her case because the judge will often seek to corroborate her testimony with additional evidence, being under the belief that her testimony alone is insufficient to prove the truth.¹⁰⁰ This is commonly referred to as judicial bias with a specific gender component. Judicial gender stereotyping turns on the belief that men and women have specific societal roles, sexual characteristics, and moral standards that predetermine the judicial ruling, regardless of the facts.¹⁰¹

Judicial stereotyping is found in many jurisdictions and can be broken down into three elements: (1) "a preconceived belief formed before full knowledge or evidence is available," (2) "about the attributes, characteristics, or roles," and

⁹⁸ See generally ICCPR, *supra* note 95; African Charter on Human and People's Rights, *supra* note 95; CEDAW, *supra* note 95; Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, *supra* note 95. Somalia has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and ICCPR, but it has not ratified CEDAW. However, in an initial report submitted to the Committee against Torture, on December 16, 2019, the Federal Government of Somalia claimed that it is in "inclusive and participatory consultations towards the ratification of the Convention on the Elimination of Discrimination against Women (CEDAW)." U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Initial Report Submitted by Somalia Under Article 19 of the Convention Pursuant to the Simplified Reporting Procedure, due in 1991, ¶ 4 U.N. Doc. CAT/C/SOM/1, at 1, 4 (2019).

⁹⁹ See NOWAK, *supra* note 96, at 5, 7–8, 19.

¹⁰⁰ SIMONE CUSACK, ELIMINATING JUDICIAL STEREOTYPING: EQUAL ACCESS TO JUSTICE FOR WOMEN IN GENDER-BASED VIOLENCE CASES ii (2014).

¹⁰¹ See *Gender Stereotyping: OHCHR and Women's Human Rights and Gender Equality*, U.N. HUM. RIGHTS OFF. OF HIGH COMM'R (2022), <https://www.ohchr.org/en/women/gender-stereotyping>.

(3) “of a social group or subgroup.”¹⁰² In gender-based violence cases, judges may have a preconceived belief that a victim will behave a certain way due to her gender.¹⁰³ Gender stereotyping is harmful when it results in the violation of fundamental human rights and freedoms such as access to justice.¹⁰⁴

Judicial stereotyping is a common courtroom obstacle for female victims.¹⁰⁵ It can also “distort judges’ perceptions of the facts, affect their vision of who is a ‘victim,’ and influence their views about witness credibility.”¹⁰⁶ For example, a common misperception in Somalia is that if a woman does not fight her attacker then she is unchaste and has consented to the sexual encounter.¹⁰⁷ Overall, gender stereotyping compromises the integrity of the justice system.

C. Gender Stereotyping in Somalia

Whenever a judge refers to a victim’s attributes, characteristics, or background (e.g., questioning her chastity), they are implementing judicial stereotyping and compromising the integrity of the adjudication process. Somali judges have made references to the age of the victim, the existence of a prior relationship with the accused, and have even accused the victim of lying in court.¹⁰⁸ In thirteen cases from the sixty-seven SGBV case files from 2020, the judge made reference to the victim’s background in his legal reasoning.¹⁰⁹

1. Victim Blaming: A Chaste Victim Fights Her Attacker

A common misperception is that individuals should protect themselves from victimization. Almost half of Mogadishu judges believe that women hold some responsibility in their own rape. Forty-eight percent of surveyed judges agreed with the statement: “Women can put themselves in a situation where it is their fault, and they should know better. For example, she was alone in a dark place/

¹⁰² Simone Cusack, *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-based Violence Cases*, OHCHR 16 (June 9, 2014), <https://www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc>.

¹⁰³ *Id.* at 17.

¹⁰⁴ See Cusack, *supra* note 102, at ii, 12–13, 36, 42.

¹⁰⁵ *Id.* at ii; see generally Navi Pillay, *Equality & Justice in the Courtroom*, HUFFPOST (May 3, 2014), https://www.huffpost.com/entry/equality-and-justice-in-t_b_4892624.

¹⁰⁶ Cusack, *supra* note 97, at ii.

¹⁰⁷ See *id.* at 19; see also Judicial Stereotyping Questionnaire, *supra* note 64.

¹⁰⁸ Mogadishu GBV Case Data, *supra* note 1; see also *infra* Children Cannot Give Consent and Current Somali Rape Law Excludes Non-Violent Rape Cases from Criminal Courts.

¹⁰⁹ *Id.* cases dated Feb. 3, 2020, Feb. 5, 2020, Feb. 19, 2020, Apr. 9, 2020, Apr. 23, 2020, June 10, 2020, July 29, 2020, Aug. 7, 2020, Aug. 18, 2020, Oct. 5, 2020, Oct. 6, 2020, Oct. 8, 2020, Dec. 9, 2020.

too pretty/showing too much of her face.”¹¹⁰ This belief supports the common misperception that individuals should protect themselves from victimization. Victim blaming occurs frequently in many different cultures and across jurisdictions, including North America and Europe. It is not unique to Somalia. Personal choices, like how a woman dresses or whether she chose to be alone in a dark place, reflect how women are expected to act over their “sexual integrity.”¹¹¹ Victims may feel the need to justify their clothing when describing their assault in their testimony.¹¹² However, a victim should never have to justify their actions.

Many Somali judges have strong opinions about the victim’s appropriate response to a sexually violent attack and how it reflects on her character.¹¹³ Seventy-six percent of the surveyed judges agreed with the statement: “The woman did not fight back, so she is not chaste.”¹¹⁴ First, there is no “right way” to respond to an attack.¹¹⁵ Victims of sexual assault will often respond in a variety of ways. In fact, freezing is a much more common response to fear, like being raped, than fight or flight is.¹¹⁶ It is a matter of scientific consensus that the victim’s response is very well beyond her conscious control.¹¹⁷ By holding on to the myth that a victim did not fight back, judges put some of the responsibility of the attack on the victim because the myth supports the common misperception that individuals should protect themselves from victimization.

Second, questioning a woman’s chastity puts the victim’s character at issue. A chaste woman is considered more likely to have resisted the defendant’s sexual advances and to have lodged a legitimate claim of rape.¹¹⁸ By contrast, an unchaste woman is considered more likely to have succumbed willingly to the defendant’s sexual advances and subsequently lie about the rape in court to

¹¹⁰ Judicial Stereotyping Questionnaire, *supra* note 64.

¹¹¹ Sydney Cherniawsky, “You should have known better:” The Social Implications of Victim-Focused Sexual Assault Prevention Tips (Dec. 2018) (M.A. thesis, University of Saskatchewan Saskatoon) (on file at <https://harvest.usask.ca/bitstream/handle/10388/11700/CHERNIAWSKY-THESIS-2018.pdf?sequence=1&isAllowed=y>).

¹¹² *Id.*

¹¹³ Judicial Stereotyping Questionnaire, *supra* note 64.

¹¹⁴ *Id.*

¹¹⁵ *The Effects of Sexual Assault*, WCSAP, <https://www.wcsap.org/help/about-sexual-assault/effects-sexual-assault>.

¹¹⁶ James W. Hopper, *Why Many Rape Victims Don’t Fight or Yell*, WASH. POST (June 23, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/>.

¹¹⁷ *Id.*

¹¹⁸ Judicial Stereotyping Questionnaire, *supra* note 64.

protect herself.¹¹⁹ Therefore, the sexual propensity of a woman is relevant to the truth of her allegation. The belief is that if a woman has broken societal norms by having illicit sex, then she would continue to break norms by lying as a witness under oath.¹²⁰ So not only is the woman untrustworthy because she is unchaste and “asked for it,” but she also consented, so it cannot be rape.¹²¹

2. *Misconceptions About Rape Victims: Women Have a Propensity to Lie*

The most common misperception about women in the courtroom is the myth that women are prone to lying. In a December 2020 case heard in Mogadishu, a girl younger than ten years old would frequently visit the home of her male relative.¹²² The girl accused the male relative of raping her.¹²³ The prosecutor presented the victim’s testimony.¹²⁴ The victim’s father was called to testify and expressed his doubts about her claims.¹²⁵ The Court commented that the evidence was insufficient and acquitted the defendant because “the victim [was] lying.”¹²⁶

In the above example, the case file notes that the judgment referred to the background of the victim and that the case turned on the attributes of the victim.¹²⁷ Additionally, the judges erred by entering the father’s opinion into evidence. The father was not providing expert testimony and personal beliefs are never a fact in issue¹²⁸ nor are they relevant.¹²⁹ They should never be part of a case or weighed by judicial officers.

Underlying many rape cases is the persistent question about the credibility of the rape victim. There remains a widespread public impression across many jurisdictions that false allegations are common, and innocent people suffer as the result of being wrongfully accused. Reasons why women are believed to lie about rape include salvaging their reputation or for blackmailing.¹³⁰ In the 2020

¹¹⁹ Leon Letwin, “Unchaste Character,” *Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 49 (1980).

¹²⁰ *Id.* at 46 (noting theory that “a moral flaw in one area of her character (sexual laxity) reflected on other aspects of her character (e.g., honesty) as well.”).

¹²¹ *Id.*

¹²² Mogadishu GBV Case Data, *supra* note 1, case dated Oct. 6, 2020.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ CPC, *supra* note 19, art. 137.

¹²⁹ CPC, *supra* note 19, arts. 137, 141.

¹³⁰ Durba Mitra & Mrinal Satish, *Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India*, 49 ECON. & POL. WEEKLY 51, 53 (2014).

case data, the defense accused the female victim of lying for revenge,¹³¹ money,¹³² and blackmail—a defendant argued that the victim was falsely accusing him of rape to get him to marry her.¹³³

The prevalence of false rape allegations is extremely difficult to assess.¹³⁴ While statistics on false allegations vary, they are invariably and consistently low.¹³⁵ Studies carried out in Europe and the United States indicate rates of falsely reported rape crimes are between two and ten percent, which is the same percentage of false allegations for other crimes.¹³⁶ The difficulty in arriving at an exact number is attributed to the fact that jurisdictions define “false accusations” differently.¹³⁷ Some reasons that reports are classified as “false” include: delayed reporting, inconsistencies in the victim’s statement, vagueness, or the victim’s indifference to injuries.¹³⁸ Additionally, it is common for justice actors to overestimate the number of false allegations, which “feeds into a culture of skepticism and leads to poor communication and loss of confidence between the victim and the criminal justice system.”¹³⁹

Somali women face additional disincentives to fabricating a rape allegation because social customs already make it difficult to report a rape crime. By identifying herself as a rape victim she would be admitting to having had sexual intercourse, which would be considered shameful.¹⁴⁰ Moreover, she could be accused of having committed adultery or fornication, which is a violation of Shari’ah principles.¹⁴¹ Most victims are encouraged by their family members or clan members not to report the crime because it would bring dishonor.¹⁴² The risk of familial, reputational, and professional harm that unfortunately results from being identified as a rape victim could last her a lifetime.¹⁴³ In sum, the

¹³¹ Mogadishu GBV Case Data, *supra* note 1, case dated Oct. 8, 2020 (defendant accuses mother of victim of defaming him).

¹³² *Id.* case dated Dec. 9, 2020 (accused claims that the victim consented in return for money).

¹³³ *Id.* case dated Oct. 30, 2020.

¹³⁴ See generally Cassia Spohn, Clair White & Katharine Tellis, *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 L. & SOC’Y REV. 161 (2014).

¹³⁵ *Id.*

¹³⁶ NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, FALSE REPORTING: OVERVIEW 3 (2012).

¹³⁷ UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON EFFECTIVE PROSECUTION RESPONSES TO VIOLENCE AGAINST WOMEN AND GIRLS 33 (2014).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Nancy Perrin et al., *Social Norms and Beliefs About Gender-Based Violence Scale: A Measure for Use with Gender-Based Violence Prevention Programs in Low-Resource and Humanitarian Settings*, 13 CONFLICT & HEALTH 6 (2019).

¹⁴¹ See generally Mogadishu GBV Case Data, *supra* note 1.

¹⁴² Perrin, *supra* note 140.

¹⁴³ *Id.*

stigma surrounding a rape reporting is so high that false accusations of rape are extremely rare within Somalia.

Victim blaming is a universal problem. In 2020, a New Jersey judge was removed from judicial office for asking a rape victim whether she knew “how to stop somebody from having intercourse with [her]” and suggested that she could have blocked the assault by closing her legs.¹⁴⁴ Similarly, a Canadian judge resigned in 2017 after asking a rape victim, “[w]hy couldn’t you just keep your knees together?”¹⁴⁵

North American judges, like Somali judges, espouse judicial prejudices and gender myths that disproportionately affect women in the courtroom. The difference between the situation in North America and Somalia is that in North America, judges are guided by victim-centered rape laws. Whereas in Somalia, judges are guided by criminal laws that were created around the turn of the 20th century when females were viewed as second class citizens. Either way, women across jurisdictions should be able to rely on a justice system that is free from myths. Eliminating judicial stereotyping is therefore a crucial step in ensuring equality and justice for victims and survivors.

III. WOMEN IN SOMALI SOCIETY

Any preconceived notions a judge may have about how a Somali female victim should act in response to a sexual attack stem from the roles that Somali society assigns women, which are shaped by cultural patriarchy, clan roots, and religious undertones.¹⁴⁶ A woman’s primary role is a homemaker and a child-bearer; it is estimated that a Somali woman gives birth to an average of six children during her lifetime.¹⁴⁷ There is a Somali saying that “while a man is the head of the household, a Somali woman is the neck that helps direct the position of the head.”¹⁴⁸ Women, particularly older women, have significant influence in their home lives.

¹⁴⁴ Brian Flood, *Judge Removed for Questions to Rape Victim, Other Misconduct*, BLOOMBERG L. (May 26, 2020), <https://news.bloomberglaw.com/legal-ethics/judge-removed-for-questions-to-rape-victim-other-misconduct> (discussing a case from 2016).

¹⁴⁵ *Judges Who Told Complainant to ‘Keep Your Knees Together’ Resigns*, BBC NEWS (Mar. 9, 2017), <https://www.bbc.com/news/world-us-canada-39224844>.

¹⁴⁶ *Somalia*, U.N. WOMEN – AFRICA, https://africa.unwomen.org/en/where-we-are/eastern-and-southern-africa/somalia_africa (last visited Mar. 29, 2022).

¹⁴⁷ Nina Evanson, *Somali Culture—Family*, CULTURAL ATLAS (2019), <https://culturalatlas.sbs.com.au/somali-culture/somali-culture-family>.

¹⁴⁸ *Id.*

Due to the impact of civil war, drought, and male migration, economic opportunities have been favorable to Somali women. “Somali women are renowned for being entrepreneurs and businesspeople. They are often the main income earners for their families.”¹⁴⁹ However, even though women have held important roles in politics and the economy, their potential for individual and collective fulfilment is strictly confined by the traditional roles assigned to them.¹⁵⁰ According to a 2021 Oxfam report, women in Somalia have almost half the opportunities afforded to men.¹⁵¹

Overall, a woman’s role in Somali society is restricted by social norms. The ideal Somali woman “is expected to be reserved, polite and humble.”¹⁵² Modesty is of particular importance. “They are required to show modesty (*xishood*) and not bring shame to their family by immodest or immoral behavior.”¹⁵³ Male relatives often take on the role of protector and their attitudes can be “very paternalistic . . . including managing whom a woman can see outside of her home.”¹⁵⁴ Unmarried people of the opposite sex are not expected to interact with one another in a private setting.¹⁵⁵ Dating, as it is understood in Western countries, is “almost non-existent in Somalia.”¹⁵⁶

Women do hold important positions in the legal sector. In 2016, the Federal AGO brought on board the nation’s first female prosecutors under the auspices of the then Attorney General, Ahmed Ali Dahir.¹⁵⁷ As of this writing, there are twenty-five female prosecutors in Somalia.¹⁵⁸ Many of these female prosecutors lead GBVAW cases. One of the greatest challenges they face in prosecuting GBVAW cases is satisfying the resistance standard and the corroborative evidence requirement, two relics of Somalia’s colonial past. The resistance standard was transposed into Somali rape law from Fascist-era Italy and the

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Oxfam assigned a gender gap index of 0.56 to Somalia, indicating that women are disadvantaged in all of the four assessed domains: economic participation, economic opportunity, political empowerment, and educational attainment. SAVE SOMALIA WOMEN AND CHILDREN, GENDER GAP ASSESSMENT: SOUTH CENTRAL SOMALIA AND PUNTLAND 7 (2021).

¹⁵² Evanson, *supra* note 147.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Abdulaziz Billow, *Somalia Hires First Female Prosecutors*, VOA NEWS (July 3, 2015), <https://www.voanews.com/a/somalia-hires-first-six-female-prosecutors/2848621.html>.

¹⁵⁸ On file with the International Development Law Organization – Somalia Office. Data obtained on Jan. 12, 2023. There are nine in the Benadir Region (which encompasses Mogadishu, the capital), seven in Puntland, three in Jubaland, and six in the Southwest. There are no female prosecutors in the states of Galmudug and Hirshabelle.

corroborative evidence requirement, a common law rule,¹⁵⁹ became a part of Somali courtroom procedure due to the British Raj.

IV. FASCIST ITALY AND SOMALIA'S RAPE LAWS

The purpose of this section is to examine the creation of the formal justice system that exists in Somalia and Italy's role in establishing it. The Somali Penal Code is based off the Italian Penal Code from 1931, which is named the Rocco Code after the Minister of Justice under Prime Minister Mussolini when the code was enacted.¹⁶⁰ The Rocco Code was introduced under fascism and was "consistent with the authoritarian political culture of the years of its adoption."¹⁶¹ For example, "[s]anctions are relatively harsh, and several provisions tend to punish manifestations of opinions and attitudes against the State."¹⁶² The Somali Penal Code is almost a "word for word replica of the Italian Penal Code."¹⁶³ Because of this, it was drafted, passed, and officially published in Italian in 1962.¹⁶⁴

The Rocco Code, like its predecessor the Zanardelli Code of 1890, regulated sexual behavior and relations between the sexes.¹⁶⁵ Female sexual behavior and interests were considered a State matter because women were responsible for the expansion and vitality of the Italian race.¹⁶⁶ Rape was classified as a crime against family honor and the State.¹⁶⁷ Similarly, under the Rocco Code, rape and other sexual assault crimes were listed under "Crimes Against Morality and Decency" and not categorized as crimes against the person.¹⁶⁸

Under Fascist Italy, women were considered subservient and inferior to men. Fascist theorists pioneered the idea that "women must return to the absolute subjection of man,"¹⁶⁹ which was also espoused by the Catholic Church during

¹⁵⁹ See generally Matthew Bova, *The Court of Appeals Should Abandon the Corroboration Rule Governing the Admissibility of Expert-Identification Testimony*, 24 C.U.N.Y. L. REV. 62 (2021).

¹⁶⁰ *Somaliland Criminal Law*, *supra* note 43.

¹⁶¹ SARAH MUSIO, *THE HISTORY OF ROCCO CODE IN THE ITALIAN REPUBLIC* (1999).

¹⁶² Introduction to Italian Penal Code (J. Delaney ed., 1978), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/italian-penal-code-0>.

¹⁶³ GANZGLASS, *supra* note 17, at xiii.

¹⁶⁴ *Id.*

¹⁶⁵ See Antonella Vitale, *Fuitina: Love, Sex, and Rape in Modern Italy, 1945–Present* (June 2020) (Ph.D. dissertation, City University of New York) (on file at https://academicworks.cuny.edu/gc_etds/3753).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Alexander De Grand, *Women Under Italian Fascism*, 19 HIST. J. 947, 965 (1976).

this time.¹⁷⁰ Giovanni Gentile, Mussolini's Minister of Education, believed that women did not have the "moral or mental vigor" to teach in Italian schools,¹⁷¹ and that generally, women should be viewed as "nice little ornaments for sitting rooms."¹⁷²

Under Mussolini, women's bodies were seen as either property of the State or of their male relatives, an attitude in line with many other European countries during this time.¹⁷³ With regards to welfare, the regime did not protect women for humanitarian reasons but rather to further the demographic aims of the State.¹⁷⁴ One of Fascism's greatest schemes was the expansion of the Italian race, an initiative that even demanded colonial outlets. Having many children was rewarded; "producers" of many children were awarded gold medals.¹⁷⁵ If a woman was sexually violated, it was usually the father who would pursue legal action against the perpetrator on behalf of his daughter.¹⁷⁶

The Italian system was only interested in protecting certain kinds of women, those who were chaste. In fact, if a rape victim was already "corrupted or married her abductor," the punishment for the offender was suspended under Article 544.¹⁷⁷ This was known as *fuitina*, where a man abducts a woman, rapes her, and then marries her.¹⁷⁸ It was a practice that grew from sociocultural values surrounding marriage and patriarchy, and it depended on notions of honor and shame that based the value of women in the marriage market on family wealth and the condition of virginity.¹⁷⁹ The goal of reparatory marriage was to compensate for the harm done to the victim's family—"the loss of opportunity to contract marriage resulting from the loss of one's virginity."¹⁸⁰ This law was abolished in 1981.¹⁸¹

¹⁷⁰ *Id.* at 956. Pope Pius XI said weakening of paternal authority contributes to the breakdown of Italian family. *Id.*

¹⁷¹ *Id.* at 953.

¹⁷² *Id.* at 954.

¹⁷³ In English common law, rape was initially seen as a property crime. Only virgins could be raped, and the crime was seen as the devaluation of the father's property. Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1328 (2005).

¹⁷⁴ De Grand, *supra* note 169, at 962 n.77.

¹⁷⁵ *Id.* at 964.

¹⁷⁶ Vitale, *supra* note 165; *see generally* De Grand, *supra* note 169.

¹⁷⁷ *Id.*

¹⁷⁸ Vitale, *supra* note 165, at 57.

¹⁷⁹ *Id.*

¹⁸⁰ *See* Gladys Acosta Vargas, *Conceptualizing the Law from a Gender Perspective: Conceptions Regarding Victim and Accused*, 7 AM. U. J. GENDER SOC. POL'Y & L. 319, 327 (1998).

¹⁸¹ Vitale, *supra* note 165, at 57.

The drafters of the Rocco Code also ensured that there would be procedures in place that would protect men from false allegations of rape, for fear that women would use the “criminal process . . . for other purposes”¹⁸² such as blackmailing.¹⁸³ The drafters introduced an onerous procedure called the *querela*, whereby rape victims would be required to make a formal request to the prosecution’s office so the State could prosecute the alleged rapist.¹⁸⁴ The victim’s formal request was irrevocable.¹⁸⁵ The drafters thought that in making the victim’s statement irrevocable, they would deter false rape allegations from women seeking to blackmail men into arranged marriages under the *fuitina*.¹⁸⁶

It wasn’t until the 1970s, when a global wave of feminist scholars changed the discourse surrounding rape and victim’s rights, that jurisdictions started to change their laws. Italian feminists focused their efforts on developing a new understanding of gender relations and of the Italian family.¹⁸⁷ They challenged male authority over children and women, advocated to make divorce illegal and contraceptives available, and fought against the husband’s right to commit adultery.¹⁸⁸ These efforts led to major changes in rape law and how the state prosecuted sexual violence. In 1996, rape was reclassified in Article 609 from an honor crime to a crime against an individual.¹⁸⁹

A. *The Criminalization of Rape Under the Rocco Code and Somali Penal Code*

Other than being an almost “word for word replica”¹⁹⁰ of the fascist Rocco Code, each crime in the Somali Penal Code carries a minimum and maximum sentence, and the judge has discretionary powers to apply extenuating or aggravating circumstances.¹⁹¹ Sexual violence crimes fall under Crimes Against Morals and Decency—an emphasis on the fact that sexual assault is an immoral crime rather than a crime against bodily integrity or liberty.¹⁹² Somali laws have not benefitted from the feminist social revolution that swept most Western

¹⁸² Rachel A. Van Cleave, *Rape and the Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273, 288 (2007).

¹⁸³ *Id.* at 287.

¹⁸⁴ *Id.* at 274.

¹⁸⁵ *Id.* at 287.

¹⁸⁶ *Id.*

¹⁸⁷ Vitale, *supra* note 165, at 57.

¹⁸⁸ *Id.*

¹⁸⁹ Rachel Fenton, *Rape in Italian Law: Towards the Recognition of Sexual Autonomy*, in RETHINKING RAPE LAW 183 (Clare McGlyn & Vanessa Munro eds., 2010).

¹⁹⁰ GANZGLASS, *supra* note 17, at xiii.

¹⁹¹ *See generally* SPC, *supra* note 19.

¹⁹² *Id.*

jurisdictions in the 1970s due to a history of military dictatorship followed by a catastrophic civil war that has lasted three decades. As such, the Somali Penal Code has not changed since its publication in 1962.¹⁹³ As written, it is insufficient to tackle most crimes, especially GBVAW.¹⁹⁴ Additionally, there is no comprehensive national law that addresses GBVAW.¹⁹⁵ A very progressive federal Sexual Offenses Bill was submitted before parliament in 2018 but never debated.¹⁹⁶ It was pending in the lower house for two years.¹⁹⁷ Instead, in August 2020, the speaker of parliament in Mogadishu put forward a highly controversial new Sexual Intercourse Related Crimes Bill, which, if passed, would violate Somalia's international and regional legal obligations.¹⁹⁸ A revised Penal Code has been drafted but is yet to be approved.¹⁹⁹

The Somali Penal Code's article on rape is one example of an outdated provision influenced by the Italian legal system. The internationally recognized definition of rape is non-consensual penetration (however slight) of the vagina, anus, or mouth with a penis or other body part.²⁰⁰ It also includes penetration of the vagina or anus with an object.²⁰¹ Under the Rocco Code, rape was known as *violenza carnale* and punishable under Article 519: "Whoever, by violence or

¹⁹³ *Id.*; see also *Somaliland Criminal Law*, *supra* note 43.

¹⁹⁴ UNITED KINGDOM: HOME OFF., COUNTRY POLICY AND INFORMATION NOTE SOMALIA: WOMEN FEARING GENDER-BASED VIOLENCE LAW 5 (2018).

¹⁹⁵ *Id.* A very progressive federal Sexual Offenses Bill was submitted before parliament in 2018 but never debated. Instead, in August 2020, the speaker of parliament in Mogadishu put forward a highly controversial new Sexual Intercourse Related Crimes Bill, which if passed would violate Somalia's international and regional legal obligations. *Somalia Events of 2020*, HUM. RTS. WATCH (2020), <https://www.hrw.org/world-report/2021/country-chapters/somalia>.

¹⁹⁶ U.N. Human Rights Council, Report of the Independent Expert on the Situation of Human Rights in Somalia, ¶ 48, U.N. Doc. A/HRC/42/62 (2019).

¹⁹⁷ Nita Bhalla & Mohammed Omer, *Outrage as Somali Parliament Drafts Law Permitting Child, Forced Marriages*, REUTERS (Aug. 11, 2020), <https://www.reuters.com/article/us-somalia-women-rights/outrage-as-somali-parliament-drafts-law-permitting-child-forced-marriages-idUSKCN257200>.

¹⁹⁸ See Press Release, Special Representative of the Secretary-General, Special Representative of the Secretary-General on Sexual Violence in Conflict Expresses Deep Concern Regarding New Draft Somalia Legislation on Sexual Crimes (Aug. 11, 2020). The new bill allows for forced marriage and for child marriage. Additionally, it does not protect against rape and other forms of sexual violence. See Bhalla & Omer, *supra* note 195.

¹⁹⁹ A draft of a revised penal code was prepared in 2017 by Professor Paul H. Robinson of the University of Pennsylvania Law School for the Federal Government of Somalia and IDLO. See DRAFT REPORT OF THE SOMALI CRIMINAL LAW RECODIFICATION INITIATIVE, UNIV. PENN. LEGAL SCHOLARSHIP REPOSITORY (2017). However, the draft has yet to be approved. *Id.*

²⁰⁰ See GLOSSARY ON SEXUAL EXPLOITATION AND ABUSE, U.N. (2nd ed. 2017), https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%202017%5D%20-%20English_0.pdf ("Penetration – even if slightly – of any body part of a person who does not consent with a sexual organ and/or the invasion of the genital or anal opening of a person who does not consent with any object or body part").

²⁰¹ *Id.*

threats, compels another to have carnal intercourse.”²⁰² In Somali law, rape is similarly known as “carnal violence” and is enumerated in the Penal Code under Article 398: “Whoever with violence or threats has carnal intercourse with a person of the other sex.” The elements of the crime under the Rocco Code and Somali Penal Code include anyone who (1) with violence or threats (2) has carnal intercourse.²⁰³ However, the Somali Code includes a third element—the carnal violence must occur with a person of the opposite sex.²⁰⁴ The term “carnal intercourse” is defined as “penetration by the male sexual organ.”²⁰⁵ The purpose of this distinction is that under Somali law, homosexual relations are criminalized under a different article with aggravating circumstances.²⁰⁶

B. *The Problem with the “Resistance Standard” in Somali Rape Law*

Rape laws must, in their essence, define situations in which an act of sexual intercourse is a criminal act. A common formulation is that intercourse is criminal if it is against the will of the victim.²⁰⁷ The issue is then defining what exactly is “against the will of the victim.”²⁰⁸ When the law requires a victim to demonstrate resistance to prove that a sexual encounter was against her will, the requirement is known as the “resistance standard.”²⁰⁹

1. *Current Somali Rape Law Excludes Non-Violent Rape Cases from Criminal Courts*

The main element of rape under Somali law is the use of violence or threats against the victim.²¹⁰ The threat must convey immediate danger to the injured

²⁰² Rachel A. Van Cleave, *Sex, Lies, and Honor in Italian Rape Law*, 38 SUFFOLK UNIV. L. REV. 427, 447 n.159 (2005). See THE ITALIAN PENAL CODE, at 177 (Edward M. Wise trans., 1978). The 1996 law repealed this provision. Legge 15 febbraio 1996, n.66, G.U. Feb. 20, 1996, n.42, art. 1 (It.).

²⁰³ SPC, *supra* note 19, art. 398(1); Van Cleave, *supra* note 202, at 447 n.159.

²⁰⁴ SPC, *supra* note 19, art. 398(1).

²⁰⁵ *Id.* art. 398(4).

²⁰⁶ Under Somali law, a rape or sexual assault that occurs between two people of the same sex is classified as an “unnatural offense.” The crime is enumerated under Article 400 of the SPC and reads: “Where any of the acts referred to in articles 398 [carnal violence] and 399 [acts of lust committed with violence] is committed against a person of the same sex, or a person of different sex, against nature, the punishment shall be increased.” In other words, this article establishes the aggravating circumstances when rape or sexual assault encounter occurs between two people of the same sex. According to Article 118 of the SPC, the increase of a single aggravating circumstance shall be up to one-third of the basic punishment. *Id.* arts. 400, 118.

²⁰⁷ Susan Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A. L. REV. 567, 567 (1983).

²⁰⁸ *Id.*

²⁰⁹ See generally *id.*

²¹⁰ GANZGLASS, *supra* note 17, at 444.

party.²¹¹ This is shown in two ways: either the prosecution can prove the use of force by the defendant, or it must prove “extreme resistance” by the victim.²¹² Use of force by the defendant can be proven through eyewitness testimony, but this is unrealistic for a crime that is traditionally committed in a private setting. “Extreme resistance” is proven through bruises or marks on a woman’s body, which would be an indication that the accused used violence or forced her to submit.²¹³ Similarly, bruises or marks on the perpetrator’s body are used to show that the victim fought back.²¹⁴

However, rape is not always a violent crime. Rape is about exploitation, dominance, and control.²¹⁵ The offender is exploiting his power to force someone to submit to a sexual encounter.²¹⁶ There are social, economic, and political factors at play that influence this power dynamic.²¹⁷ For example, the 2020 SGBV case data²¹⁸ indicated that the alleged perpetrator was an immediate relative (6);²¹⁹ an older family friend (1);²²⁰ a stepparent (1); an employer (1);²²¹ an older school mate (1);²²² an older housemate (1);²²³ and (4) a teacher.²²⁴ In one case, a teacher told his fifteen-year-old female student that he would help her pass an exam on the condition that she have sex with him.²²⁵ The victim claimed that they had sex on multiple occasions.²²⁶ The only evidence presented by the prosecution was the victim’s statement.²²⁷ The court acquitted the defendant and held that this was a case of consensual sex because the victim was fifteen years old.²²⁸ There was no evidence to indicate resistance by the victim.²²⁹ Somali law does not make room to consider power dynamics in legal

²¹¹ *Id.*

²¹² *Id.*

²¹³ Interview with S. Mohamed, *supra* note 27.

²¹⁴ GANZGLASS, *supra* note 17, at 444.

²¹⁵ See generally Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147 (2011).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ This includes victims that were both male and female.

²¹⁹ Mogadishu GBV Case Data, *supra* note 1, cases dated Feb. 24, 2020, May 13, 2020, Sept. 27, 2020, Oct. 25, 2020, Dec. 8, 2020 (three female victims and three male victims).

²²⁰ *Id.* case dated Oct. 6, 2020 (a male victim).

²²¹ *Id.* case dated June 13, 2020 (a male victim).

²²² *Id.* case dated Oct. 25, 2020.

²²³ *Id.* case dated Sept. 22, 2020 (the older house mate was helping the younger victim with homework).

²²⁴ *Id.* cases dated Feb. 24, 2020, May 13, 2020, Sept. 27, 2020, Oct. 25, 2020, Nov. 18, 2020, Dec. 8, 2020.

²²⁵ *Id.* case dated June 10, 2020.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

reasoning because lack of consent is measured by the amount of resistance demonstrated by the victim.²³⁰ In many cases of sexual abuse where power dynamics are present, the force element cannot be established because the victim submits to unwanted sexual demands out of fear that they will be subjected to non-physical harm or as in the above case, manipulated into thinking that they had something to gain from a sexual exchange.²³¹ By using the resistance standard, the Somali Penal Code limits the definition of rape to a violent crime, meaning that victims who suffer from rape due to coercion or socioeconomic influence cannot bring their case before the criminal courts. If they do, they are accused of consenting to the sexual encounter.

2. *“Extreme Resistance Standard” Only Criminalizes Certain Type of Violent Rapes*

Even in rape cases where violence is used, finding proof of “violence or threats” is a challenge. The “extreme resistance standard” gives certain evidence an expiry date. Bruises and scratches can heal by the time the rape is reported and an investigation starts. In many of the 2020 SGBV cases, months passed between the date the sexual offense took place and the date the AGO opened the case.²³²

An “extreme resistance standard” also separates rape into different categories of violence and excludes “mildly violent” rape cases from the criminal court system. For example, if a perpetrator forcefully holds down a victim but does not bruise her, and she does not bruise or scratch him, then the prosecution will not have a case. In the cases studied for this article, not all victims had physical injuries to present as evidence.²³³ Only in eleven case files did the prosecution team make note of “bruises” or “injuries.”²³⁴

3. *Lack of Consent in Rape Law Overlooks Women’s Autonomy and Volition*

Consent is a major element in distinguishing between forced sexual penetration and consensual sexual relations. Because consent is excluded from the Somali definition of rape, Somali judges assess resistance to interpret

²³⁰ GANZGLASS, *supra* note 17, at 444; *see also* SPC, *supra* note 19, art. 398.

²³¹ Buchhandler-Raphael, *supra* note 215, at 153.

²³² Mogadishu GBV Case Data, *supra* note 1.

²³³ *Id.*

²³⁴ *Id.*

whether the victim consented to the sexual encounter.²³⁵ In a 2020 child rape case heard in Mogadishu, the court acquitted the accused and noted “that [the] victim would have defended herself if she was not consenting.”²³⁶ In other words, because the victim could not show that she fought off her attacker, the judge assumed that she had consented to the sexual encounter.

Not only is this conclusion based on the prevailing social myth that rape is always violent, but it also completely dismisses women as independent and autonomous beings. Under Somali judicial reasoning, there is no consideration given to the fact that a woman is allowed to choose her own sexual partner.²³⁷ She is either a victim of sexual violence or a consenting passive participant.²³⁸

Ultimately, rape is the impermissible interference with one’s sexual choices. A widely accepted theory about rape laws is that rape ought to be viewed as a violation of a right to exercise sexual autonomy.²³⁹ Sexual encounters should be evaluated by looking at women as equal partners in a sexual relationship, capable of making independent choices, and fully deserving of having those choices respected by their freely chosen sexual partner.²⁴⁰

a. Consent Should be Measured Through Clear and Unambiguous Words or Actions

Consent can be difficult to measure. Consent can range from a flat “no” to passive submission due to some form of exploitation. In one controversial case, an Indian court equated a “feeble no” with a “yes,” basing its judgement on the societal belief that women can be timid about expressing their sexual desires.²⁴¹ According to the court, the victim should have been more assertive.²⁴²

In response, legal scholars argue that an Affirmative Consent Standard should be used in the evaluation of rape cases.²⁴³ The Affirmative Consent

²³⁵ GANZGLASS, *supra* note 17, at 445 (“Marks on the face or other parts of the body of the accused showing resistance by the woman are good evidence that the woman did not consent.”).

²³⁶ Mogadishu GBV Case Data, *supra* note 1.

²³⁷ See SPC, *supra* note 19, art. 398.

²³⁸ *Id.*; see generally Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, 34 BERKELEY J. GENDER, L. & JUST. 30, 32 (2019).

²³⁹ Buchhandler-Raphael, *supra* note 215, at 201.

²⁴⁰ Little, *supra* note 173, at 1336.

²⁴¹ *Uncovering Patriarchal Undercurrents in the Quest for the ‘Genuine Rape Victim’: A Feminist Legal Theory Narrative of the Gendered Perceptions on Consent*, OXFORD POL. REV. (Sept. 24, 2020), <http://oxfordpoliticalreview.com/2020/09/24/uncovering-patriarchal-undercurrents-in-the-quest-for-the-genuine-rape-victim-a-feminist-legal-theory-narrative-of-the-gendered-perceptions-on-consent/>.

²⁴² *Id.*

²⁴³ Dhonchak, *supra* note 238, at 64.

Standard espouses the concept that sexual consent can never be assumed.²⁴⁴ For sexual intercourse to ensue, both parties must express consent through “clear and unambiguous words or actions.”²⁴⁵ If the other party declines, then the sexual activity must cease.²⁴⁶ If the other party continues without this clear consent then that party is guilty of rape, regardless of whether there was force or resistance.²⁴⁷ The Affirmative Consent Standard cannot apply in instances where the victim was impaired or incapacitated.²⁴⁸ If there is confusion on the issue of consent, then both parties must stop until they are clear on what has been consented to and what has not been consented to.²⁴⁹ In other words, affirmative consent must be voluntary, knowing, and competent.²⁵⁰

Most jurisdictions have abandoned the requirement of physical resistance as a measure of consent, noting that this standard is ill-suited to determine lack of consent.²⁵¹ Many jurisdictions are still grappling with how to define consent and whether the Affirmative Consent Standard is sufficient to eliminate gender bias in the courtroom. The United Kingdom has legislation that is clearly in line with the affirmative consent model.²⁵² Other European countries that have amended their rape laws to include consent (although not all are based on the affirmative model) include Sweden (2018), Iceland (2018), Greece (2019), and Denmark (2020).²⁵³ European countries that still maintain a resistance standard in their rape laws include Italy, France, and Poland.²⁵⁴ Canada does not have a stand-alone rape law, and consent is not expressly mentioned in the sexual assault provisions.²⁵⁵

²⁴⁴ See generally *id.*

²⁴⁵ Eric Sandoval, *The Case for an Affirmative Consent Provision in Rape Law*, 94 N.D. L. REV. 456, 469 (2019); see also Maura Lerner, *University of Minnesota to Adopt ‘Affirmative Consent’ Rule for Sex Partners*, STAR TRIBUNE (July 7, 2015), <http://www.startribune.com/university-of-minnesota-toadopt-affirmative-consent-rule/311650821/>.

²⁴⁶ Sandoval, *supra* note 245.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 470.

²⁵⁰ *Id.*

²⁵¹ Buchhandler-Raphael, *supra* note 215, at 159; see also Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 987–89 (2008).

²⁵² *Legislative Approaches to Rape in the EU*, GENPOL (June 11, 2019), <https://genpol.org/2019/06/legislative-approaches-to-rape-in-the-eu-outlining-case-study-examples/>.

²⁵³ *Let’s Talk About “Yes”: Consent Laws in Europe*, AMNESTY INT’L (Dec. 17, 2020), <https://www.amnesty.org/en/latest/campaigns/2020/12/consent-based-rape-laws-in-europe/>.

²⁵⁴ *Legislative Approaches to Rape in the EU*, *supra* note 252.

²⁵⁵ *An Estimation of the Economic Impact of Violent Victimization in Canada*, GOV. CANADA (2009), https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/tr14_01/p10.html (last updated Dec. 14, 2021).

b. Children Cannot Give Consent

By legal definition, a child is unable to provide consent because they are considered to be too young to fully comprehend the agreement into which they are entering. The Somali Penal Code recognizes that a child cannot provide consent.²⁵⁶ However, not all judges follow suit. In one case, a thirteen-year-old girl was raped after the perpetrator took her to a garden where they watched a pornographic video together.²⁵⁷ A medical report concluded that there had been recent sexual activity and that the hymen was broken.²⁵⁸ The court acquitted the defendant.²⁵⁹ The judge's reasoning was that the victim consented.²⁶⁰ The victim was thirteen years old and could not have legally consented.

In 2020, there were a reported forty-five cases of child sexual abuse to the Federal AGO in Mogadishu.²⁶¹ A "child" is defined as someone who is under eighteen years of age,²⁶² which is in line with the Somali Provisional Constitution and international human rights standards.²⁶³ However, the Somali Penal Code recognizes a child as someone who is under fourteen years of age.²⁶⁴ Most defendants were acquitted due to lack of evidence.²⁶⁵

Unfortunately, children are held to the same resistance standard in sexual assault cases as adults.²⁶⁶ They must show that they resisted their attacker with "extreme resistance," even though they have a significant physical disadvantage. Similarly, there is no consideration given to power dynamics that an adult may have over a child in rape cases. Coercion is very prominent in child abuse cases.

²⁵⁶ Under Article 401, whoever obtains someone who is incapable of giving consent (a minor under fourteen years of age)—for the purposes of rape, lust, or marriage—will be liable and subjected to punishments prescribed in the articles for acts of lust or unnatural offense. SPC, *supra* note 19, art. 104. Article 47 enumerates who can provide legal consent and refers to Article 59 (Persons Under Fourteen Years of Age) as not obtaining the "capacity of understanding." SPC, *supra* note 19, art. 47. Someone under legal capacity is "a person under 14 years of age" per Article 433. SPC, *supra* note 19, art. 433.

²⁵⁷ Mogadishu GBV Case Data, *supra* note 1, case dated Aug. 30, 2020.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Mogadishu GBV Case Data, *supra* note 1 (noting that in twenty-seven of those cases, the victim was female and in eighteen of those cases, the victim was a male).

²⁶² G.A. Res. 44/25, Convention on the Rights of the Child, art. 1 (Nov. 20, 1989).

²⁶³ *Id.*; see also Somali Constitution, *supra* note 52.

²⁶⁴ See SPC, *supra* note 19, arts. 432 ("a person who is under the age of 14 years"); SPC, *supra* note 19, art. 433 ("a person under 14 years of age"); SPC, *supra* note 19, art. 177 ("a minor under 14 years of age"); SPC, *supra* note 19, art. 565 ("under the age of 14 years").

²⁶⁵ Mogadishu GBV Case Data, *supra* note 1.

²⁶⁶ See generally *id.* Children cannot provide consent. However, judges will not always follow this. There is also an issue that the Penal Code considers a child to be someone under fourteen years of age instead of someone under eighteen years of age. *Id.*

For example, one case file notes that an elderly defendant lured a young girl under the age of ten to an isolated place with the promise of sweets before raping her.²⁶⁷

The “extreme resistance” standard is ill-suited to define an encounter that was “against the will of the victim.” Not all rapes are violent, and the “extreme resistance” standard overlooks coercion by the perpetrator. Power dynamics between men and women, as well as between adults and children, need to be considered by judges. By narrowly defining the act of rape as one of violence, the female narrative is left out. In sum, what the woman wants does not matter, so long as she does not get hurt. However, merely implementing a standard of consent is not enough; legal analysis in Somali courtrooms should include an Affirmative Consent Standard. Absent a verbal “no,” judges must consider the power dynamics at play that might force a victim into an unwanted sexual situation. Finally, judges must remember that children can never consent.

V. VICTORIAN ENGLAND AND SOMALIA’S EVIDENCE LAW

Like Italy, Britain’s legacy can be seen in Somalia’s criminal legal regime. Britain took control of the territory of Somaliland in 1884 and governed it from India.²⁶⁸ As a result, the laws of British India were transposed onto Somaliland.²⁶⁹ Under British governance, criminal procedure in Somaliland was based on the Indian Code of Criminal Procedure and the Indian Evidence Act of 1872.²⁷⁰ After the unification of Italian Somalia and British Somaliland in 1960, the new country of Somalia retained the criminal procedure code from the

²⁶⁷ Mogadishu GBV Case Data, *supra* note 1, case dated Oct. 5, 2020.

²⁶⁸ Up until 1898, British Somaliland was administered from British India. Clause 10 of the Somaliland Order in Council 1899 confirmed that “subject to the other provisions of the Order, the Code of Criminal Procedure and the other enactments relating to the administration of the criminal justice in India, for the time being applicable to the Protectorate shall have effect.” Clause 18 of the 1929 Somaliland Order in Council, which repealed the 1899 Order, reiterated the same provisions. The Code, as applied in Somaliland, was set out in Somaliland Criminal Procedure Ordinance No. 4 of 1926 (September 6, 1926) with some amendments to suit the Somaliland circumstances. Section 2 of the Code stated that it applied to ‘all criminal proceedings’ and confirmed that all offences under the (Indian) Penal Code shall be “investigated, enquired into, tried, and otherwise dealt with according to the provisions” of the Code. The Code was since then amended on many occasions, primarily to accommodate the developments and changes in the court structures and the changes made to the Indian CPC. By the 1950s, the Criminal Procedure Code consisted of thirty-nine chapters containing 418 sections and four schedules dealing with magistrate’s fees, tables of the Penal Code offences, ordinary powers of magistrates, and powers of the District Courts. *Somaliland Criminal Law*, *supra* note 43.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

British Raj.²⁷¹ For example, Mr. Contini writes that the Somali “rules of evidence were taken, with a few changes, from the Indian Evidence Act.”²⁷²

A. Victorian-era Legal Theories on Rape Law

Because the Somali Criminal Procedure Code originates from British India, it is worth noting the circumstances in which the Indian Evidence Act came into existence. Elizabeth Kolsky, associate professor of History and Director of Asian Studies at Villanova University, writes that, despite the British promise of a more modern and humane criminal law, “English common law presumptions about the frequency of false charges and a suspicion of a woman’s claims combined with colonial insistence on the peculiarity of Indian culture [made it] difficult for victims of rape to prevail in court.”²⁷³ In fact, the crime of rape in colonial India “largely reflected contemporary trends back home in England.”²⁷⁴

At the time, Victorian era legal trends on rape were rife with gender myths and biased assumptions.²⁷⁵ An 1872 rape case became *cause célèbre* when a barmaid accused her employer of attempted rape.²⁷⁶ Initially, the accused was convicted of aggravated assault; however, he was released after his lawyer claimed that the victim came to his office and confessed that she “made up the whole incident.”²⁷⁷ The victim subsequently stood by her claims but it was too late; the accused was released, the judge penned a letter saying he was “duped” by the girl, the media “called for her prosecution for perjury,” and the government dropped the case.²⁷⁸ Records of rape trials reflected that English judges took into consideration the status of the accused; if his occupational status was higher than that of a soldier then he received a lesser sentence.²⁷⁹ In the 1870s, English judges were known to “side-step the law in rape cases” by

²⁷¹ Contini - *Integration of Legal Systems*, *supra* note 18, at 1093.

²⁷² *Id.*

²⁷³ Elizabeth Kolsky, *The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57*, 69 *J. ASIAN STUD.* 1093, 1093 (2010).

²⁷⁴ *Id.* at 1095. Kolsky also writes: “In early colonial India, as elsewhere in the British Empire, the institutional treatment of rape was contradictory: in theory, it was harshly punished by law, but in practice, assumptions about female mendacity prompted a rigorous interrogation of their claims in court.” *Id.* at 1104.

²⁷⁵ The Victorian era was the period of Queen Victoria’s reign, from June 20, 1837, until her death on January 22, 1901. *Victorian Britain: A Brief History*, HIST. ASS’N, history.org.uk/primary/resource/3871/victorian-britain-a-brief-history. It was during this time that the Indian Evidence Act came into existence. *Id.*

²⁷⁶ Carolyn A. Conley, *Rape and Justice in Victorian England*, 29 *VICTORIAN STUD.* 519, 522 (1986).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 523.

dismissing rape cases that were on the calendar without hearing any evidence.²⁸⁰ If there was no proof of resistance, such as bruises or marks on the victim or accused, judges advised juries that the crime was not rape.²⁸¹ Judges and juries even assumed consent in a rape case if the victim and defendant were “even slightly acquainted.”²⁸² Generally, rape trials reflected an extreme concern for false rape accusations and the need to protect the liberty of respectable men.

The most prominent figure in English legal thinking on rape from the 18th century and well into the Victorian era was Sir Matthew Hale.²⁸³ Hale defined rape as vaginal penetration by a man or men of a female above the age of ten years old against her will.²⁸⁴ He was especially concerned with the “perceived problem of false charges,” and so he framed rape victims as a special class of witnesses to whom special cautionary rules apply.²⁸⁵ In contrast to most crimes, where the prosecution must establish the *actus reus* and *mens rea* of the accused, Hale’s strict evidentiary requirements concentrated on the victim, placing her at the center of the trial.²⁸⁶ A victim’s claim and credibility required strict corroborative evidence requirements to prove the facts set forth in trial.²⁸⁷ Some of these evidence requirements focused on her “character, body and behaviour [sic]” in order to support the presumption that the victim consented to sex and then lied about it.²⁸⁸ For example, a woman’s prior sexual history, how quickly she reported the crime, and proof of resistance (such as bruises) were all considered crucial pieces of evidence.²⁸⁹

²⁸⁰ *Id.*

²⁸¹ Most judges and juries assumed that anything less than a violent struggle implied that the act had not been against the will of the woman. Justice John Mellor of the Queen’s Bench advised on jury that a case “might turn out not to be a rape as there were no marks of violence upon the person of the prosecutrix.” In another case, a soldier was acquitted of rape because the victim had “evidently, to a certain extent, been consenting as her injuries were very slight.” *Id.* at 524.

²⁸² *Id.*

²⁸³ Kolsky, *supra* note 273, at 1096. One of Sir Hales’ most cited quotes was that the allegation of rape is a charge “‘easily to be made and hard to be proved, and harder to be defended by the party accused, tho [sic] never so innocent.” Isabelle Barraquiel Reyes, *The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy*, 12 UCLA WOMEN’S L.J. 355, 360 (2003).

²⁸⁴ Kolsky, *supra* note 273, at 1096.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 1096–97.

²⁸⁹ *Id.* at 1097; see also Téa Braun, *Dark Side of the Moon: The Legacy of British Sexual Offences Laws in the Commonwealth* (June 17, 2014), https://www.humandignitytrust.org/wp-content/uploads/resources/British_colonial_sexual_offences_legacy-Tea_Braun.pdf. The substantive rules have been completely overhauled in the Sexual Offences Act 2003. Applicable rules of evidence such as the regulation of the admissibility of sexual experience evidence and the admissibility of evidence of recent complaint have also been reformed: sections 41–43 of the Youth Justice and Criminal Evidence Act 1999, sections 41–43 and the Criminal Justice Act 2003, section 120, respectively. In sexual offense cases, Crown Prosecutors are told “It

Hale's impact was significant in India, "as the upper-level judges, who were all British, frequently cited him in their legal opinions."²⁹⁰ Colonial Indian judges generally emphasized the importance of protecting defendants against false claims from female rape victims.²⁹¹ Generally, women's claims were regarded with great suspicion—"women were positioned by the courts in *ad dual* role as complainants (charging rape) and defendants (dispelling the presumption of consent)."²⁹² In order to protect the defendant in rape trials, cautionary rules like the corroborative evidence requirement and evidentiary rules—like the introduction of the victim's "immoral character"—were used in rape cases.²⁹³ Even though the Evidence Act of 1872 is still in effect today, since 1952, India has largely recognized that the corroborative evidence is harmful to the victim,²⁹⁴ and evidentiary rules that are biased towards a female rape victim have largely been amended.²⁹⁵ In fact, it is widely recognized that the general reputation of the victim has no bearing on whether she was raped.²⁹⁶ Many countries have enacted "rape shield laws" that explicitly bar the admission of

is essential that prosecutors do not introduce a requirement for corroboration in their review process or identify the 'one versus one' feature of the case as a negative in their assessment of the evidence. One person's word can be sufficient to provide a realistic prospect of conviction. A jury can and does convict in such cases." *Rape and Sexual Offences - Chapter 2: Applying the Code for Crown Prosecutors to Rape and Serious Sexual Offences*, CODE CROWN PROSECUTORS (May 21, 2021), <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-2-applying-code-crown-prosecutors-rape-and-serious>.

²⁹⁰ Kolsky, *supra* note 273, at 1097.

²⁹¹ *Id.* at 1104.

²⁹² *Id.* at 1106.

²⁹³ *Id.* at 1104.

²⁹⁴ Courts emphasized that the social repercussions of rape for a woman in India were too grave for her to make false allegations of rape. For example, in 1952, in *Rameshwar v. State of Rajasthan*, the Supreme Court reasoned against corroboration of the rape victim's testimony by distinguishing rape victims in India and in the Western World in the following words: "Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile." In spite of such significant rulings, however, which privileged the uncorroborated testimony of the rape victim, case law evidence suggests that the reality has been rather different. Indeed, complainant credibility has been very much on trial, as observed in the horrific judgment of the Supreme Court of India in *Tukaram v. State of Haryana* in 1979. In *Tukaram*, two policemen were acquitted of charges of rape when the court refused to believe that the seventeen-year-old tribal girl, Mathura, was raped by the policeman even though sexual intercourse with her in the police station by the police constable was proven. Ravinder Barn & Ved Kumari, *Understanding Complainant Credibility in Rape Appeals: A Case Study of High Court Judgments and Judges' Perspectives in India*, 55 BRITISH J. CRIM. 435, 435–53 (2015).

²⁹⁵ Article 155(4) allows the impeachment of a female rape victim with the introduction of her "immoral character" has been removed since 2003, and a new provision (Article 146) that makes it impermissible to cross-examine a prosecutrix in a rape trial on her immoral character. See The Indian Evidence Act (Amendment) 2002, Act No. 4 of 2003 (Dec. 31, 2002), <https://indiankanoon.org/doc/1555515/>.

²⁹⁶ *To the Government of Pakistan Legislative and Regulatory Reform*, HUMAN RTS. WATCH REP. (1999), <https://www.hrw.org/reports/1999/pakistan/Pakhtml-02.htm>.

reputation or opinion evidence relating to a woman's past sexual behavior in rape cases.²⁹⁷

Similarly, Pakistan, which used the Indian Evidence Act and retained similar provisions in its own post-independence Evidence Act, has also made amendments.²⁹⁸ However, similar amendments have not occurred in Somalia. Victorian-era gender myths that are embedded within the Indian Evidence Act and transposed within Somali Criminal Procedure—namely the fear of false accusations—still permeate Somali evidence law.

B. *The Corroborative Evidence Requirement in Somalia*

A big obstacle that women face in the Somali courtroom is the corroborative evidence requirement, which stems from Hale's philosophy that a woman's testimony alone is insufficient to support a rape claim due to the preponderance of sham rape charges. The corroborative evidence requirement is not expressly stipulated within the Somali Code of Criminal Procedure.²⁹⁹ However, Somali judges have followed the corroborative evidence requirement in rape cases since the 1960s.³⁰⁰ The Supreme Court of the Somali Republic held in *Ibrahim Idris Saed v. State* that the evidentiary rule to prove cases of rape cannot be based solely on the woman's testimony.³⁰¹ The court elaborated that "there should be some corroborating evidence to show that the crime was, in fact, committed and that the accused was the man."³⁰²

In order to satisfy the corroborative evidence requirement, judges look for a combination of evidence beyond the victim's statement.³⁰³ Examples include forensic evidence, medical reports, a confession, or eyewitnesses.³⁰⁴ Because forensic capabilities in Somalia are limited, and medical reports are unreliable,

²⁹⁷ *Id.*

²⁹⁸ Pakistan repealed the "immoral character" rule, deeming it unconstitutional and a violation of the principles of gender equality enshrined in the Holy Qur'an. Initially, Pakistan replaced the colonial Evidence Act of 1872 with its own, Qanun-e-Shahadat Order 1984 ('The 1984 Order'), with minimal revisions. The 1984 order's Article 151 (4) was the Pakistani equivalent to section 155(4) of India's "immoral character" provision. In 2009, this provision was challenged before the Federal Shariat Court, and in spite of heavy opposition, the court decided to repeal it altogether, declaring it unconstitutional. Nabila Kauser, Syed Tanzil Ahmed & Chowdhury Albab Kadir Abir, 'Virtue' of Rape Victims: If Pakistan and India Declared it Irrelevant, Why Can't We?, BUS. STANDARD (Feb. 11, 2021), <https://www.tbsnews.net/thoughts/virtue-rape-victims-if-pakistan-and-india-declared-it-irrelevant-why-cant-we-200077>.

²⁹⁹ See CPC, *supra* note 19.

³⁰⁰ GANZGLASS, *supra* note 17, at 445.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*; see also Mogadishu GBV Case Data, *supra* note 1.

³⁰⁴ GANZGLASS, *supra* note 17, at 445; see also Mogadishu GBV Case Data, *supra* note 1.

the two forms of corroboration most available in GBVAW cases are a confession from the alleged perpetrator or statements from eyewitnesses.³⁰⁵ According to the Federal AGO, two adult eyewitnesses are sufficient to prove a rape case in the Somali courtroom.³⁰⁶ The eyewitnesses do not necessarily have to see the act taking place; rather, it is sufficient that they heard screams from the victim or witnessed the immediate aftermath, (e.g. bruises, the victim crying, etc.).³⁰⁷ It is unclear where the requirement for two adult witnesses originates. Under classical Islamic law, the evidentiary standard for proving rape included four adult male eyewitnesses or a confession by the perpetrator.³⁰⁸

C. *Obstacles in Meeting the Corroborative Evidence Requirement*

Under Somali law, the two eyewitnesses must be adults.³⁰⁹ In one Mogadishu rape case, a group of three children reported a rape to the victim's parents, saying that they saw the accused having sex with the victim on the beach.³¹⁰ During the trial, the prosecution admitted the testimony of only two of the children.³¹¹ The court held that the evidence presented was insufficient and that the eyewitness testimony of the two children could not qualify as grounds for a conviction unless other corroborating evidence was brought forward.³¹²

In a second Mogadishu case, a twenty-one-year-old woman was returning home to a refugee camp after selling vegetables in a local market when she was abducted by two men, dragged into a bushy area, beaten, and raped.³¹³ After the rape, a passerby heard her screaming and took her to the nearest hospital, where she was treated for her injuries, including vaginal wounds.³¹⁴ The two defendants denied the rape charge and accused the victim of lying.³¹⁵ The prosecutor's evidence included the medical report, the victim's testimony, and witness testimony.³¹⁶ The court requested that the prosecutor collect more evidence to establish the crime.³¹⁷

³⁰⁵ Based on case data and author's experience.

³⁰⁶ Interview with S. Mohamed, *supra* note 27.

³⁰⁷ *Id.*

³⁰⁸ JOHN L. ESPOSITO & NATANA J. DELONG-BAS, SHARIAH: WHAT EVERYONE NEEDS TO KNOW 210 (2018).

³⁰⁹ Interview with S. Mohamed, *supra* note 27.

³¹⁰ Mogadishu GBV Case Data, *supra* note 1, cased dated Feb. 1, 2020.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* case dated Nov. 10, 2020.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

Out of the fifty-four SGBV cases that were fully adjudicated in Mogadishu in 2020, only seven cases resulted in a conviction.³¹⁸ In six cases, the judge convicted the defendant based on the prosecutor being able to submit into evidence the defendant's confession.³¹⁹ In only one case, the judge convicted the defendant because there were two eyewitnesses to corroborate the victim's testimony.³²⁰ The remaining cases were either dismissed or the defendant was acquitted due to the prosecutor not being able to satisfy the corroborative evidence rule.³²¹

1. *Moving Away from Corroboration*

The corroboration requirement is a rule of practice and not a legal requirement. Indeed, the Somali Criminal Procedure Code does not require that the prosecution produce two adult eyewitnesses or forensic evidence to establish a rape crime.³²² The court may convict someone in a sexual offense case without corroboration.

Similar to Somalia, Pakistan is an Islamic jurisdiction with evidence laws that stem from the Indian Evidence Act of 1872.³²³ In Pakistan, the corroboration requirement is a "rule of abundant caution" and not a default rule.³²⁴ In other words, Pakistani case law shows that a victim's direct testimony evidence is sufficient to establish the charge. Its application is only used when the Court is not satisfied with the evidence.³²⁵ Such was the Supreme Court's ruling in *Shakeel and Others v. The State*, which found that the victim's statement was sufficient and corroborating evidence not necessary.³²⁶

³¹⁸ *Id.* Three convictions for rape, two convictions for "unnatural offense," which under the Somali Penal Code is same-sex rape, and one conviction for sexual assault. *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* The evidence that the prosecution presented included a medical report, the victim's statement, and two eyewitness testimonies. The accused denied the charges, but the court determined that there were ordinary aggravating circumstances in the case and sentenced the defendant to more than six years in prison and a \$1,500 USD fine. *Id.*

³²¹ *Id.*

³²² See generally CPC, *supra* note 19.

³²³ See generally The Indian Evidence Act, 1872.

³²⁴ See ASIAN DEVELOPMENT BANK, COURT COMPANION ON GENDER-BASED VIOLENCE CASES 133 (Zarizana Abdul Aziz & Maria Cecilia T. Sicangco eds., 2021) [hereinafter ADB Pakistani Court Companion]; see also Abdul Rashid v. State, (2003) SCMR (Sindh) 799 (Pak.).

³²⁵ ADB Pakistani Court Companion, *supra* note 324, at 133.

³²⁶ *Id.* at 138; Shakeel v. State, (2011) PLJ (SC) 1 (Pak.).

In *Shakeel*, the victim was held by the four accused and given sedatives.³²⁷ She was semiconscious and subjected to rape by the accused.³²⁸ The victim reported the rape to the police three days later.³²⁹ The accused was convicted in criminal court.³³⁰ On appeal to the Supreme Court, appellants argued (1) the victim was a “lady of easy virtue,” (2) her statement should be discarded, (3) delay in reporting indicated concoction, (4) her initial report to police was “not supported by any member of her family,” and (5) semen did not prove rape and it did not identify the appellants.³³¹ Furthermore, they contended there was no corroboration of her evidence.³³²

The Supreme Court of Pakistan held that there was no reason to disbelieve the victim and that a conviction could be handed down solely on her testimony.³³³ The Court stated that even if she was a girl of “easy virtue, no blanket authority can be given to rape her by anyone who wishes to do so.”³³⁴ Furthermore, the Court went on to say:

[A]s a rule it is not necessary that there [should] be corroboration in every particular [case], all that is necessary is that the corroboration must be such as to [a]ffect the accused by connecting or tending to connect him with the crime. . . . To say that certain witnesses require corroboration and then to lay down that the corroborative evidence must show that the accused did not do the precise act attributed to him by the witnesses is tantamount to doing away with the evidence of those witnesses.³³⁵

In other words, victim’s testimony holds value in Pakistani rape cases, and not all cases must be substantiated by corroboration.

Other legal jurisdictions in Africa have recently held that the corroboration requirement is “not necessary in law and the court may act on a testimony of a single witness if it is fully satisfied that the evidence points to the culpability of the accused.”³³⁶ The High Court of Kenya has held that this was especially true in cases of child sexual abuse, as long as the judge had strong reasons to believe

³²⁷ ADB Pakistani Court Companion, *supra* note 324, at 138.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*; *Shakeel v. State*, (2011) PLJ (SC) 1 n.26 (Pak.).

³³⁴ ADB Pakistani Court Companion, *supra* note 324, at 138; *Shakeel v. State*, (2011) PLJ (SC) 1 n.26 (Pak.).

³³⁵ ADB Pakistani Court Companion, *supra* note 324, at 138–39.

³³⁶ *Amkwach v. Republic* (2016) K.L.R. (Kenya).

that the child was telling the truth.³³⁷ Other African jurisdictions that have abandoned the corroboration requirement include Uganda, Malawi, South Africa, and Namibia.³³⁸ As well as Tanzania and Zimbabwe.³³⁹

D. Cautionary Rules and Character Evidence in Somali Rape Cases

The corroborative evidence requirement, as it stands, is a tremendous burden on the victim. Because of limited forensic evidence capacity and the unlikely scenario of a confession, Somali rape victims must typically rely on producing two adult eyewitnesses to substantiate their claim. Even if they meet this harsh standard, they will still encounter hurdles in Somali evidence law that are designed to protect men from false rape accusations, namely additional cautionary rules. First, the defense is allowed to impeach the female rape victim through the introduction of evidence supporting the claim that the victim is of “immoral character.”³⁴⁰ The policy behind this rule is to discredit the victim and allow the defense an opportunity to bring forth proof of a sham accusation. Second, medical evidence is often used as an “objective” tool to assess the past sexual history of the woman.³⁴¹ If a medical report references the woman’s sexual habituation or lack of virginity, the judge will often rely on this information in deciding whether sexual penetration took place.³⁴²

1. The Immoral Character Rule – Impeaching the Victim

The Somali Penal Code has a provision that is unique to rape cases and exclusively applies to female victims. In cases of sexual violence where the female victim is over sixteen years of age, Article 197 of the Criminal Procedure Code allows for the admission of evidence to show that the victim “was of immoral character.”³⁴³ This article permits defense counsel to cross-examine the victim to show that she is of “immoral character.”

This is a broad standard. The Criminal Procedure Code does not define “immoral character” or specify which evidence is admissible as proof of it. The

³³⁷ BKM v. Republic (2018) K.L.R. (Kenya) (referencing Bernard Kebiba v. Republic (2000) K.L.R. (Kenya)).

³³⁸ Carmel Rickard, *High Court Judges Finds ‘No Place’ for Sexual Offences Corroboration Rule in Malawi*, AFRICAN LII (Oct. 1, 2020), <https://africanlii.org/article/20201001/high-court-judge-finds-%27no-place%27-sexual-offences-corroboration-rule-malawi>.

³³⁹ JANICE DU MONT & DEBORAH WHITE, *THE USES AND IMPACTS OF MEDICO-LEGAL EVIDENCE IN SEXUAL ASSAULT CASES: A GLOBAL REVIEW* 35 (2007).

³⁴⁰ CPC, *supra* note 19, art. 197.

³⁴¹ Mogadishu GBV Case Data, *supra* note 1; *see also* Mitra & Satish, *supra* note 130, at 52.

³⁴² Mitra & Satish, *supra* note 130, at 56.

³⁴³ CPC, *supra* note 19, art. 197.

case data shows that sometimes the defense will introduce evidence that the victim was found in compromising positions with the defendant, like drinking alcohol with him³⁴⁴ or kissing him,³⁴⁵ and that she cried rape in order to avoid responsibility for her actions. It is unclear whether these activities, which would be considered outside of the “norm” for Somali society, would meet the standard of proof for “immoral character.” Both of the above cases were withdrawn and resolved out of court.³⁴⁶

The immoral character rule can be used to introduce evidence of past sexual history to attack or create doubt about the veracity of the victim’s claim. In one Mogadishu case, the defense introduced evidence that the victim and defendant were in a relationship prior and that she “allowed him to touch her before.”³⁴⁷ Allowing the introduction of a victim’s past sexual history plays on the myth that the more a woman consents to one sexual activity, the more she will consent to other sexual activity. Introducing evidence of the victim’s prior sexual history to undermine the credibility of the victim shifts the focus away from the acts of the alleged perpetrator and onto the victim, which results in victim blaming.

Other former British colonies have or have had almost the exact same “immoral character” cautionary rule, including Kenya,³⁴⁸ India,³⁴⁹ Pakistan,³⁵⁰ and Bangladesh.³⁵¹ The immoral character rule most likely originates from a combination of Hale’s legal theory and the British approach towards governing its former empire. First, in Victorian and Edwardian courtrooms, evidence in a

³⁴⁴ Mogadishu GBV Case Data, *supra* note 1, case dated Apr. 9, 2020.

³⁴⁵ *Id.* case dated May 13, 2020.

³⁴⁶ *Id.*

³⁴⁷ Mogadishu GBV Case Data, *supra* note 1.

³⁴⁸ The Evidence Act (1963) Cap. 80 §163 (Kenya) (“when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.”).

³⁴⁹ The Indian Evidence Act, 1872, §155(4) (“when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”). Section 155(4) was repealed in 2003. See The Indian Evidence (Amendment) Act, 2002.

³⁵⁰ Qanun-e-Shahadat Order 1984 (Law of Evidence), art. 151 (1984) (Pak.) (“Impeaching credit of witness: The credit of a witness may be impeached in the following ways [:] . . . (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”) It was omitted by the Criminal Law (Amendment) (Offences Relating to Rape) Act 2016; see Rida Tahir, *Supreme Court of Pakistan Delivers Landmark Judgment on Sexual Violence*, LONDON SCHOOL OF ECONOMICS: WOMEN, PEACE & SECURITY BLOG (May 11, 2021), [https://blogs.lse.ac.uk/wps/2021/05/11/supreme-court-of-pakistan-delivers-landmark-judgement-on-sexual-violence/#:~:text=worthy%20of%20belief-.Art.,Relating%20to%20Rape\)%20Act%202016](https://blogs.lse.ac.uk/wps/2021/05/11/supreme-court-of-pakistan-delivers-landmark-judgement-on-sexual-violence/#:~:text=worthy%20of%20belief-.Art.,Relating%20to%20Rape)%20Act%202016).

³⁵¹ The Evidence Act, 1872, §155(4) (Bangladesh) (“when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”) The law is set to be repealed; See Maya Oppenheim, *Bangladesh to Bar Colonial-Era ‘Immoral Character’ Test in Rape Cases*, THE INDEP. (Mar. 16, 2022), <https://www.independent.co.uk/asia/south-asia/bangladesh-character-certificate-rape-victims-b2037541.html>.

rape trial included the assessment of a victim's character.³⁵² Even as late as the 1960s, one English judge remarked: "that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute."³⁵³ Second, the British approach towards its colonial subjects was one of caution and suspicion, which was reflected in colonial laws.³⁵⁴ Generally, imperial subjects were seen as less reliable, and "colonized women were seen as possessing a heightened form of sexuality."³⁵⁵ Laws governing sexual behavior were meant to protect the colonizers against moral lapses.³⁵⁶

In Pakistan, the immoral character cautionary rule was used in rape trials by defense counsel until it was repealed in 2016.³⁵⁷ Section 151 of the Evidence Act gave the defense counsel permission to attack the victim's character by suggesting that she was immoral (for instance, that she was habituated to sex).³⁵⁸ "Character attacks were principally based on the argument that the victim was "impure," and therefore, not credible."³⁵⁹ This rule was applicable only to rape trials and not to any other offenses.³⁶⁰

The Supreme Court of Pakistan in *Atif Zareef v. The State* strongly advised the court against using the victim's character, including her past sexual history, in a rape case.³⁶¹ The Court reiterated:

[T]he real fact-in-issue is whether or not the accused committed rape on her. If the victim had lost her virginity earlier, it does not give to

³⁵² Louise A. Jackson, *Sexual Assault, Criminal Justice and Policing Since the 1880s*, HIST. & POL'Y, https://www.historyandpolicy.org/kl/ljackson_text.pdf.

³⁵³ See *R v. Henry* (1968) 53 Cr. App. R 150, 153 (Eng.) ("human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.")

³⁵⁴ See generally *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, HUMAN RTS. WATCH (Dec. 17, 2008), <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>.

³⁵⁵ See generally *id.*

³⁵⁶ *Id.*

³⁵⁷ ADB Pakistani Court Companion, *supra* note 324, at 140. Some provinces expounded upon the 2016 provision repeal and further clarified that past sexual conduct of the victim is immaterial and irrelevant. For example, the Punjab Witness Protection Act, 2018 Section 12(3) Rules of cross-examination: "The court shall forbid a question to the victim of a sexual offence relating to any sexual behavior of the victim on any previous occasion with the accused or any other person, unless such a question, in the opinion of the court, is a relevant fact in the case." *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 140.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 141.

anyone the right to rape her. In a criminal trial relating to rape, it is the accused who is on trial and not the victim. The courts should also discontinue the use of painfully intrusive and inappropriate expressions, like “habituated to sex”, “woman of easy virtue”, “woman of loose moral character”, and “non-virgin”, for the alleged rape victims even if they find that the charge of rape is not proved against the accused. Such expressions are unconstitutional and illegal.³⁶²

Judges always have discretion to prevent the introduction of unnecessary and irrelevant evidence. If there are questions about the admissibility of prior sexual acts, then the judge should hold a closed hearing in chambers to decide if the evidence is admissible or not. The lawyer who is trying to admit the evidence of prior sexual acts should provide detailed legal reasoning as to why the prior sexual act is relevant.

2. *Medical Report as an “Objective Tool” to Assess Sexual Habitation*

Another cautionary rule (more accurately, a practice) is the overreliance by Somali judges on medical reports. Medical reports in Somalia may comment on the state of the victim’s hymen and whether the victim sustained any physical injuries.³⁶³ For example, in one GBVAW case, the medical report determined that the “girl was circumcised, hymen was broken, and [there were] signs of fresh vaginal wounds.”³⁶⁴ Together, the medical report, which allegedly proved penetration, and the defendant’s confession, which linked the perpetrator to the crime, were enough to convict the defendant.³⁶⁵ However, sexual penetration will not always leave behind physical evidence, and judges mistakenly believe that the medical report will conclusively determine whether rape occurred.³⁶⁶ Often, the medical report will not show signs of sexual assault or sexual penetration.³⁶⁷ As a result, the judge will rule that no rape occurred by citing the medical report as contradicting the victim’s statement.³⁶⁸ Judges’ overreliance on medical reports is due to a lack of knowledge of the female anatomy, a misunderstanding of how a rape victim should behave, and biases toward women. Moreover, judges assume, contrary to scientific consensus, that a medical report can attest to a woman’s sexual history.³⁶⁹

³⁶² *Id.*

³⁶³ Mogadishu GBV Case Data, *supra* note 1.

³⁶⁴ *Id.* case dated Aug. 9, 2019.

³⁶⁵ *Id.* It is worth noting that without the confession, the defendant would probably have been acquitted. *Id.*

³⁶⁶ *See generally id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

a. A Medical Exam is Different from a Forensic Medical Exam

Even though most Somali medical practitioners can perform a standard medical exam, not all of them are able to conduct a sexual assault forensic medical exam. A forensic medical exam is different from a medical exam.³⁷⁰ The former addresses the victim's health concerns as they relate to a sexual assault and allows the examiner an opportunity to collect and preserve forensic evidence, such as DNA evidence, debris, foreign materials, blood, saliva, buccal material, and clothing, among other things.³⁷¹ Most forensic medical examiners are trained how to properly collect evidence, conduct tests, analyze results, and provide expert opinions.³⁷² In Somalia, medical practitioners have not yet received training in forensic medical examinations.³⁷³ Moreover, many Somali women refuse pap smears because it is an invasive process and runs contrary to cultural norms.³⁷⁴

In a few cases, Somali forensic scientists have successfully obtained DNA evidence from sexual assault crime scenes.³⁷⁵ Somalia has two forensic labs, the Forensic Science Laboratory (FSL) in Mogadishu and the Bureau of Forensic Science (BFS) in Garowe, Puntland.³⁷⁶ The FSL is equipped to carry out forensic tests relating to counter-terrorism, such as ballistics and lifting latent fingerprints.³⁷⁷ The BFS, conversely, can perform DNA testing.³⁷⁸ In 2019, the BFS was instrumental in convicting three men in a sexual assault case by analyzing DNA evidence—the first time that DNA evidence was ever used in a

³⁷⁰ *What is a Forensic Medical Exam?*, W.V.A. FOUND. RAPE INFO. & SERV., <https://www.fris.org/SANes/WhatisExam.html>.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ See Hussein Yussuf Ali, *BREAKING THE SILENCE: A CONTEXTUAL ANALYSIS OF THE BARRIERS, LAWS AND POLICIES TO SAFE ABORTION FOLLOWING RAPE IN PUNTLAND 6* (Somali Institute for Development Research and Analysis, 2021) (enumerating challenges that women have, including lack of available rape kits, “lack of awareness at the community level in terms of services and laws, a lack of health services and a scarcity of trained staff to administer the drugs of the Rape Kit”).

³⁷⁴ *Id.*; see GHEBRE RG, SEWALI B, OSMAN S, ET AL., *CERVICAL CANCER: BARRIERS TO SCREENING IN THE SOMALI COMMUNITY IN MINNESOTA* (2015); see also Elinor A. Graham, *Dysuria Symptoms in Somali Girls and Women*, *ETHNOMED* (Oct. 1, 1997), <https://ethnomed.org/resource/dysuria-symptoms-in-somali-girls-and-women/>.

³⁷⁵ See also Salman Jama, *Somalia: Forensic Evidence Helps Identify Rapists*, *SOMALIA TRIB.* (May 13, 2019), <https://www.somtribune.com/2019/05/13/somalia-forensic-evidence-helps-identify-rapists/>.

³⁷⁶ *Id.*

³⁷⁷ *Id.*; See *Somalia: ICITAP Provides Latent Fingerprint Training to the Forensic Sciences Lab*, U.S. DEP'T JUST. (Aug. 5, 2021), <https://www.justice.gov/criminal-icitap/blog/somalia-icitap-provides-latent-fingerprint-training-forensic-sciences-lab>.

³⁷⁸ *Id.*

Somali criminal courtroom.³⁷⁹ However, the BFS scientists are not always able to travel to a crime scene and collect physical evidence because the lab is located in the northern city of Garowe, in the semi-autonomous region of Puntland. Additionally, any samples that the lab receives from other parts of Somalia contain very little DNA due to poor collection methods and a lack of understanding about the importance of collecting sensitive evidence.³⁸⁰ However, DNA evidence in courtrooms is the exception, and courts still rely on non-forensic medical reports.³⁸¹

b. No Scientific Way to Test Sexual History

As noted above, Somali judges incorrectly believe that a medical exam can attest to a woman's past sexual history. In a June 2020 case heard in Mogadishu, a fifteen-year-old girl reported that she was raped by three of her classmates.³⁸² During the medical examination, "the doctor found no signs of rape and reported that she [was] even [a] virgin."³⁸³ The court eventually dismissed the case for lack of evidence.³⁸⁴

Judges must understand that there is no way to scientifically test a woman's sexual history, including her virginity status. The concept of "virginity" is "a social, cultural, and religious construct."³⁸⁵ Historically, virginity testing emerged to regulate female sexual activity, requiring that girls should remain virgins until they are married.³⁸⁶ Despite the fact that virginity testing has "neither scientific basis nor clinical utility, doctors and medical personnel continue to perform the examination, supposedly to ascertain whether or not rape occurred."³⁸⁷ According to the WHO, "[t]he result of this unscientific test has an impact on judicial proceedings, often to the detriment of victims and in favour [sic] of perpetrators, which results in victims losing court cases and perpetrators

³⁷⁹ *Id.*; see Jama, *supra* note 375.

³⁸⁰ *Id.* For example, DNA evidence from Galdogob (a city located in the middle of Somalia, next to the border with Ethiopia) "was stored in unclear and unrefrigerated conditions for five days before being sent to the lab, meaning a defence counsel could potentially argue the DNA evidence had been tampered with." See Amanda Sperber, *Somalia's First Forensic Lab Targets Rape Impunity*, YAHOO NEWS (Feb. 21, 2018), <https://news.yahoo.com/somalias-first-forensic-lab-targets-rape-impunity-031424066.html>.

³⁸¹ Mogadishu GBV Case Data, *supra* note 1, case dated June 13, 2020.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ WORLD HEALTH ORGANIZATION, ELIMINATING VIRGINITY TESTING: AN INTERAGENCY STATEMENT 4 (2018).

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 7.

being acquitted.”³⁸⁸ The medical examination can be a painful procedure for the victim, often mimicking the original act of sexual violence, leading to re-traumatization and re-victimization.³⁸⁹ Performing a “virginity test” is a harmful and medically unnecessary test that not only violates the ethical standards of the medical profession to do no harm, but it is also a human rights violation.³⁹⁰ Female rape victims have the right to attain the highest standard of health, the right to physical integrity and intimacy, and the right to be free from discrimination based on sex.³⁹¹

c. The Importance of Understanding Female Anatomy

In any rape case, it is critical to understand the anatomy of the female body. It is common across many jurisdictions for medical examiners to mistakenly conclude whether a rape occurred by examining the state of the hymen.³⁹² The hymen can vary in “shape, size and elasticity, and may not be present at all in women.”³⁹³ Sexual penetration can result in no tearing or bleeding.³⁹⁴ Moreover, the hymen heals rapidly, and it may look unaffected upon examination.³⁹⁵ The hymen cannot serve as a reliable indicator of sexual intercourse.³⁹⁶

In the case of *Ranjit Hazarika v. State of Assam*, the Supreme Court of India held that the “mere fact that no injury was found on the private parts of the prosecutrix or her hymen does not belie the statement of the prosecutrix as she nowhere stated that she bled ... as a result of the penetration.”³⁹⁷

The Court went on to emphasize that “[t]o constitute the offence of rape, penetration, however slight, is sufficient.”³⁹⁸ In sum, a medical report that lacks confirmation of a vaginal injury does not negate the possibility of nonconsensual sexual assault. Without a proper forensic medical exam, a healthcare medical exam can provide limited information about the crime.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 4.

³⁹¹ *Id.*

³⁹² Mitra & Satish, *supra* note 130, at 53.

³⁹³ *Id.*

³⁹⁴ ADB Pakistani Court Companion, *supra* note 324, at 142.

³⁹⁵ Anette Wickström, *Virginity Testing as a Local Public Health Initiative: A 'Preventive Ritual' More than a Diagnostic Measure*, 16 J. ROYAL ANTHROPOLOGICAL INST. 532, 534 (2010).

³⁹⁶ *Id.* at 4–5.

³⁹⁷ ADB Pakistani Court Companion, *supra* note 324, at 142.

³⁹⁸ ADB Pakistani Court Companion, *supra* note 324, at 142.

Women in Somalia face many obstacles when it comes to proving rape. Not only does the State have limited resources to collect evidence in rape cases, but it also provides Somali women with a biased legal code and courtroom. Satisfying the corroboration requirement and overcoming cautionary rules are two unnecessary hurdles that need to be repealed.

CONCLUSION

The gender myths that a female rape victim needs to protect her own chastity and has a propensity to lie are universal. These beliefs were codified into law during a time when women were seen as second-class citizens with no human rights considerations. Within the past fifty years, the value of a woman's testimony has been supported by changes in legislation in many jurisdictions, including post-colonial countries. However, Somalia's legal regime has not meaningfully changed since it gained independence in 1960.

The Somali courtroom reflects a colonial and religious history, influenced by longstanding traditional customs, that perpetuate harmful preconceptions about women. The resistance standard, introduced to the Somali Penal Code through Italian influence, presumes that rape is a crime of violence and that a chaste woman would put up a robust fight to defend her honor. Judges concurrently believe that there is a "right way" to respond to an attack. Without evidence of a physical struggle, the victim is considered unchaste and, at worst, consenting. The law makes no room for the consideration of power dynamics between perpetrator and victim, which can influence the victim's response.

Additionally, cautionary rules compel the judge to approach a female victim's testimony with wariness in the belief that women are untrustworthy. Corroboration requirements in Somali rape trials can be attributed to Victorian-era legal theories and British views of the moral character of their colonial subjects. In Victorian courts, women were thought to fabricate rape charges. Therefore, special rules were introduced in rape cases to vindicate male defendants and to turn the blame on female rape victims.

A major cautionary rule that impedes the victim's access to justice is the immoral character provision in the Somali Code of Criminal Procedure. The rule allows for the defense to impeach the victim's credibility by introducing her sexual habituation and chastity. As a result, there is a dependence on supplemental evidence such as medical reports, which often prove to be unreliable, and eyewitness testimony, which is almost non-existent in sexual assault cases. The immoral character rule is a remnant of Britain's colonial

legacy; however, many former English colonies have recently repealed this provision.

Overall, both the resistance standard and cautionary rules create a tremendous burden for the Somali female victim and an evidentiary standard that is almost impossible to meet. One possible remedy is to abandon the resistance standard in favor of a benchmark to assess an alleged victim's consent, such as the Affirmative Consent Standard. A second is to eliminate the corroborative evidence requirement, which, after all, is a rule of practice and not an actual legal requisite. Another necessary amendment is to entirely remove the immoral character rule. Judges should furthermore be properly trained in female anatomy and trauma behavior in order to properly approach a case without biases.

The judiciary, as officials of the State, are obligated to protect and respect women's rights in the courtroom. The judiciary should ensure that women are equal to men before the law and are protected from judicial bias and negative stereotyping. Somali judges need to be aware of these obligations in order to make informed decisions and ensure access to justice for women.

Somalia's criminal laws need to be updated. Law is not static. It is ever-changing and should keep abreast of a society's political, social, economic, and legal development. Somalia serves as a poignant case study of the dangers of legal stagnation: society's most vulnerable members suffer the most.