



## Analysis-Report



# THE EVAW LAW IN *MEDICA AFGHANISTAN'S* LEGAL AID PRACTISE

**An analysis of the use of EVAW Law in *Medica Afghanistan's* legal aid cases  
between January 1st 2011 and July 31st 2012**

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June 2013

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Cover picture: Lawyer from *Medica Afghanistan* talks to a client.  
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**Funded by:**

European Union –  
Delegation to Afghanistan

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## Foreword

This report on the use of EAW Law by *Medica Afghanistan*'s legal aid team was drafted in January 2013. At that time the status of the law enacted under the form of a presidential legislative decree in 2009 was not very much questioned.

Since then, the situation has changed.

In application of article 79 of the Afghan Constitution, the EAW Law was submitted to the approval of the Parliament in April 2013. First put on the agenda of the Women's Affairs, Human Rights, and Civil Society Commission of the Lower House, the law was sent to the Joint Commission of Parliament in charge of preparing draft laws in May 2013.

This legislative process has raised many concerns.

First of all it has activated the controversial debate surrounding the law, with some MPs considering it against Sharia and Islamic principles. This controversy within the parliament has drawn full attention from the Afghan society, sometimes provoking agitation. So far, a great part of the Afghan population had ignored the existence of the law and was discovering it in the course of the political debate.

The legislative process has particularly focused the deep concern of women's rights defenders and activists who fear the rejection of the law by the National Assembly, or the adoption of amendments that are likely to jeopardize the legal benefit the EAW Law has brought to Afghan women.

For the time being, the future of the law remains uncertain.

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June 9th, 2013

## EVAW Law, where do we stand?

Enacted in August 2009, the Elimination of Violence against Women Law constitutes a landmark in the adoption of legislation addressing specifically the issue of violence against women in Afghanistan.

The law brings substantial changes in the law of Afghanistan: for the first time, it establishes a list of instances of violence against women; it criminalizes them and establishes specific sentences for their perpetrators:

- The crime of rape is defined by the law and is prosecutable. Likewise forced prostitution and forced labor are recognized by the law, whereas it has not been the case before.
- Acts of physical violence which are very common in Afghanistan such as battery and laceration, causing injury or disability, burning or spraying chemical substances are also criminalized.
- The phenomenon of self-immolation of Afghan women has been taken into consideration as it has led to a special provision penalizing violent behaviors inciting to commit suicide.
- The law also addresses deeply rooted societal and cultural forms of violence against women: child marriage, forced marriage, prohibition from the right of marriage, selling and buying women for the purpose or under the pretext of marriage, the practice of baad which consists in giving away a woman or girl to settle a dispute.
- It encompasses a series of harmful attitudes of neglect such as forced isolation and the non-provision of food, and psychological violence: harassing, humiliating, intimidating, denying relationship.
- Finally, it criminalizes hindrances to Afghan women's rights to acquire inheritance, dowry and property, to get education and to work and it sets a specific punishment for the non-observation of law provisions concerning marriage with more than one woman.

The adoption of the EVAW Law stands as an immense progress in the extremely violent context that prevails against women in Afghanistan. Proportionately, it is a huge challenge as many acts that it penalizes are not considered as crimes by the vast majority of society, including law enforcers themselves. Moreover, it draws controversy, particularly from influential religious leaders.

In November 2012, religious scholars declared that some parts of the law were inconsistent with the Islamic jurisprudence<sup>1</sup>. Though not very clear in certain parts, their statement does not question the main acts criminalized by the law, which means that religious legal scholars admit instances of violence against women as crimes. But in a context where cultural/societal practices weight more than the law, even among law enforcers, the challenge is extremely high as it means reversing that balance. On the other side, EVAW law defenders who estimate that the law is still incomplete and provides for too little punishment have elaborated an amendment draft that penalize further criminal acts of violence against women<sup>2</sup>.

However, the law is still under the form of a legislative decree that needs to be ratified by the National Assembly. This approval by the NA has generated very much concern. Three types of attitudes are to be found among MPs: one group believes that most of the articles of EVAW are in contradiction with the Islamic Sharia, the second group reasons that there is no need for a specific bill on women affairs when there is a presidential decree, and the third group warns if the Women Affairs Commission adheres to this bill in its present form, then some of the MPs will work to reject it<sup>3</sup>.

The recently published UNAMA report<sup>4</sup> concludes both to positive progress and continuing gaps in the implementation of the EVAW Law in the 16 provinces of Afghanistan. Over the year 2012, although prosecutors and courts have increasingly applied the law in a growing number of reported incidents of violence against women, the overall use of the law has remained low indicating that there is still a long way to go before women and girls in Afghanistan are fully protected from violence through the law.

1 Remarks of Religious Scholars and Religious Specialists on the EVAW Law, 13 November 2012

2 House of Representatives, Proposed Amendments by the Women Affairs Commission

3 Speech by Fozia Kofi, Chairperson of the Women's Affairs, Civil Society and Human Rights Commission of Wolesi Jirga (WJ) at the public organized by the WJ Commission and the Research Institute for Women Peace and Security (RIWPS) on December 9, 2012

4 Still a Long Way to Go: Implementation of the Law on Elimination of Violence against Women in Afghanistan, UNAMA, December 2012

The report identified the main reasons to such a low use of the law:

- Lack of reporting incidents to police and prosecutor
- Lack or registration of cases by the police
- Lack of prosecution of cases
- Poor investigation of cases

According to the same report, in 2012, in all 16 Afghan provinces:

- 470 incidents of violence against women were registered with the Afghan National Police and prosecutors.
- Of the 470 incidents, prosecutors filed indictments in 163 cases, of which 100 indictments resulted in conviction at trial.
- 72 of the 163 indictments filed relied on the EAW Law.
- Of those 72 indictments based on EAW Law, 52 resulted in convictions at trial using the EAW Law as the basis for a finding of guilt.

These figures show that the numbers of incidents of violence against women that are prosecuted remains low, especially when it is based on the EAW Law but it shows that prosecutions of cases of violence against women based on EAW law are more likely to result in convictions based on it as well.

The purpose of this present report is to analyze the use of EAW Law by *Medica Afghanistan's* Legal Aid Team over the period from January 1st 2011 to July 31st 2012, and the results it has produced, to correlate this use to trends that have been assessed nationwide especially by the UNAMA report, and to provide recommendations for a better practice of the law in the future.

The report is based on the analysis of different questionnaires to which *Medica Afghanistan's* lawyers in Kabul, Herat and Mazar have answered to, and on examples of EAW law cases they have managed.

**Part I** deals with general data and observations.

**Part II** is dedicated to the EAW Law use in *Medica Afghanistan's* concrete legal aid cases: victim cases, criminal cases, civil assistance cases and mediation cases

**Part III** contains conclusions and recommendations for a better use of EAW Law in future cases.

## I – General perception and use of EAW Law by Medica Afghanistan

### 1. Understanding, practicality and compatibility of EAW Law

*Medica Afghanistan's* lawyers from Kabul, Mazar and Herat all declare having a clear knowledge and clear understanding of EAW Law. They say to be comfortable with the law but Kabul and Herat lawyers admit not being fully satisfied when they use the law because prosecutors and judges don't pay attention to it. This is in line with general country trends that show that there is still a long way to go for prosecutors to indict on the basis of EAW Law provisions, and for judges to convict on this basis as well.

### 2. Provisions that pose problem and need to be changed in the EAW Law

Asked the question "What has to be changed in the EAW Law", reactions from the teams are different. Mazar team estimates that no provision needs to be changed, whereas Herat and Kabul team point out necessary changes.

Herat team says that article 40 is a real problem. According to it, relevant cases and judicial proceedings falling under EAW Law shall be prosecuted based on the complaint filed by the victim or a relative. But the victim can withdraw her case at any stage of the judicial prosecution. In that case pursuing the case and implementing the punishment shall be stopped. According to Herat team, this situation happens frequently. Many women under pressure and intimidation withdraw their complaints. They also mention that when a woman has withdrawn her complaint once, she cannot complain another time. Given the fact that the most widespread acts of violence against women in Afghanistan fall under article 23: battery and laceration, and are committed within the family cell, particularly by husbands, one can easily imagine the fear women feel and all the moral and economic obstacles that prevent them from filing a complaint.

The UNAMA report also points out the problem of article 40 as an obstacle to the implementation of the EAW Law, but it highlights that the two conditions set in this article are not applicable to most serious crimes such as rape, forced immolation or suicide, forced prostitution, publicizing the identity of a victim, burning or using chemical substances.

Those crimes must be acted on by the State irrespective of the victim's decision to file or withdraw the proceeding.

Kabul team advocates a change in the punishments set by the law. According to *Medica Afghanistan's* lawyers there, the fact that the sentences established by the law are systematically imprisonment sentences becomes problematic, especially since the woman lives with her in-law family and has no possibility to live on her own. Families rarely accept the man to be sentenced to prison even for a short time. Moreover, when the husband is released from prison, he can take revenge, for example divorce from his wife, and take the children. Rather than a prison sentence, *Medica Afghanistan's* lawyers in Kabul advocate for a fine. The question that remains is to evaluate if the payment of this fine will change something in the consequences women will face. Will that prevent the man from repudiating his wife and divorcing her?

The problems mentioned by *Medica Afghanistan's* lawyers highlight the great difficulty for a woman to engage prosecutions based on EAW law against her husband when she doesn't intend to divorce. This situation is very detrimental to women but unfortunately, it is not sure that it can be easily solved. Such a situation is not specific to Afghanistan and is common to women facing domestic violence worldwide.

One difficulty pointed out by Kabul lawyers is the appliance of the provisions of the penal code rather than the ones of EAW Law. This point is largely developed in UNAMA report which underlines that there are overlaps and lack of harmonization between the provisions of the penal code and the EAW Law. Whereas the crime of rape is not defined as such in the penal code though it is provided for in article 429, the crime of "beating" is more elaborated in the penal code particularly when it results to injury than the article 22 of the EAW Law (causing injury or disability) or the article 23 (battery and laceration). In some cases, the use of the penal code disadvantages victims: many perpetrators of acts of violence against women criminalized under EAW Law when indicted under the Penal Code have been either charged with less serious offences, or have received lighter sentences or have been acquitted. In addition, some prosecutors prefer to indict perpetrators of violence against women under the Penal Code rather than under the EAW Law because they think that perpetrators will benefit from a Presidential pardon. Yet, the Supreme Court annulled article 43 of the EAW Law barring pardon and mitigation of punishments of the convicts of crimes.

### 3. Stakeholders' reactions to EVAW Law

*Medica Afghanistan's* Lawyers have been asked to comment the attitudes of prosecutors, judges, police officers and clients towards EVAW Law.

The police is a major player in EVAW Law cases because it is the first law enforcement authority to which violence acts are reported to. *Medica Afghanistan's* lawyers are unanimous concerning their reaction: police officers don't know the law. Sometimes they have not even heard about it. When they know about the law, they don't want to use it.

Concerning prosecutors, *Medica Afghanistan's* lawyers consider their attitudes far from being open to EVAW Law:

- Kabul lawyers point out the disparities that exist among them: some of them have a positive reaction towards the law, but some don't want to hear about it.
- Herat lawyers mention that only prosecutors who work in the EVAW Department are ready to apply the law.
- Mazar lawyers point out negative reactions, particularly in regard to the imprisonment sentence that may affect men perpetrators of violent acts towards their wives. According

to these prosecutors, unity and balance of families are very much likely to be jeopardized by prosecution of husbands.

These attitudes are in line with the UNAMA report assessment that points out that one of the major obstacle is the lack of prosecution.

The main attitude of judges noticed by *Medica Afghanistan's* lawyers remains negative in general, but *Medica Afghanistan's* lawyers highlight the fact that when prosecutors' indictments are based on EVAW Law, judges generally follow their summons. This situation is fully confirmed by the situation mentioned in UNAMA report: Prosecutions of cases of violence against women based on EVAW law are more likely to result in convictions. This means that the main solution for a greater effective implementation of EVAW Law is to increase prosecutions, therefore improve prosecutors' attitudes.

As for clients of *Medica Afghanistan's* lawyers, they are generally happy about the law but many of them are surprised about the imprisonment punishment, and are therefore reluctant to file a case because of their children and the future of their families.

## II – EAW Law in Medica Afghanistan cases

### 1. General data

Out of a total number of 1077 cases *Medica Afghanistan* had between January 1st 2011 and July 31 2012, EAW Law was invoked by *Medica Afghanistan*'s lawyers in 69 cases, which accounts for 6.5 % of all cases:

Out of these 69 cases where EAW Law was used:

- 10 were victim cases<sup>5</sup>
- 21 were criminal cases<sup>6</sup>
- 17 were civil cases<sup>7</sup>
- 21 were mediation cases<sup>8</sup>

Asked to comment this ratio of 6.5 % of cases, *Medica Afghanistan* explains that this figure is low for the following reasons.

- The present study covers a period starting on January

1st 2011. It is therefore about the early times of EAW Law. At the beginning *Medica Afghanistan*'s lawyers didn't have any experience in using the law in criminal and civil proceedings and in mediation cases. As for victim cases, their number had been already low compared to criminal cases.

- When *Medica Afghanistan*'s lawyers started to have recourse to the provisions of the law in proceedings they faced a lot of difficulties with law enforcers. First, on the side of the police, the vast majority of police officers didn't know that such a law existed. As for prosecutors and judges their first reaction was to reject the law because it was not passed by parliament, and was therefore not enforceable as a law. Some of them were also against it as they considered the law as an impediment to women wrongdoing and punishment. The ideological reluctance in combination with arguments on the legality led to rejection of the law in judicial proceedings. For example, in civil matters, *Medica Afghanistan*'s lawyers were summoned not to quote the provisions of the law to highlight the harm their clients had experienced; in criminal matters EAW Law was rejected as a defense argument to stress the violence the accused woman had gone through and in order to mitigate her criminal responsibility.

The chart below gives a breakdown per location and per type of cases and their ratio:

	Victim cases			Criminal Cases			Civil cases			Mediation cases		
	All	Using EAW Law	%	All	Using EAW Law	%	All	Using EAW Law	%	All	Using EAW Law	%
<b>Herat</b>	0	0	0	168	13	8	238	0	0	132	6	4,5
<b>Kabul</b>	5	5	100	114	7	6	107	6	3,5	146	11	7,5
<b>Mazar</b>	5	5	100	26	1	4	76	11	14,5	70	4	5,5
<b>TOTAL</b>	<b>10</b>	<b>10</b>		<b>308</b>	<b>21</b>		<b>421</b>	<b>17</b>		<b>348</b>	<b>21</b>	

5 In *Medica Afghanistan*'s classification of cases, a victim case is a criminal case where a woman or a girl child has been victim of a criminal offence. In such a case *Medica Afghanistan*'s work consists in providing legal advice to the victim.

6 In *Medica Afghanistan*'s classification of cases, a criminal case is a case where a woman or a girl child is charged of perpetrating a criminal offence. *Medica Afghanistan*'s role is then to defend the accused woman.

7 In *Medica Afghanistan*'s classification of cases, a civil case is a case where *Medica Afghanistan*'s lawyers provide legal representation to women willing to engage civil proceedings (such as divorce, child custody, claiming alimony...).

8 In *Medica Afghanistan*'s classification of cases, mediation cases are cases where *Medica Afghanistan*'s lawyers and social workers mediate between a woman or a girl and another party (generally the husband or the family) in order to solve a problem or a conflict between parties. Mediation is considered successful when at the end, parties agree to solve the problem and conclude an agreement under the auspices of *Medica Afghanistan*. The mediation process has failed if parties don't agree with each other, or if the problem continues in spite of an agreement.



The breakdown shows real disparities according to project locations:

- Herat team has used EAW Law the most in criminal cases
- Kabul team has used it the most in mediation cases
- Mazar team has used it the most in civil cases.

## 2. Victim cases

*Medica Afghanistan's* lawyers assisted 10 victims of criminal acts over the period considered (5 in Kabul, 5 in Mazar and 0 in Herat). Out of these 10 cases, only 5 cases - all of Kabul - resulted to effective prosecution based on EAW Law.

### In Herat:

- Herat team declared no victim case over the period
- Herat team points out that they encounter difficulties when they want to register cases. They say that prosecutors require doctors' certificates or some witnesses in order to open the prosecution case. Yet, this is against the law. According to article 22 of the criminal procedure code, the prosecutor has the obligation to introduce the penal action for prosecution of all crimes, known directly by him or reported to him, committed in the territory of the district, unless otherwise expressly provided by law. The EAW Law doesn't expressly provide otherwise. Moreover the prosecutor shall not dismiss or stay a case except as otherwise provided by the law.

### In Mazar:

- *Medica Afghanistan's* lawyers declare 5 victim cases of women victims of physical violence by their husbands
- In the 5 cases, no indictment was drafted by the prosecutor. This leads to the conclusion that there was no prosecution. In 3 cases, women engaged in a reconciliation process with their husbands. In 2 cases, *Medica Afgha-*

*nistan's* clients who had asked for divorce before the family court got separated from their husbands.

### In Kabul:

- The 5 cases were cases of adult women. No juvenile case was reported.
- All of them were based on article 23 of the EAW Law (battery and laceration)<sup>9</sup>.
- Two were coupled with respectively articles 30 (harassment/ persecution)<sup>10</sup> and 31 (forced isolation)<sup>11</sup>.
- The 5 cases were domestic violence committed by husbands towards their wives.
- In all these cases *Medica Afghanistan's* lawyers addressed an inquiry letter to the prosecutor to ask him to prosecute the accused based on the above mentioned EAW Law provisions.
- According to information provided by *Medica Afghanistan's* lawyers<sup>12</sup> prosecutors followed their requests in the 5 cases.
- According to information provided by *Medica Afghanistan's* lawyers<sup>13</sup>, in the 5 cases the judgments of the court were based on the EAW Law provisions and the accused were all convicted to one to six month of imprisonment, as provided by the law.
- Out of these 5 cases, 4 ended in a divorce for harm. One case was subject to mediation by *Medica Afghanistan* and ended in the reconciliation of the couple and the re-integration of the client in her family.

The examples provided by Kabul team are very promising:

- They show that *Medica Afghanistan* can have an influence on prosecutors in cases of women victims.
- They confirm that judges generally follow prosecutors' requests in EAW Law cases.

9 Article 23: If a person beats a woman which does not result in damages and injury, the offender in view of the circumstances shall be sentenced to the short term imprisonment not more than one month.

10 Article 30: 1. If a person commits harassment/ persecution to a woman, considering the circumstances he will be convicted to short term imprisonment not less than 3 months. 2. If the crime of paragraph 1 of this Article is based on abuse of authority and position, the offender considering the circumstances shall be imprisoned to medium imprisonment not less than 6 months.

11 Article 31 : If a person force a women to isolation, considering the circumstance the offender shall be convicted to short term imprisonment not more than 3 months.

12 The consultant could not have a copy of the indictments.

13 The consultant could not have a copy of the judgments.

These examples also corroborate the fact that judicial procedures under EAW Law engaged by women victims against their husbands are more likely to be coupled with a divorce procedure.

### 3. Criminal cases

EVAW Law was used by *Medica Afghanistan's* lawyers in 21 criminal cases over the period (13 in Herat, 7 in Kabul and

1 in Mazar), that is to say cases where women were accused of crimes.

Out of these 21 cases where EVAW Law was used, 5 were juvenile cases. These 5 cases were in Herat whereas all cases in Kabul and Mazar were adult cases. This can be explained by the high rate of juvenile criminal cases that Herat team has: 70 juvenile criminal cases out of a total of 168 criminal cases, whereas in Kabul 9 out of 114 and in Mazar 0 out of 26.

The provisions of EVAW Law invoked were as follows:

Articles	Kabul	Herat	Mazar	Remarks
5 - Instances of violence		5		
17 - Rape <sup>14</sup>		1		
22 - Causing injury or disability <sup>15</sup>		1		
23 - Battery and laceration	2	1	1	
24 - Selling of women for marriage <sup>16</sup>	1			
25 - Baad <sup>17</sup>	1			
26 - Forced marriage <sup>18</sup>		5		
30 - Harassment/ persecution	1		1	(with art.23)
31 - Forced isolation	2			

14 Article 17: (1) If a person commits rape with an adult woman, the offender shall be sentenced to continued imprisonment in accordance with the provision of Article (426) of the Penal Code, and if it result the death of victim, the perpetrator shall be sentenced to death penalty. (2) If a person commits rape with an underage woman even with her consent, the offender shall be sentenced to the maximum continued imprisonment according to the provision of Article (426) of Penal Code, and if it result the death of victim, the perpetrator shall be sentenced to death penalty. (3) In the two above mentioned paragraphs (1, 2) of this Article the perpetrator shall be convicted to pay the amount of dowry (Mahre Mesl) to the victim. (4) If a person commits to violate chastity of a woman, but his violation does not result to adultery or pederasty (committees touching etc...), considering the circumstances he will be sentences to long term imprisonment not more than 7 years. 6

(5) If the victim of paragraph 4 of this Article has not reached the age of 18 or the perpetrator of the crime is close relative up to degree 3, or the perpetrator is teacher, cleaner, doctor of the victim or somehow the perpetrator has influence and authority over the victim, in such situations, the perpetrator shall be sentenced to long term imprisonment not more than 10 years considering the circumstances.

15 Article 22: 1. If a person beats a woman considering the mitigating and aggravating circumstances, the offender in view of the circumstances shall be sentenced in accordance to Article 407 – 410 of the Penal Code.

2. If the acts included in paragraph (1) of this Article cause to the death of the victim, the offender in view of circumstances shall be sentenced in accordance to Article 395 – 399 of the Penal Code.

16 Article 24: A person who sells a woman for the purpose of marriage, or purchases a woman or facilitates the process, the perpetrators including buyers and sellers and the facilitator considering the circumstances shall be sentenced to long term imprisonment not more than ten years.

17 Article 25: 1. If a person marries a woman in retribution for a murder as blood money or for making peace, considering the circumstances the offender shall be sentenced to a long term imprisonment, not exceeding ten years. 2. In the circumstance indicated in paragraph (1) of this Article, the persons involved (the witnesses, the attorney, Aqid "one who weds the couple" and others) each, in view of circumstances, shall be sentenced to a medium imprisonment, and the marriage contract of the woman given in Baad shall be considered invalid in accordance with the provisions of the law based on the request of the woman.

18 Article 26: If a person, engage a woman who has reached her legal age or Marries her without her consent, in accordance to the law the engagement shall be cancelled and nullified, and considering the circumstances the offender shall be sentenced to medium term imprisonment not less than 2 years.

Two main remarks can be drawn from this chart:

- The provisions of the law invoked are different from one project location to another. Except 4 cases common to all locations based on the same article 23 – Battery and laceration, and 2 cases common to Kabul and Mazar based on the same article 30 - Harassment/ persecution, the rest of the cases are based on provisions of the law that differ from one location to another. Whereas in Kabul instances of violence over the reporting period pointed out by lawyers were selling of women for marriage, Baad, forced isolation, in Herat they were rape, causing injury and disability and forced marriage.
- 5 cases of Herat were based on article 5 of the law. But article 5 is not related to one particular offence. It is a general article listing the 23 acts that are deemed as violence against women.

In these total 21 criminal cases, EAW Law provisions quoted above were invoked in lawyers' defense statements in their defense strategy against prosecutors' indictments, before primary and secondary courts.

As for the reaction of judges, in none of the 21 cases EAW Law was quoted in the judgment. This is in a way normal. Judges cannot refer to the EAW Law in their judgment because it is not relevant from a legal point of view: in a criminal case where a woman is accused of perpetrating a crime, it is not possible to charge someone else with a crime committed against her. But what matters is the recognition of violence the woman has undergone. In this regard, the attitudes of judges are contrasted. If some are ready to recognize violence against women (see criminal case KBLL35 below), *Medica Afghanistan's* lawyers agree to say that most of them are not ready to acknowledge it in criminal proceedings against women. For them their criminal profile weights more than their condition of victims of violations. *Medica Afghanistan* should nonetheless not underestimate that disclosing that women have experienced violence may play a mitigating role in the final sentence adjudicated by a court.

The three criminal cases below give an interesting teaching about the use of EAW Law provisions by *Medica Afghanistan's* lawyers, and the reaction of judges.

#### a) Criminal case KBLL35

The case was about a married woman accused of having an extramarital relationship with two men. *Medica Afghanistan's* defense lawyer invoked article 31 of EAW Law (forced isolation) to justify that her husband was not letting her visit

her family. According to the judgment, the client was surprised in a house with two men and she was receiving money for having sexual intercourse (according to the statement of one of the men, they were paying her 500 USD per night). Moreover according to the case history, the medical test she had to do confirmed that she had sexual intercourse that night. The primary court sentenced the lady to 5 years in prison based on article 427 of the criminal code (adultery) – The two men got respectively 3 years and 6 months of imprisonment.

The appeal court confirmed the guilt of the lady but reduced her sentence from 5 to 4 years in prison on the basis that she had experienced violence from her husband and her mother in law, that she was unaware of the consequences of her acts and that she was regretting her action. The court didn't refer to any EAW Law provision. The sentences of the two main perpetrators remained unchanged.

The fact that the secondary court appeared to me more sensitive to the violence experienced by the client than the primary court is surely due to the different personalities of the judges. But beyond that assessment, this case reveals that judges may be sensitive to the violence perpetrated against the accused/convicted woman. Though they could not refer to the EAW Law in their judgment, they recognized that violence occurred and this is due to the defense arguments brought by the defense lawyer, including the fact that she invoked EAW Law.

#### b) Criminal case MZRL279

The case was about a widow, harassed by a man who entered her house and tried to rape her. In order to have protection, she decided to marry one of her relatives. Both went to the court to marry but they were sent to the prosecutor's office. The prosecutor sent the lady to prison and accused her and her future husband to have had sexual intercourse before marriage.

The argument of *Medica Afghanistan's* defense lawyer was good as she used the fact that the prosecutor had simply no evidence, nor no witness to prove that extramarital sexual intercourse had occurred. She used article 30 of the EAW Law (harassment, persecution) to justify her harassment and attempt of rape by an unknown man<sup>19</sup>.

The court withheld that the couple had sexual intercourse but recognized that the man and the woman didn't think it was a crime as they intended to marry. The court therefore decided that both should be released but pay a fine of 5,000 Afghani. The court didn't refer to the harassment the lady had previously experienced.

<sup>19</sup> Rape is criminalized in the EAW Law (article 17) but the offence of attempting to rape doesn't exist. In such cases only the offence of harassment/persecution of article 30 can be used.

In this case, EAW Law provision was appropriately used as a way to back up the situation of a woman living on her own and exposed to harassment. It was as an additional legal defense argument, not the main one but it was appropriate.

### c) Criminal case HRTL312

The case was about a young woman from Logar who eloped with the young man she loved to Herat. The young man had previously sent several marriage proposals to her parents but they didn't accept and were planning to marry her to another man. Both lovers escaped and went to the police voluntarily to seek help because they wanted to marry. Both were accused of committing adultery. The medical certificate stated at the young lady's hymen was circular; with no additional detail.

Before the primary court, *Medica Afghanistan's* defense lawyer denied the accusation of sexual intercourse based among others on the medical certificate which didn't prove anything; and on facts: the couple had gone voluntarily to the police; they intended to marry. *Medica Afghanistan's* defense lawyer used article 26 (forced marriage) and 27 (prohibiting from the right of marriage) of EAW Law.

The primary court withheld that the couple committed adultery based on the confessions they made to the prosecutor (according to the prosecutor's indictment, the couple had several sexual intercourses) and sentenced them to one year and two months of imprisonment.

## 4. Civil cases

EAW Law was used by *Medica Afghanistan's* lawyers in 17 civil cases over the period (0 in Herat, 6 in Kabul and 11 in Mazar) in order to back a divorce procedure for harm. Out of these 17 cases, 12 ended up by a divorce, 5 by reconciliation and the return of the spouse with her husband.

The use of EAW Law in Kabul and Mazar focused mainly on the following articles: 23 (battery and laceration), 29 (abusing, humiliating, and intimidating), 30 (Harassment and persecution) and 31 (forced isolation/segregation). Only one case in Mazar referred to articles 18 (forcing into compulsory prostitution), 23, 30, 35 (prevention from acquisition of property) together.

In all locations, lawyers have pointed out the difficulty to use EAW Law before the family court. The reason is that the EAW Law is a criminal law, not a civil one. Consequently, judges who refer to the family legislation in case of divorce for harm see no reason to apply the law. Either they don't pay attention to it, or they reject it by saying that the family court is not the place to register an EAW Law case. If a lady wants the application of EAW Law, she has

to register her case either at the police, or at the prosecution office. This situation has led Herat lawyers not to refer to EAW Law in their defense statements.

To this problem Mazar lawyers point out the uselessness of invoking EAW Law when women don't want to register their cases as an EAW Law case at the prosecution services. Many women who seek divorce for harm don't necessarily wish to start criminal proceedings against their husbands based on EAW Law. Moreover the ratio of women who after starting a divorce procedure decide to reintegrate the family cell is high. Women who make that choice are even less likely to register an EAW procedure.

The reaction of the family court judges is understandable, as EAW Law involves another criminal judicial procedure. But in criminal cases involving women as accused, this is a different procedure as well. In both cases civil and criminal, and at the difference of criminal victim cases, EAW Law is not used for a proceeding purpose. It is only used to back the situation of a woman who has experienced violence. In a criminal case, it is an additional means to require the mercy of the court, or the acquittal of the accused woman and is therefore important. In a divorce case it is a means to help the court to evaluate the type of harm the woman has experienced from her husband and to back her divorce procedure. This is particularly important in a context where the woman's right to divorce in case of harm is threatened, especially after the Supreme Court gave instructions to the country wide family courts to avoid pronouncing divorces.

Beside a good defense strategy describing before the family court the different instances of harm the client has experienced, quoting breaches of EAW Law even if it is not related to the procedure is a real plus, and makes a difference. Besides backing the client's case, it can contribute to promote the idea that violence against women is a crime, make this idea progress, particularly in family courts where judges who don't deal with criminal offences probably have no knowledge of EAW Law.

## 5. Mediation cases

Out of 348 mediation cases *Medica Afghanistan* had over the period, 21 referred to the EAW Law (6 cases in Herat, 11 in Kabul and 4 in Mazar). The great majority of the cases were about domestic violence perpetrated by husbands, and/or by the in-law family based on articles 23 (battery and laceration), 29 (abusing, humiliating, intimidating), 30 (Harassment and persecution), 31 (forced isolation/segregation). One case in Herat was a case of forced marriage imposed by a father to his daughter based on article 27 (prohibiting from the right of marriage); one other case also in Herat was about domestic violence by the father to pre-

vent his daughter to go to school but was based on articles 23, 30, 31 but didn't refer to article 36 (prohibition from education and work).

In all these 21 mediation cases, the above mentioned provisions of EAW Law were explained to the parties, particularly to the perpetrator(s) of violence. The vast majority of them didn't know about the law and were surprised to hear that they could face possible imprisonment. According to *Medica Afghanistan's* lawyers' feedback, explaining the provisions of the law had a very positive impact. All lawyers in the three locations quote that it led men to acknowledge their mistakes and commit to respect their wives' and daughters' rights.

Mediation results appear to be very positive. All the couples came to an agreement either to live together without reiteration of violent acts, or to divorce. The father who was against his daughter's marriage with a man of her choice agreed to it and the one who was preventing his daughter

to go to school agreed to her education.

Using EAW Law in mediation has shown successful results in raising awareness of men. It constitutes therefore a great added value, particularly as regard to the fact that men realize that their violent acts may no longer go unpunished. Moreover, it can only help women to know their rights and refuse future acts of violence that may occur.

Given the fact that the vast majority of mediation procedures are about domestic violence situations, it is surprising that EAW Law was used only in 6,5% of all cases. According to information provided by lawyers, EAW Law is used repeatedly in mediation cases, especially in cases of physical violence and when women are prevented to go out to visit their relatives, etc. But these cases were not reported. Lawyers only reported cases where EAW Law was strongly invoked in regard to the particular appalling situation of the case.

### III – Conclusions and recommendations

*Medica Afghanistan's* practice of EAW Law shows very interesting results and global positive achievements that need to be very much encouraged in spite of many obstacles and difficulties. There is definitely a long way to go to get EAW Law recognized and integrated in the judicial sphere as a routine. Such obstacles and difficulties are related to the social and cultural norms that are very much disadvantageous to women in Afghanistan. But they are exacerbated by the two plagues of the Afghan judicial system: impunity and corruption. Therefore, results achieved by *Medica Afghanistan's* lawyers in using EAW Law must necessarily take these two factors into consideration.

The assessment made in this report has led to the main following recommendations that could be used to support and encourage the use of EAW Law in *Medica Afghanistan's* practice and to give more positive results:

#### 1. Re-examining the law

*Medica Afghanistan's* lawyers have all gone through the different provisions of the law and know it. But some provisions might lead to different interpretations within the organization. It is therefore recommended to organize one workshop with all lawyers from all provinces with *Medica Afghanistan's* Legal Aid Manager and Legal Advisor to discuss the law and comment it, article by article. This session would be a good opportunity to discuss the way the law can be best used for situations *Medica Afghanistan's* lawyers encounter the most in their practice. Given the fact that the law is applied differently according to *Medica Afghanistan's* project locations, the workshop would be a great opportunity for lawyers from the different project locations to exchange about their practice.

#### 2. Having one common position about the law as an organization

Some provisions of the law are subject to controversy in the Afghan society. *Medica Afghanistan's* lawyers may not have the same views on the law. At the same time, *Medica Afghanistan* as an organization defending and promoting women's rights has to take a position regarding this law. It is therefore very important that *Medica Afghanistan's* staff members get together and adopt one common position for each law provision that they will adopt and use in their everyday practice. The workshop to discuss the law can be a good opportunity to shape this common position.

#### 3. Promoting implementation of the law by law enforcers

As a women's rights organization, *Medica Afghanistan* has always advocated for the recognition of the EAW Law at the political level, and the enforcement of the law at the judicial level. It is in this regard important that *Medica Af-*

*ghanistan* reinforces its advocacy for the implementation of the law towards law enforcers. UNAMA report and *Medica Afghanistan's* lawyers are unanimous to say that police officers are either ignorant of the law, or reluctant towards it. Training sessions that *Medica Afghanistan's* lawyers provide in police offices and the relations they have established with them can be used to promote EAW Law and the registration of cases. Concerning prosecution services and judges, it is a sound and adapted use of EAW Law to criminal and civil defense strategies that will contribute to promote the law (see recommendations 5 to 8 below).

#### 4. Advocating improvement in the implementation of the law

EAW Law is far from perfect. Problems pointed out by lawyers such as the overlap or disharmony with the penal code, the condition to file a complaint, withdrawal of complaints, and the imprisonment sentences are a reality and should be discussed within the team, in order to lead to common possible solutions, positions and advocacy. Again *Medica Afghanistan's* workshop on EAW Law is an excellent opportunity for *Medica Afghanistan's* team to determine possible solutions to law conflicts and/or overlaps and decide about the best legal strategies to adopt according to cases.

#### 5. Taking more victim cases and drafting more complete inquiry letters

*Medica Afghanistan* follows few victim cases, whereas the results they achieve in such type of cases are very positive. *Medica Afghanistan's* lawyers should be encouraged to take more victim cases. In this regard, it is recommended that they identify how they can get these cases. Good relations with police offices are a possibility amongst others. Moreover, *Medica Afghanistan's* lawyers can encourage the clients they have in criminal and civil matters and who have been subjects to EAW Law violations to register their cases as victims, and follow the procedure.

Victim cases are the only cases where EAW Law is used with a proceeding purpose, which explains their positive results. Prosecutions of cases of violence against women based on EAW law are more likely to result in convictions based on it. Therefore, *Medica Afghanistan's* Lawyers are strongly encouraged to continue to invite prosecutors to prosecute under EAW Law. But in order to be more efficient, they are also encouraged to draft more detailed inquiry letters to prosecutors.

#### 6. Using EAW Law more efficiently, precisely and strategically in criminal cases

In criminal cases where women are accused of crimes, EAW law cannot be used in a proceeding purpose but as a way to help mitigate the sentence of the woman or to lead the court to acquit it. Many women commit crimes simply because they are victims of violence. When this principle

finds concrete application in a case, it should be stressed before a court, as it can lead the court to recognize this violence, and it has its influence.

Moreover, *Medica Afghanistan's* lawyers are invited to encourage accused women who have been victims of EAW Law violations to register their cases. There is no principle that prevents a woman who is accused or convicted of a crime to register an EAW case.

### **7. Insisting on describing instances of violence and quoting EAW Law in civil proceedings**

Judges of family courts are not interested in EAW Law because they consider it has to be brought in a criminal procedure, not in a civil one. But quoting the type of violence a woman has experienced to enable the judges to identify the harm she has undergone and convince them in a context where divorce proceedings are not welcome by judges themselves is important. In this regard after describing the instance of violence her client has undergone in order to back her claim, *Medica Afghanistan's* lawyer can insist on

the fact that the violent act committed towards her client is punishable by the law. This can only have a teaching effect over family judges who probably ignore the provisions of the law. And this will definitely promote the idea that violence against women is a crime and make this idea progress.

In addition, as for criminal cases, *Medica Afghanistan's* Lawyers are encouraged to support their clients seeking divorce to register their cases as EAW Law cases before prosecution services.

### **8. Increasing the use of EAW Law in mediation cases**

EAW Law is surprisingly not very much used in mediation cases that however deal with domestic violence. Yet, the use of EAW Law in mediation cases has a real teaching and sensitizing purpose and can make a big difference in the couple. Many Afghan men probably don't know that they can go to prison for beating their wives. Telling them about the law is without contest a good way to change their attitudes. It is therefore strongly recommended to increase teaching and referring to EAW Law in mediation activities.