



ELIMINATION OF VIOLENCE AGAINST WOMEN IN MEDICA AFGHANISTAN LEGAL AID PRACTICE

Second Report

**An analysis on the use of the Elimination of Violence against Women Law (EVAW Law) in
Medica Afghanistan legal aid cases**

Period covered: August 1st 2012 to December 31st 2013

Fatma Boggio-Cosadia
Legal Aid Consultant

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Purpose and Methodology of the Report

The present report intends to describe:

- the evolution of the Elimination of Violence against Women Law (EVAW Law) over the year 2013 and in the first months of 2014,
- its use by Medica Afghanistan legal aid team and its implementation by the judiciary (mainly prosecution services and courts) over the period going from August 1st 2012 and December 31st 2013 through the analysis of EVAW Law cases that Medica Afghanistan managed.

Its purpose is also to assess any correlation between the findings of the report with general issues that have been developed under this chapter and trends that have been assessed nationwide, particularly in the latest reports drafted by the United Nations Assistance Mission in Afghanistan (UNAMA)¹ and by the Afghanistan Ministry of Women's Affairs (MoWA)².

It finally intends to establish recommendations for a better practice of the EVAW Law by Medica Afghanistan legal aid team in the future.

The report is based on information gathered in the laws of Afghanistan, from international and national reports and press releases on the EVAW Law, and from information provided by Medica Afghanistan legal aid team, in particular:

- legal case records,
- series of questionnaires that have been filled by Medica Afghanistan lawyers and Legal Aid Programme Manager and Adviser,

¹ *A Way to Go: An Update on Implementation of the Law on Elimination of Violence against Women in Afghanistan*, UNAMA, December 2013, <http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20REPORT%20on%20EVAW%20LAW%20December%202013.pdf>

² *First Report on the Implementation of the Elimination of Violence against Women (EVAW) Law in Afghanistan*, MoWA, January 2014

- selected EVAW cases including defence statements, petitions and mediation agreements established by Medica Afghanistan lawyers, prosecutors' indictments, primary and secondary court decisions
- exchanges with Medica Afghanistan Legal Aid team and Director

Part I deals with the Status of the EVAW Law in 2014.

Part II describes general data and observations made by Medica Afghanistan lawyers over the period from August 1st 2012 and December 31st 2013.

Part III is dedicated to the EVAW Law use in MA concrete legal aid cases: victim cases, criminal cases, civil cases and mediation cases.

Part IV contains conclusions and recommendations for a better use of EVAW Law in future cases.

The consultant thanks Medica Afghanistan team for translating judicial documents and for their active collaboration in the establishment of this report.

PART I
Status of the Elimination of Violence
against Women Law in 2014:
Between Tolerance and Hostility

Enacted in August 2009, the Elimination of Violence against Women Law (EVAW Law) represented a landmark and an immense progress in the adoption of legislation addressing violence against women in Afghanistan. For the first time the law has established a list of crimes against women, and it has provided for specific sentences for their perpetrators³.

³ *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:*

- *Sexual assault/rape is prosecutable. In this regard there is a difference between the Dari version of the Law and its translation in English. While the Dari version mentions the word "rape", the English version of the text refers to sexual assault.*
- *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.*

During the four years that have followed the adoption of the law as a Presidential decree, the EVAW Law has constantly encountered obstacles and has been legally challenged by its detractors including the most powerful law-makers and decision-makers. Proportionally it has gathered incredible mobilization and resistance from its defenders, namely Afghan human rights and women's rights organizations.

Over the past year, EVAW Law has faced a series of challenges, consisting in its possible ratification by the Afghan National Assembly (1), the conditionality of the victim's complaint for serious crimes committed against women (2), the adoption of the article 26 of the criminal procedure code (3), the use of the "Attempting to Zina" incrimination (4), the emergence of a debate concerning the introduction in the Afghan Law of the punishment of stoning (5), the decrease of violence against women cases indicted and prosecuted under all applicable laws (6), and the recourse to mediation by the judiciary as a way to avoid prosecution of EVAW cases (7).

1 - The question of ratification of the EVAW Law by the National Assembly

In May 2013, the Parliamentary Commission on Women's Affairs, Civil Society and Human Rights brought the EVAW Law to the Parliament with the objective of confirming the decree as a law.

This decision led to very violent reactions against the law and in an inflamed debate concerning the amendment of sections of the law considered anti-Islamic. The law was submitted to the 18 parliamentary committees so as to check its conformity with Sharia Law.

Since then, no further development made public has occurred. Uncertainty remains about the future of the law. For the time being the EVAW Law continues to be applied under its 2009 shape. The parliamentary controversy of May 2013 has however very much contributed

to blacken its image as an anti-Sharia law within the country.

2 – The conditionality of the victim’s complaint for serious crimes committed against women

According to Article 39 of the EVAW Law:

1. Relevant cases and judicial proceedings of the perpetrators of crimes enshrined in Articles 22 - 39 of this law shall be prosecuted based on the complaint filed by the victim or a relative.

2. In circumstances mentioned in paragraph 1 the victim may withdraw her case at any stage of judicial prosecution (detection, investigation, trial or conviction). In this case pursuing the case and implementing the punishment shall be stopped.

Article 39 bars prosecution of EVAW crimes provided for by articles 22 to 38 if the victim or her relative has not filed a complaint, namely the crimes of causing injury and disability (art. 22), beating (art. 23), selling and buying women for the purpose of or on the pretext of marriage (art. 24), giving Baad (art. 25), forced marriage (art. 26), prohibiting from the right of marriage (art. 27), underage marriage (art. 28), abusing and humiliating (art. 29), harassment and/or persecution (art. 30), forced isolation (art. 31), forced addiction (art. 32), depriving from inheritance (art. 33), prohibiting to access personal property (art. 34), prohibiting from the right to education, work, access to health services (art. 35), forced labor (art. 36), marrying more than one wife (art. 37), denial of relationship (art. 38).

The drafters of the law have only let the EVAW crimes provided in articles 17 to 21 prosecutable independently from a complaint by the victim or her relative, that is to say: sexual assault (article 17), forcing into prostitution (article 18), recording and publishing the identity of the victim (article 19), burning or using chemical substances (article 20), self-ignition and suicide (article 21).

Yet, crimes set forth in articles 22 to 38 are serious, and some of them particularly those

that violate mental and physical integrity are as serious as the ones established in articles 17 to 21, there is no justification for the distinction established by article 39.

As an example, the crime of causing injury and is extremely serious and can result to the death of the victim (article 22, paragraph 2). Why should its prosecution conditioned by a complaint of the victim or her relative, whereas the crime of recording and publishing the identity of a victim is not? That is not logical.

Article 39 is definitely the Gordian knot of the EVAW Law as many women don’t complain or end withdrawing their complaints under pressure.

Unfortunately Article 39 is not the only provision of the law that prevents prosecution of crimes that largely affect women. The recently adopted articles 63, 64 and 68 of the new Criminal Procedure Code⁴ prohibit the initiation of a criminal case without a written complaint by victims for a series of crimes that include among others battery and laceration (Chapter 5 of the Penal Code), kidnapping (Chapter 7), threat (Chapter 11), abuse (Chapter 13).

⁴ *Preventing the Initiation of a Criminal Case - Article 63: Initiating a criminal case and making any kind of decision on the crimes set forth in chapters 5, 7, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23, 24, and 25 of the Penal Code 2nd part which involves loss caused by relatives to each other shall not be permissible without a written complaint by the victim.*

Multiplicity of Defendants or Victims - Article 64: (1) If there are multiple suspects or victims, a complaint against one of them is considered a complaint against all of them and withdrawal of a complaint in favor of one of them is considered withdrawal of the case in favor of all of them. (2) If there are multiple victims, a complaint by one of them to initiate a case is considered a complaint from all the victims.

Dismissal of Filed Complaint by a Victim or His/Her Representative- Article 68: (1) Prior to a final verdict in cases described in Article 63 of this law, a criminal case shall be dismissed upon written request of the victim. (2) If there are multiple victims, all must request dismissal in writing before dismissal of the action.

The enactment of such legislation will definitely prevent the prosecution and the punishment of crimes committed against women.

3 - The adoption of the article 26 of the new Criminal Procedure Code

In June 2013 the Lower House of the Parliament passed a new draft criminal procedure code which included an article 26 prohibiting relatives of the accused from testifying in criminal cases⁵.

Under pressure of women's rights activists, the Ministry of Justice conceded to revise the provision. In February 2014, President Hamid Karzai signed into law the new criminal procedure code but issued a separate presidential decree modifying article 26, evolving from forbiddance of relatives' testimony to exemption.

⁵ Initial draft of Article 26 - Forbiddance of Questioning a Witness - (1) The following people cannot be questioned as witnesses: 1- A person whose testimony would violate his/her legal responsibility not to reveal secrets related to the organization stipulated in the enforced laws, unless he/she is relieved from his/her responsibilities by the relevant authority.

2- The defence lawyer.

3- An accomplice if their case is being preceded jointly.

4- Relatives of the accused person.

5- Legal advisor, physician, expert, psychiatrist or journalist who is obligated to keep confidential information obtained during their duty, contact with their clients or reporters, unless their responsibility is relieved by the court.

6- A non-discerning child who has not reached the age of seven years.

7- A person who lacks the capacity to testify:

(2) The judicial police officer, prosecutor's office and court are obligated to inform the individuals set forth in paragraph (1) of this article of their right not to answer questions.

(3) In cases where reasons exist that deem the testimony to be critical to confirm the criminality or innocence of the suspect or accused person or its social benefits are greater than keeping its confidentiality, the court based on the request of either one of the parties can relieve professional liability of the persons set forth in subparagraph 5 of paragraph (1) of this article. In this case the court shall hear the statement of the witness in a specific room and if necessary without the presence of the litigants.

The new version of article 26 is the result of a compromise with rights organisations and has been endorsed by Presidential Decree. It is worded as follows:

Refusal to Provide Testimony and Testimony That Will not be Heard - Article 26:

(1) The following persons may refuse to testify:

1. A person whose legal responsibility as stipulated in existing laws may be violated by revealing secrets through the provision of testimony, such as a legal adviser, physician, psychiatrist, experts and similar professional functions.

2. Relatives of the accused, up to two levels of ancestors and descendants, and spouses (even if the matrimonial relationship has been ended). Any relative who has been victimized as a result of the crime in question and/or is a complainant or informant regarding the crime, is exempted from this provision.

(2) Judicial officers, prosecutors and the courts are required to inform any person stipulated in paragraph 1 of this article of their right to refuse to testify. (3) When the court determines that the testimony of the persons included under Paragraph 1, Section 1 of this Article is necessary for the proper consideration of a case, to determine the guilt or innocence of the accused, or if the public interest is deemed to be of higher importance than the responsibility to maintain confidentiality, then the court may order to hear the testimony of the witness in a private setting, and, if necessary, without the presence of either party.

(4) The testimony of the following persons is not admissible:

1. A defence lawyer who is defending the accused in the case.

2. A person who is considered an accomplice to the crime and is being tried in the same case.

3. A person who lacks the legal competency [Ahliyat] to testify.

The new version of article 26 exempts parents, grand-parents, children, grand-children, husbands and wives, including former ones from testifying in criminal proceedings as witnesses if they don't wish to do so.

From a general crime prosecution perspective, article 26 is not in line with the State's obligation towards its citizens to discover crimes, investigate, prosecute and judge them. By doing so, the State fulfils its protection role and obligation towards its citizens. The Constitution of Afghanistan has highlighted this principle. According to article 134, "*Discovery of crimes shall be the duty of police, and investigation and filing the case against the accused in the court shall be the responsibility of the Attorney's Office, in accordance with the provisions of the law*".

The obligation of discovering, investigating, prosecuting and judging crimes means taking all the measures to discover the truth based on evidence gathered. Evidence is fundamental as it enables to determine the author(s) of a criminal act, therefore the establishment of his (her/their) guiltiness and the determination of his (her/their) punishment. Likewise, Evidence is a guarantee that innocents will not be held responsible and not be sentenced.

Witnesses' testimony and collection of evidence in general have been highlighted as important pillars in the new Criminal Procedure Code:

- Article 19 establishes incriminating reasons and ranks testimonies of the witnesses as the second incriminating evidence;
- Article 20 bounds the judicial police officer and the prosecutor to take appropriate actions in collecting, recording, evaluating, and maintaining the evidence and documents in order to clarify all case related situations;
- Article 23 stresses the priority of evidence. It says: "*The court shall assess the evidence and issue its verdict based on evidence provided by a legal authority considering*

the weakness and strength of the evidence".

In light of the above, by accepting witnesses' refusal to testify, Afghanistan misses the opportunity to abide by the principles set forth in its own law and deliberately prevents truth-making. Such a decision to give family members the option not to testify can bend the truth and leave crimes unresolved and unpunished. This can only reinforce insecurity and people's lack of confidence in the State and its justice system.

Moreover, such a rule can only encourage the arbitrary as it promotes the idea that persons can be accused, prosecuted, judged and sentenced without taking into account all elements of proof. Therefore it is likely to result to innocent people being prosecuted and declared guilty, and perpetrators being not prosecuted or acquitted.

One other critical point in article 26 is the exception it provides for. The text says that if the court thinks that a relative's testimony is important, it can order to hear his/her testimony in a private setting, and, if necessary, without the presence of either party. This prevents the accused to have access to all elements of proof against him or her, to examine the witnesses against him or her, to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her, to raise defences and to present other evidence admissible. In this regard it represents a hindrance to the right of defence and is contrary to the international human rights standards of fair trial.

Moreover, according to international human rights standards, witnesses are not exempted to testify in criminal proceedings. The only possibility that they have is to provide an

anonymous testimony if their security is at stake⁶.

By enacting article 26, Afghanistan blatantly violates Human Rights principles it is bound to in regard to international conventions it has ratified, such as the International Covenant on Civil and Political Rights, but also in regard to its own Constitution, particularly Article 5 (obligation of the State to preserve national security), Article 6 (respect of human rights and equality), Article 7 (respect of international treaties), Article 27 (due process of law), Article 31 (right of information in criminal proceedings).

In regard to women's rights, the enactment of article 26 will definitely prevent prosecution of crimes provided by the ERAW Law based on lack of proof. ERAW crimes being mainly domestic crimes and occurring in the private sphere, who else than relatives can testify as witnesses, and contribute to the discovery of truth, consequently to prosecution, judgment and punishment of perpetrators. In a country like Afghanistan where violence against women is tolerated, accepted and sometimes encouraged at the domestic level, relatives who are given the choice not to testify will predominantly prefer not to do it.

Article 26 of the new Criminal Procedure Code which has been approved by the Parliament and endorsed by the President definitely puts the ERAW Law at high risk of not being implemented.

[4 - The use of the "Attempting to Zina7" incrimination](#)

⁶ See for example the Rome Statute to which Afghanistan is party.

⁷ In Sharia Law which is applicable in Afghanistan the crime of *Zina* means unlawful sexual intercourse, that is

For a long time, women in Afghanistan have faced prosecution for running away from home. However running away or elopement has had no legal basis and has infringed the principle of criminal legality.

Having no offence provided for by the penal code, prosecution services have based prosecution on article 130 of the Constitution according to which *"in cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi⁸ jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner"*.

But the recourse to article 130 of the Constitution has been wrong since provisions in the law existed. Namely, article 2 and 3 of the Penal Code both underline the principle of criminal legality: *"No act shall be considered crime, but in accordance with the law"* (Article 2) and *"No one can be punished but in accordance with the provisions of the law which has been enforced before commitment of the act under reference"* (Article 3).

Moreover, article 1 of the Afghan Penal Code clearly mentions that the code regulates the Sharia Law *Ta'zir* crimes and penalties and provides that Sharia Law crimes of *Hudood*, *Qisas* and *Diyat* shall be punished in accordance to the provisions of Islamic religious law applicable in Afghanistan, that is to say the *Hanafi* school jurisprudence.⁹ Running away

to say sexual intercourse that takes place outside marriage.

⁸ Afghanistan abides by the *Hanafi* School which is one of the four major Sunni Islamic schools of law.

⁹ For precise definitions of *Ta'zir*, *Hudood*, *Qisas* and *Diyat*, see Farhat J. Ziadeh, "Criminal Law", *The Oxford Encyclopedia of the Islamic World* on line:

from home is not codified as a *Ta'zir* crime, nor does it constitute a *Hudood*, *Qisas* or *Diyat* crime.

Consequently, even while invoking article 130 of the Constitution, prosecution has lacked legal basis. But unfortunately, not only prosecutions have lacked legal basis. Judgments have been as well. Most of the judges have never questioned the illegality of the incrimination of running away and have rendered decisions and sentences based on article 130 of the Constitution even if these decisions were illegal. Recently, prosecution services have managed to bypass this legal mistake by transforming the act of running away from home perpetrated by a girl or a woman into “attempt to commit *Zina* (unlawful sexual intercourse)” which does have a legal basis, *Zina* being a *Ta'zir* crime according to the article 426 and 427 of the Penal Code of Afghanistan but also a *Hudood* crime according to the Sharia Law¹⁰.

Under this new legal setting, a girl or a woman who runs away from home is necessarily perceived as doing so in order to have unlawful sexual intercourse, which is a real bias. The whole Afghan society is aware that many girls and women in Afghanistan resort to leave their homes because they face domestic violence or because they refuse forced marriages, not necessarily to have unlawful sexual intercourse.

Above all, prosecuting and sentencing on the simple basis of “attempting to *Zina*” may fully ignore one core principle of criminal law according to which there is no crime without

<http://www.oxfordislamicstudies.com/article/opr/t236/e0170>

¹⁰ See UNAMA Report, pages 6, 7, 22, 23, <http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20REPORT%20on%20EVAW%20LAW%208%20December%202013.pdf>

intent to commit it. Yet the moral element of crime (intent) is expressly provided for in the Afghan Penal Code in its articles 34 and 35.

Consequently, women and girls who run away from home are very much exposed to be charged with a crime that they have not intended to commit, and for which they should normally not be prosecuted, nor sentenced.

In its December 2013 update report on the implementation of the EVAW Law in Afghanistan, The United Nations Assistance Mission in Afghanistan (UNAMA) observed that the determination of intent in *Zina* cases is often subjective based on circumstantial evidence and often centered on the views of a specific prosecutor or police officer. UNAMA quotes that the circumstance of a woman seated in a public plane with a man who is not her *Mahram*¹¹ may be a sufficient basis to prosecute and convict her of “attempting to *Zina*”¹².

It is a real paradox to see that whereas the laws applicable in Afghanistan – The EVAW Law but also the Penal Code and the Criminal Procedure Code – contain provisions on criminal legality and fair trial principles, presumption of innocence and criminalise patterns of domestic violence, forced marriage, underage marriage, prohibiting a girl or a woman from the right of marriage, that they legitimate women’s right to protection in those situations, Afghan women and girls continue to face prosecution for actions that they probably might have not intended to commit.

¹¹ In Islamic terminology, a *Mahram* is an unmarriageable kin with whom sexual intercourse would be considered incestuous or a punishable taboo. In Islamic countries, it is a male guardian who is entitled to accompany a woman in the absence of her husband.

¹² UNAMA Report, page 23.

Given this paradox, one can only question the judiciary's willingness to implement protective laws towards women.

5 - The debate concerning the introduction of the punishment of stoning in the Law

In November 2013 the organisation Human Rights Watch raised the issue of the possible introduction in the Afghan law of stoning to punish adultery and extra-marital sexual intercourse in the frame of the revision of the Penal Code by the Ministry of Justice Criminal Law Working Group.

The draft provision, seen by Human Rights Watch, provides that if a couple is found by a court to have engaged in sexual intercourse outside a legal marriage, both the man and woman shall be sentenced to “[s]toning to death if the adulterer or adulteress is married.” *The provisions state that the “implementation of stoning shall take place in public in a predetermined location.”* If the “adulterer or adulteress is unmarried,” the sentence shall be “whipping 100 lashes.”¹³

Stoning was used as a punishment for adultery during the Taliban rule but it has never been codified in any law. Therefore the debate of introducing such a provision in the law and the existence of a draft in the Ministry of Justice are particularly terrifying and appalling.

Immediately after the release of the news, and the protests it brought about President Hamid Karzai declared that such a punishment would not be introduced in the law. Moreover the

¹³ Human Rights Watch, *Afghanistan: Reject Proposal to Restore Stoning*, November 25, 2013, <http://www.hrw.org/news/2013/11/25/afghanistan-reject-proposal-restore-stoning>

Minister of Justice said in a statement that although stoning had been proposed it would not appear in the new legislation because there was no need to regulate the issue.¹⁴

According to the Afghanistan Analyst Network the head of the working group said in December 2013 that the working group had not attempted to reintroduce flogging and stoning as punishments for moral crimes but only wanted to explain Islamic law terms to international colleagues. He however added that it was not decided yet if these punishments should be included in the Penal Code which indicates that their introduction is not excluded¹⁵.

6 – The decrease of violence against women cases indicted and prosecuted under all applicable laws and the decrease of court decisions based on the EAW Law

In its December 2013 update report on the implementation of the EAW Law in Afghanistan, UNAMA compared the number of registered incidents of violence against women and their prosecution in 16 provinces from October 2012 to September 2013 with the figures it had collected between October 2011 and September 2012¹⁶.

It observed that while registration of reported incidents increased by 28% amounting to 650 cases (470 cases the previous period), the use of the EAW Law as a basis for indictment

¹⁴ “Stoning will not be brought back, says Afghan president”, Emma Graham-Harrison, *The Guardian*, 28 November 2013, <http://www.theguardian.com/world/2013/nov/28/stoning-not-brought-back-afghan-president-karzai>

¹⁵ Sari Kouvo, Afghanistan Analyst Network, *War with no End in Sight: the backlashes regarding Afghan women's rights*, 17 February 2014, <http://www.afghanistan-analysts.org/a-war-with-no-end-in-sight-the-backlashes-regarding-afghan-womens-rights>

¹⁶ UNAMA Report, page 3 (see footnote 8)

increased only by 2%, which is clearly insufficient in comparison to the number of registered incidents.

The report mentions that between October 2012 and September 2013, courts applied the EAW Law in only 55% of the 109 indictments filed under the EAW Law, that is to say 60 decisions, which constitutes a 17% decrease in courts' use of the EAW Law to decide cases.

Moreover, the report highlights a decrease of the overall number of criminal indictments filed by prosecutors in violence against women cases under all applicable laws, in spite of reported and registered incidents.

A significant increase of incidents of violence against women should have normally increased proportionally the number of cases prosecuted and judged based on the EAW Law. On the contrary, information collected by UNAMA highlights a real timidity of the judiciary to adhere to the EAW Law, which doesn't predict good signs for the future.

7 – The recourse to mediation by the judiciary as a way to avoid prosecuting cases

One major finding of the UNAMA report was the deliberate decision by prosecution services and courts to resolve EAW cases through mediation, resulting to few cases going to courts for prosecution¹⁷. UNAMA observed that mediation was used even for the most serious crimes.

Moreover the Report on the implementation of the EAW Law published by the Ministry of Women's Affairs in January 2014 established that mediation has emerged as the most preferred and commonly used method of

¹⁷ UNAMA Report, page 5 (see footnote 8)

resolution of violence against women cases as according the report *"it respects the sanctity of family as a unit and is in consonance with cultural traditions"*. In this regard the Ministry of Women's Affairs intends to prepare a guidelines on the use of mediation in consultation with all implementing agencies and accordingly to train staff of agencies¹⁸.

Yet EAW Law provides for a series of instances of violence against women which are considered crimes and have specific and very precise criminal penalties. There is no provision in the EAW Law concerning the recourse to mediation as an alternative to criminal proceeding and sentencing, and there is absolutely no provision in the Afghan criminal procedure code concerning the use of mediation in criminal matters.

Therefore by using mediation, prosecution services simply don't abide by their general duty to prosecute crimes as it is specified in the criminal procedure code, but also in the EAW Law, in particular under its article 4 (*"Violence is a crime.... If committed it shall be punished in accordance to the provision of this law"*) and article 39 (*"1 – Relevant cases and judicial proceedings of the perpetrators of crimes enshrined in the articles 22-39 of this law shall be prosecuted based on the complaint filed by the victim or a relative"*).

Beyond not being in conformity with the law, recourse to mediation produces opposite effects. It encourages impunity, which is simply the contrary of the spirit which underpins the EAW Law. Moreover, instead of abating violence, it is more likely to increase it. For instance UNAMA observed that mediation and

¹⁸ *First Report on the Implementation of the Elimination of Violence against Women (EAW) Law in Afghanistan*, MoWA, January 2014, paragraph 41.

informal dispute resolution failed to discourage and penalise violence against women and girls, and that settlements and agreements reached through mediation were often not observed through adequate follow-up, leading to further violence against women.

In conclusion, the possible ratification of the ERAW Law by the Afghan National Assembly, the conditionality of the victim's complaint to prosecute serious crimes committed against women, the adoption of the article 26 of the criminal procedure code draft of article 26, the use of the "Attempting to Zina" incrimination, the emergence of a debate concerning the introduction in the Afghan Law of the punishment of stoning, the decrease of violence against women cases indicted and prosecuted under all applicable laws, and the recourse to mediation by the judiciary as a way to avoid prosecution of ERAW cases represent enormous challenges ahead in order to preserve the ERAW Law, to have it implemented at best and to improve it.

PART II

General assessment of the use of EAW Law and its implementation by the Judiciary in Medica Afghanistan legal cases between August 1st 2012 and December 31st 2013

1- About Medica Afghanistan Legal Aid Programme

Medica Afghanistan started operating in Afghanistan in 2002 as a programme of medica mondiale, a non-governmental women's rights organisation based in Germany that is specialised in providing holistic support to women victims of sexual violence in war-torn countries and crisis zones around the world. In 2011 Medica Afghanistan became an independent organisation and was officially registered as a self-sustaining Afghan NGO.

Medica Afghanistan carries out an advocacy work to make the rights of women progress in Afghanistan.

It also provides direct services and training:

- psychosocial counselling to women victims of violence and training of medical staff to adopt a trauma sensitive approach towards women affected by violence
- direct legal aid to indigent women in judicial proceedings and training of the police and the judiciary.

With a team of lawyers and social workers the legal aid programme of Medica Afghanistan operates in the cities of Kabul, Herat and Mazar-e-Sharif.

It carries out the following activities:

- 1 – Legal support to women and girls victims of criminal offences through legal advice and through collaboration with prosecution services to indict alleged perpetrators.
- 2 – Legal defence of women accused, indicted, prosecuted and judged for crimes at all stages

of proceedings (prosecution services' investigation, defence before district and appeal courts and the Supreme Court).

3 – Legal representation of women engaging civil proceedings before family courts (divorce, child custody, alimony....)

4 – Mediation between couples or within families to solve family/domestic issues at the request of women involved

5 – Legal advice to women in need

6 – Social support of women in prison (restoration and development of links with their families, preparation of their release) and social follow-up of criminal, civil and mediation cases.

2 – General information concerning the use, implementation and perception of EAW Law over the period

2.1-Use of EAW Law by Medica Afghanistan lawyers

Over the period considered, Medica Afghanistan lawyers report to have used more the EAW Law in their defence strategy than in the previous period considered (January 1st 2011 to July 31st 2012)¹⁹.

Medica Afghanistan lawyers have definitely used the EAW Law while supporting victims of violence prosecutable under the EAW Law with a view to obtain prosecutors' indictments based on the EAW Law provisions and court decisions and sentences on the same basis.

Moreover like during the previous period, they used EAW Law while defending women prosecuted and judged for criminal offences as a defence strategy to have courts recognise violence perpetrated against women.

They also did the same before civil courts to back divorce requests.

¹⁹ *The EAW Law in Medica Afghanistan Legal Aid*

Practice Report, June 2013,

<http://www.medicaafghanistan.org/Files/Annual%20and%20other%20reports/EAW%20LAW%20Analysis-Report.pdf>

In their mediation work, Medica Afghanistan lawyers also used the EAW law as a deterring strategy to end domestic violence.

2.2-Prosecution of cases based on the EAW Law

Medica Afghanistan lawyers in Kabul, Herat and Mazar all observe that prosecution of cases based on the EAW Law is still low. They have not noticed an increase in prosecution services' interest or willingness to indict on the basis of the EAW Law. This confirms the trend highlighted by UNAMA in its report.

Moreover, Medica Afghanistan lawyers mention that prosecutors have recourse to EAW Law only in high level of violence, almost never when this level is low.

2.3-Attitude of judges and court decisions based on the EAW Law

Medica Afghanistan lawyers have observed no improvement in the attitude of judges towards the EAW Law and enforcement of the law by courts. On the contrary, some of them mention an increase in negative perceptions due to the debate that took place at the National Assembly in Spring 2013, including sarcastic remarks during court sessions²⁰.

As in the previous period, judges followed the prosecutors' indictments. When these indictments were based on the EAW Law, court decisions were also based on the same EAW Law provision, otherwise judges rarely took the initiative to apply the EAW Law on their own initiative.

In criminal cases concerning indicted women or civil cases, some judges could be receptive to violence experienced by women but it depended on the judges' own perception of the woman.

²⁰ One lawyer pointed out the ironical remark of a judge saying that men as well experience violence in Afghanistan, and inviting her to draft a law for the elimination of violence against men.

2.4-Perception of the EAW Law by the police

All lawyers point out an improvement of the attitude of the police towards women victims of violence, thanks to training they have carried out throughout 2012 and 2013 in police stations. But still, according to Medica Afghanistan team, many police officers don't know about the EAW Law and the appropriate procedure to file a complaint.

Herat is the programme location where this change is very much significant compared to the previous period. The Herat team of Medica Afghanistan particularly points out the positive impact police officers training has had, particularly on police women²¹.

In Kabul, police officers now take victims to the hospitals.

However in Mazar, the police don't immediately send victims to the EAW Unit in charge of proceeding cases²². Police officers refer victims to the Family Response Unit (FRU)²³ for mediation. If mediation fails, then victims are directed to EAW Units. Lawyers are then requested by EAW units to follow cases.

Lawyers in Kabul have also pointed out the developing practice of mediation.

2.5-Knowledge of the Law by women

²¹ Medica Afghanistan team in Herat has given the example of a police woman who has declared that her knowledge of EAW Law has changed her life. She has used it to solve the conflicts existing in her family and she has sensitized her village on the EAW Law, in particular on provisions regarding child marriage.

²² EAW units have been established in 8 prosecution offices in the country: Balkh, Herat, Badakhshan, Nangarhar, Parwan, Kapisa, Bamyan and Kabul. They are especially in charge to proceed to EAW cases.

²³ Family response units (FRU) are special offices of the Afghan National Police in charge of dealing with family issues, especially violence against women and against children. Established in 2006, they operate in some provinces of Afghanistan.

Medica Afghanistan lawyers point out an increased knowledge of what is considered violence against women in the laws of Afghanistan by women. Before the EVAW Law, many women were experiencing different forms of violence without knowing that such violence was repressed, sometimes considering it was normal.

Still many women don't know about their rights, even less about the provisions contained in the EVAW Law and the work of Medica Afghanistan lawyers consists in raising awareness among women who come to request their services.

2.6-Knowledge of the Law by the population in general

According to Medica Afghanistan lawyers, there is definitely an increased knowledge of the existence of the EVAW Law among the Afghan population but its perception is mitigated given the wrong messages that have been released by conservative leaders and the hostility that has developed in the society.

This has resulted to more and more women refusing to file complaints and requests formulated by women and men to go for mediation.

2.7-Provisions of the Law that are problematic or have to be changed

According to some lawyers of Medica Afghanistan, the provision of article 39, paragraph 2 should be amended.

Article 39 deals with judicial prosecution. It says:

1. Relevant cases and judicial proceedings of the perpetrators of crimes enshrined in Articles 22 - 39 of this law shall be prosecuted based on the complaint filed by the victim or a relative.

2. In circumstances mentioned in paragraph 1 the victim may withdraw her case at any stage of judicial prosecution (detection, investigation, trial or conviction). In this case pursuing the

case and implementing the punishment shall be stopped.

Medica Afghanistan lawyers state that too many women withdraw cases under pressure (see the developments about article 39 in Paragraph 2, Part I).

PART III
The EVAW Law in Medica Afghanistan
legal cases
between August 1st 2012 and December
31st 2013

1- The use of the EVAW Law by Medica Afghanistan lawyers

1.1-Clarification about Medica Afghanistan terminology

The “use” of the EVAW Law must be understood as the invocation of one or more specific provisions of the law in Medica Afghanistan lawyers’ letters to prosecutors to ask them to indict (in victim cases), in their defence statements (in criminal cases), in their submissions to the court (in civil cases) and in the letters of agreement signed between parties (in mediation cases).

As for victim, criminal, civil and mediation cases in Medica Afghanistan terminology, they must be understood as follows:

- Victim cases are cases of women or girls victims of criminal acts who have been legally assisted by Medica Afghanistan lawyers;
- Criminal cases are cases of women or girls accused of perpetrating one or more criminal acts who have benefited from Medica Afghanistan defence;
- Civil cases are cases of women or girls who were assisted by Medica Afghanistan lawyers to engage a petition or a lawsuit before family courts (for divorce, alimony, child custody purposes...);

- Mediation cases are cases of women or girls who had recourse to Medica Afghanistan legal aid team to help them solve an issue in their families and to mediate between them and one party (generally their husband) or more (other members of the family).

The word “girl” in Medica Afghanistan terminology refers to juveniles (under 18 according to the Afghanistan Juvenile Code), whereas the word “woman” designates a person beyond 18 years old.

1.2-Figures reported over the period from August 1st 2012 and December 31st 2013

Out of a total number of 1,277 cases Medica Afghanistan had over the reported period, (17 months) the EVAW Law was invoked by MA lawyers in 98 cases, which accounts for 7.6% of cases.

In the previous period studied, that is to say between January 1st 2011 and July 31 2012 (19 months) Medica Afghanistan had a total number of 1,077 cases, of which 64 invoked the EVAW Law (6% of all cases).

Out of these 98 cases where Medica Afghanistan referred to the EVAW Law:

- 8 consisted in victim cases,
- 30 were criminal cases,
- 16 were civil cases,
- 44 were mediation cases.

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 EVAW Law	%	All	Using EVAW Law	%	All	Using EVAW Law	%	All	Using EVAW Law	%
Herat	4	4	100	166	15	9	268	6	2.2	123	3	2.4
Kabul	1	1	100	121	10	8.2	86	2	2.3	195	10	5
Mazar	3	3	100	32	5	15.6	139	8	5.7	139	31	22
TOTAL	8	8	100	319	30	9.4	493	16	3.4	457	44	9.5

2 – Victim cases

2.1–Preliminary remarks concerning legal assistance to victims

Since its creation the legal aid programme of Medica Afghanistan has focused on the provision of legal defence of women and girls accused of crimes, representation in civil courts and mediation. It has not been centred on the legal assistance of women and girls victims of criminal offences, this for two interrelated reasons: Afghanistan legal aid framework and its criminal procedure system.

Concerning the legal aid framework, Medica Afghanistan operates under the framework of article 31 of the Afghan Constitution²⁴ which provides for defence of accused persons and for free legal aid for indigents in criminal matters. Such a provision is also highlighted in the 2004 Afghan Interim Criminal Procedure Code²⁵. The

²⁴ Article 31 (Constitution of Afghanistan):

Every person upon arrest can seek an advocate to defend his rights or to defend his case for which he is accused under the law.

The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law.

In criminal cases, the state shall appoint an advocate for a destitute.

The confidentiality of oral, written or telephonic communications between an advocate and his accused client are immune from invasion.

The duties and authorities of advocates shall be regulated by law.

²⁵ Article 19 (Criminal Procedure Code):

The suspect or the accused be financially unable to appoint a defense attorney are entitled to have a free defense attorney appointed for him or her in the following manner:

a. The investigating Saranwal or the Court adjudicating the case, on the petition of the person, appoints a defense attorney for the destitute person from amongst the lawyers officially permitted to work as defense attorney.

b. The person for whom an attorney has been appointed reserves the right not to accept the appointed defense attorney and to defend himself in person.

c. The fees of the aforesaid attorney shall be paid from the State budget and its extent shall be fixed by regulation.

NGO also operates under the 2007 Advocates Law which regulates legal professionals, and the 2008 Legal Aid Regulation that has specifically included civil cases involving children and women within the category of cases entitled to legal aid.

According to this framework, alleged victims of criminal offences are not entitled to benefit from legal aid.

As for the Afghan criminal procedure system so far it has not provided for participation of alleged victims in criminal proceedings. According to the 2004 Criminal Procedure Code, an alleged victim was considered as any individual entitled to report an offence and to make a complaint and he/she was not a party to the criminal proceeding. Only the prosecutor and the accused were, and the law did not provide for their legal assistance. Victims have however always been considered as witnesses during the trial and they are the first witnesses to be heard. As a result, being informed by the police or prosecution services only for the sake of defending accused persons, Afghan lawyers have rarely come across cases of victims of criminal acts. This explains why Medica Afghanistan lawyers have had such a low number of cases of women and girls victims of criminal offences.

However the situation might change with the enactment of the 2014 Criminal Procedure Code. A special article 6 concerning the rights of victims and plaintiffs during the legal prosecution stages has been inserted.

It says:

Article 6 - Rights of the Victim and Plaintiff during the Legal Prosecution Stages

(1) During the legal prosecution of the case, the victim and plaintiff have the following rights:

1– Fair behavior, respect of their human dignity and personal honor.

2– Ensured safety.

3- *Participating during legal prosecution of a criminal case and directing special questions to the accused person in murder and battery crimes.*

4- *Request for reimbursement in accordance with the provisions of the law.*

5- *Access to information concerning the proceedings and prosecution results of the case in different stages of the legal prosecution.*

6- *Objections to judicial officers, experts, prosecutors and judges performances in accordance with the provisions of the law.*

7- *Access to necessary legal, physical, medical, psychological, and social services.*

(2) The police, prosecutor's office and court each shall, within their area of jurisdiction, take and enforce required measures to ensure that the victim has access to his or her rights set forth in paragraph (1) of this article.

According to this new legislation, victims have gained rights during prosecution and they are entitled to have "access to necessary legal services", which at this stage remains unclear. Does it mean that victims are entitled to benefit from legal aid? This point will have to be clarified by the Ministry of Justice.

Beside legal reasons that have so far prevented Medica Afghanistan to deal with victim cases, one cause related to societal attitudes towards women must be added: Most of the criminal offences women experience in Afghanistan are related to domestic violence. Given the widespread opinion that domestic violence issues belong to the private sphere and must be confined, the proportion of cases that go over this private sphere remains low. But more and more victims approach Medica Afghanistan through their mediation offices where lawyers and social workers operate together to provide advice and mediation services. These mediation offices have gained reputation in Kabul, Herat and Mazar. Some of these victims are referred by the regional EAW units that exist in prosecution offices.

2.2-Referral and attitudes of victims

Over the period studied, Out of the 1,277 cases they had Medica Afghanistan lawyers and social workers provided assistance to 8 victims of criminal acts (1 in Kabul, 3 in Mazar and 4 in Herat).

Most of the violence against women situations that Medica Afghanistan lawyers have come across are cases of domestic violence, most generally perpetrated by husbands.

One part of these victims came to Medica Afghanistan mediation offices to seek advice, sometimes ignoring the existence of the EAW Law and the judicial proceedings they could initiate.

Other victims were referred by EAW units for mediation purposes, that is to say in order for Medica Afghanistan to facilitate dialogue and reconciliation with the perpetrator of violence. But in all victim cases referred, Medica Afghanistan team found that violence perpetrated was very serious and convinced victims not to go for mediation but to file a judicial complaint at the EAW unit.

Medica Afghanistan lawyers observe that the vast majority of women still refuse to file a complaint because they are afraid of the consequences of initiating judicial proceedings:

- Many fear an increased violence, including killing from their husbands after they have served their sentence and are released from prison.
- A great number point out a total absence of family support, therefore their fear to be rejected by their families and communities.
- When they finally overcome their initial reluctance to file a complaint, too many women are pressurized or forced by their husbands or their families to withdraw their complaint. They consequently face increased violence.

One significant reason that compels women not to file a complaint is the fear not to have enough evidence to prove violence. Witnesses

may definitely refuse to testify, especially since the law has authorized them to do so (see previous developments on article 26 of the Criminal Procedure Code).

Medica Afghanistan lawyers also point out the fact that many women victims of physical violence come to seek help many days after violence has been perpetrated. As they don't have marks of violence on the body, the EVAW units refuses to register their complaint.

2.3–Scope of the legal assistance provided by Medica Afghanistan to victims and case typology

All these 8 victim cases involved women over the age of majority as victims and their husbands as alleged perpetrators of violence. In one case, violence was not only committed by the perpetrator against his spouse, but also against his two children daughters who were juveniles.

The 8 cases were all about crimes provided for in the EVAW Law. Some of them were also about general crimes provided in the Penal Code, but all combined with EVAW Law crimes: battery and laceration, abusing and humiliating, causing injury and disability, retribution of a woman (*Baad*), murder and attempted murder.

The work carried out by Medica Afghanistan lawyers in these 8 cases consisted in collecting evidence for the prosecutors to base their accusations on (mainly pictures, medical certificates), in providing legal advice to the alleged victims and their families, and in lobbying to get prosecutors base their indictments on EVAW Law appropriate provisions together with the Penal Code ones when relevant. In addition, they were present during trial.

Beside the work carried out by lawyers, one must not forgot the active role played by Medica Afghanistan social workers in carrying out the follow-up of victims after the trial to check on their situation and to provide them

advice and guidance concerning management of their lives.

The examples below illustrate the type of cases Medica Afghanistan had and the assistance provided by its team.

The Case of S.

In Herat, the husband of S. declared that he had found her dead at night. He said that she had psychological problems and that she had committed suicide. The police took this argument for granted and concluded its investigation to suicide. The medical certificate showed that S. had died from strangulation. Medica Afghanistan lawyer brought the evidence that she could not have done that on her own, she took pictures of the physical marks on her body showing she had been lacerated and injured on the night she died. The pieces of the necklace S. was wearing were found all over the place in the house showed the signs of a fight. With this evidence, Medica Afghanistan lawyer managed to convince the prosecution services to investigate further, which they did. Testimonies of witnesses and other evidence collected led to the accusation and the indictment of the victim's husband. In addition to the crime of murder provided by the Penal Code, Medica Afghanistan lawyer lobbied the prosecutor so as to indict the accused on the basis on article 22, paragraph 2 of the EVAW Law (act of causing injury resulting to the death of the victim). She also provided advice to the victim's family, including their right to lodge an appeal if they were not satisfied with the primary court's decision, which they did.

The Case of A.

In Mazar, A. was living in a house with her husband and her family in law. Her father in law heard her screaming at night. He woke up and discovered her injured and bleeding. He saw his son with a knife and realised that he had assaulted his wife. A.'s father in law testified that his son was violent with his wife, which his wife and daughter confirmed. A. explained that her jobless husband had injured her because she had refused to prostitute. Medica

Afghanistan lawyer asked the prosecutor to indict the accused on the basis of article 22 of the EVAW Law, beside article 396 of the Penal Code (attempted murder). Moreover, she assisted A. in filing a divorce request before the family court.

The Case of H., S. and F

In Kabul, with the support of Medica Afghanistan lawyer, H. made a complaint at the EVAW unit. She explained that her husband had 10 years before given their two daughters, S. and F. as retribution for murdering his first wife in Pakistan. She said that he had attempted to rape them several times and was playing pornographic films in their presence, which S. and F. confirmed. She finally declared that she was regularly subject to physical violence from her husband. The husband of H. recognised he had given his daughter for retribution but denied sexual assaults towards them, as he denied beating his wife. Medica Afghanistan lawyer advocated for prosecution based on article 25 of the EVAW Law (*Baad*, retribution of a woman for murder), article 17 of the EVAW Law (rape) and article 22 of the EVAW Law (causing injury or disability).

2.4–Prosecutors’ indictments

In the 8 victim cases, Medica Afghanistan lawyers tried to convince prosecutors to indict on the EVAW Law provisions, sometimes together with other provisions of the Penal Code.

They succeeded in 6 cases:

- 3 cases were indicted on the sole basis of article 23 of the EVAW Law (battery and laceration) : 2 in Herat and 1 in Mazar
- 1 case (*the Case of H., S. and F.* described above) was indicted on the basis of articles 22 (causing injury or disability) and 25 of the EVAW Law (*Baad*, retribution of a woman) in Kabul. However, the prosecutor didn’t take on the suggestion of Medica Afghanistan lawyer to prosecute on the basis of attempt to rape (article 17 of the EVAW Law).

- 1 case (*the Case of A.* described above) was indicted on the basis of article 22 of the EVAW Law (causing injury or disability) together with article 396 of the Penal Code (attempted murder) in Mazar
- 1 case (*the Case of S.* described above) was indicted on the basis of article 22 of the EVAW Law (causing injury or disability) together with article 395 of the Penal Code (murder) in Herat

As for the 2 cases which were not indicted based on the EVAW Law:

- In the first case that took place in Herat and concerning acts falling under article 22 of the EVAW Law, the prosecutor didn’t indict the alleged perpetrator as he escaped and the police could not find him. The case is still pending at the Attorney office and the prosecutor is waiting for the alleged perpetrator to reappear.
- The second case that took place in Mazar was about physical violence (beating) and forced sexual intercourse (rape) committed by a husband towards his wife. Medica Afghanistan lawyer advocated for an indictment based on article 17 of the EVAW Law. Such a solution would have recognised rape committed by a husband towards his wife. Instead, the prosecutor chose to base his indictment on article 427 of the Penal Code (Pederasty). The primary court found the husband guilty of the crime of pederasty and convicted for one year and six months in prison. The victim was provided legal assistance by Medica Afghanistan lawyers and after the conviction of her husband, she returned to live in her own family.

2.5–Court decisions

The 3 cases indicted based on sole provisions of the EVAW Law resulted to court convictions based on these provisions. The court sentenced the perpetrators on the basis of article 23 (battery and laceration) to imprisonment amounting respectively 12 months, 18 months and 3 months with a fine of 3,000 Afghanis.

The convict sentenced to 18 months imprisonment lodged an appeal before the secondary court. The case is presently pending.

In the third case (conviction of 3 months and 3,000 Afghanis) which was about physical violence perpetrated by a husband towards his wife in Mazar, the convict lodged appeal but by the time the secondary court took its decision, the man had served his sentence and the spouses decided to reconcile. The couple presently lives together and the woman victim is under Medica Afghanistan social worker follow-up.

In the Kabul case (*the Case of H., S. and F.* described above) indicted on the basis of articles 22 and 25 of the EVAW Law, the primary court found the accused guilty and sentenced him to six years in prison on the basis of article 25 of the EVAW Law (*Baad*, retribution of a woman) and to 3 months in prison on the basis of article 22 of the EVAW Law (causing injury or disability), together with article 409 of the Penal Code (battery and laceration). Appeal was lodged and the secondary court decision confirmed the primary court decision.

In the Mazar case (*the Case of A.* described above) indicted on the basis of article 22 of the EVAW Law (causing injury or disability) together with article 396 of the Penal Code (attempted murder), the primary court declared the accused guilty to have caused injury or disability as provided in the article 22 of the EVAW Law and to have attempted to murder his wife in regard to the Penal Code provision and sentenced him to 10 years of imprisonment.

In the Herat case (*the Case of S.* described above) indicted on the basis of article 22 of the EVAW Law (causing injury or disability) together with article 395 of the Penal Code (murder), the primary court found the accused guilty of the above mentioned crimes and convicted him to 10 years in prison. Unsatisfied with the verdict, the victim's brother appealed the case, and the

secondary court sentenced the perpetrator to 20 years in prison.

2.6-Conclusions and recommendations concerning victim cases

Though limited, the victim cases Medica Afghanistan has managed have shown very positive results.

Medica Afghanistan is therefore encouraged to take on more victim cases, therefore to communicate more about its activities so that they are known by the population and particularly by women experiencing violence. Good relations must be strengthened with EVAW units but also police offices for case referrals.

In this regard Medica Afghanistan is strongly recommended together with other legal aid agencies to clarify as soon as possible with the Ministry of Justice the scope of the new legislation enacted in article 6 of the Criminal Procedure Code that provide victims with rights during the prosecution stage in order to redefine the scope of its action and to collaborate with the appropriate authorities to assist victims of criminal acts during this part of the proceedings.

However a major obstacle remains the reluctance or refusal of women to file complaints due to the high risks they are exposed to. There is no much Medica Afghanistan can do about that, as one cannot push a woman to engage judicial proceedings if she is not ready to. But Medica Afghanistan lawyers are encouraged to continue to be transparent and inform as much as possible their clients about the law, the proceedings and their consequences, if possible to talk and provide information to women's families in order to get their support, finally to provide a high quality legal assistance and support in order to obtain from courts the most favourable decisions and to ensure a reinforced follow-up after court adjudication.

Medica Afghanistan team has been right to scrutinize cases submitted to them by EAW units for purposes of mediation, as a strategy to avoid prosecution. In such a context, Medica Afghanistan lawyers are invited to strengthen their vigilance and try as much as possible to convince women to file complaints in case of serious acts.

The victim cases Medica Afghanistan has had over the period have shown that prosecution services might content themselves with little, even with no evidence. This can only lead to the arbitrary. Medica Afghanistan lawyers have played a great role in collecting evidence to sustain a case and have come over the poor investigation carried out by prosecution services. They are strongly encouraged to continue taking an active role in the investigation process.

In the majority of victim cases, Medica Afghanistan lawyers succeeded in collaborating with prosecutors and having their indictments based on the EAW Law provisions suggested. Moreover, all cases indicted have led to court convictions. This shows that courts generally follow prosecutors' indictments. Medica Afghanistan lawyers are therefore encouraged to reinforce their dialogue and collaboration with prosecution services in order to have violence against women cases prosecuted, indicted and adjudicated on the basis of the appropriate EAW Law provisions but also on the relevant Penal Code ones.

3 – Criminal cases

Criminal cases are cases women or girls accused of perpetrating one or more criminal acts and who have benefited from Medica Afghanistan defence.

Over the period considered, out of the 319 criminal cases they had, Medica Afghanistan lawyers invoked the EAW Law in their defence statements in 30 cases (15 in Herat, 10 in Kabul and 5 in Mazar).

Invoking the EAW Law had two specific purposes: to provide mitigating circumstances or to withdraw charges against accused women or girls. In addition, Medica Afghanistan legal aid team experienced a previously unseen situation: women accused of committing crimes provided for in the EAW Law.

3.1 – The use of instances of violence against women provided for in the EAW Law as mitigating circumstances

Medica Afghanistan lawyers used as much as they could violence perpetrated against their clients to justify their committing unlawful or criminal acts. Therefore they referred to EAW Law provisions to stress the fact that the instances of violence their clients had experienced were condoned by the law.

In this regard they used several provisions of the law, in particular article 22 (causing injury or disability) and article 23 (battery and laceration), article 26 (forced marriage), article 27 (prohibiting from the right of marriage), article 31 (forced isolation) to justify runaway or adultery prosecutions.

In all court decisions analysed the court did not mention experiences of violence as mitigating circumstances. According to Medica Afghanistan lawyers, the invocation of EAW Law provisions had no effect on cases where guiltiness was established by courts.

3.2 – The use of EAW Law provisions to withdraw criminal charges

In 4 cases (all in Kabul) Medica Afghanistan lawyers used crimes provided for in the EAW Law in order to lead courts withdraw criminal charges against their clients and release them. The results obtained in these 4 cases were successful and led to accused women and girls declared not guilty and be released.

4 cases were indicted on the crime of unlawful sexual intercourse (adultery), sometimes

together with the charge of running away. One involved a married woman with another man, two involved juveniles:

In the case of L. who was a married woman, Medica Afghanistan lawyer claimed and proved that the accused woman was raped. She was declared innocent by the primary court. The prosecutor lodged appeal, but the secondary court confirmed the primary court judgement.

In the case of S., a 17 year old girl who had escaped from Ghazni Province, the primary court acknowledged that S. had experienced a high level of violence. Medica Afghanistan lawyer proved that she was raped by one of her cousin's friend. Accused of having sexual intercourse, she was lashed by villagers and escaped to Kabul where she found refuge in a women shelter. Even her father who had contacted the Afghanistan Human Rights Commission was beaten and punished by the community. In spite of all these elements, Kabul prosecutor indicted her for committing adultery and for running away from home. The judges withdrew both charges declaring that the prosecution lacked evidence and released her.

In the case of SH., the 16 year old girl was abducted and her father made a complaint to the police saying she had been kidnapped. The prosecutor however indicted her for "attempted Zina", for which the primary court declared her guilty and sentenced her to 6 months in prison. Medica Afghanistan lawyer appealed the case and showed there was no evidence of adultery, instead she proved that Sh. was abducted in order to be sold and invoked EAW Law article 24 (selling a woman for the purpose of marriage). SH. was released by the secondary court based on lack of evidence.

In the case of K. where K. together with her 3 sisters had escaped from home due to family violence with the support of their cousins, Medica Afghanistan lawyer claimed that she was denied her right to marry (article 27 of the EAW Law) and that she was forced to isolation

(article 31 of the EAW Law). The primary court released her on the basis that the prosecution had no ground to accuse her for committing adultery and for running away from home.

3.3 – The defence of women accused of committing crimes provided for in the EAW Law

Among the criminal cases studied, two deserve special attention as they involved women accused of inciting their daughters in law to commit suicide.

According to article 21 of the EAW Law, *"If the violent behavior of another person forces a woman to commit self-emolition, suicide or spray chemical or other poisonous substances on herself, the offender shall be sentenced to medium imprisonment in case of injury or infirmity, and in case of death of victim the offender shall be sentenced to continues imprisonment not exceeding 10"*.

In Herat a 65 year old woman, G. was indicted on the ground of the above mentioned incrimination after her daughter in law had committed suicide by swallowing poisonous substance. The primary court found her guilty and sentenced her to two year in prison based on article 21 of the EAW Law but applied article 145, paragraph 2 of the Penal Code according to which when the court finds out that the conditions and circumstances of the crime require compassion, it can reduce long imprisonment into medium or short imprisonment which should not be less than six months. Medica Afghanistan lawyer appealed the verdict claiming her client was not responsible. The secondary court found no evidence and released her.

In Mazar F. was indicted on the basis of article 21 of the EAW Law after her future daughter in law took poison and died. The two women had a verbal argument and the primary court held F. responsible of the suicide and sentenced her to five years and six months in prison. Medica Afghanistan lawyer lodged an appeal

and the secondary court having no evidence to establish the crime found F. not guilty and released her.

3.4 – Conclusions and recommendations concerning criminal cases

Highlighting instances of violence provided for in the EVAW Law experienced by their clients in order to mitigate the circumstances of the commission of their acts has proved unsuccessful when courts had sufficient evidence to charge the accused woman or girl and establish their guiltiness. Medica Afghanistan lawyers should however not be discouraged and continue to use this strategy whenever it fits to a case. Such a defence may pay in the long term.

The energy deployed by Medica Afghanistan lawyers to make courts withdraw the charges against women or girls has produced very positive effects as in all cases analysed, accused women and girls were proved non guilty and were released. But it appears that this success is more due to the demonstration by Medica Afghanistan lawyers of poor evidence from the prosecution, rather than the invocation of violence their clients have gone through. That is why, Medica Afghanistan lawyers must give priority to evidence, and continue to collect evidentiary elements scrupulously. As for victim cases, evidence is fundamental.

However one must not underestimate the great contribution the crime of rape introduced for the first time in Afghanistan by the EVAW Law has brought. The introduction of the rape incrimination in the Afghanistan legislation has provided judges with a legal alternative to the crime of adultery and has led to women and girls being declared not guilty of committing the crime of adultery. The next step for Medica Afghanistan lawyers will be to convince prosecutors not to indict on the ground of adultery when rape is established. Again only evidence brought to prosecution services will be able to change their mind.

The two cases of women indicted for inciting their daughters in law to commit suicide based on article 21 of the EVAW Law are particularly appalling. Beyond the fact that such a provision has been used to prosecute women, Medica Afghanistan lawyers should be very careful with this EVAW Law incrimination which moral element (intent) is difficult to prove. One cannot be attributed the responsibility of a crime he/she didn't intend to commit. Suicide is a personal act and no one can be held responsible for someone else's committing such an act unless it is proved that he/she had the intention to.

4 – Civil cases

4.1 – Quoting EVAW Law provisions in civil cases

The EVAW Law is a criminal law and is not applicable in civil proceedings.

However, Medica Afghanistan lawyers have been used to refer to EVAW Law provisions in the divorce for harm requests before family courts.

Quoting the EVAW Law has been a deliberate strategy to back a case, in addition to providing elements of proof such as medical certificates, testimonies etc., in order to underline the type of violence the woman claimant has gone through, and to insist on the fact that such acts of violence are forbidden and punished by the law.

But quoting the EVAW Law has been subject to different practices according to lawyers. Some prefer not mentioning it simply because presiding judges reject references to provisions applicable in a criminal instance in a civil one. Some prefer referring to these provisions verbally, other writing them in their submissions.

Out of the 493 civil cases they had throughout this period, and which include divorce requests but also alimony, child custody... Medica Afghanistan lawyers quoted EVAW Law

provisions in 16 cases (6 in Herat, 2 in Kabul, 8 in Mazar) which were exclusively in divorce for harm cases.

The most widespread acts of violence to be found in the 16 civil cases are battery and laceration (article 23 of the EVAW Law), abuse, humiliation and intimidation (article 29). One case included acts of harassment and persecution (article 30).

Out of these 16 cases, only one was coupled with a parallel criminal complaint based on the EVAW Law. In two cases identified, the husbands had been sentenced and detained for other reasons.

These 16 divorce proceedings ended with a primary court judgement of divorce in 14 cases, and by 2 withdrawals as women claimants engaged in reconciliation with their husbands. Most of the divorces adjudicated by the primary court were subject to an appeal before the secondary court lodged by husbands but in all situations, secondary courts confirmed decisions taken in the first instance.

4.2 – Conclusions and recommendations concerning civil cases

EVAW Law is obviously not applicable in civil proceedings. But quoting appropriate provisions in a divorce proceeding can have positive effects. Beyond backing a case, it promotes the idea that violence against woman is a crime. This needs to be highlighted particularly in family courts where judges who don't deal with criminal offences, are not familiar with the EVAW Law. Medica Afghanistan lawyers are therefore encouraged to continue to refer about the EVAW Law whenever possible to change perceptions.

Divorce for harm is definitely a right according to the Islamic Law applicable in family matters

in Afghanistan and it is provided for in the family law. Therefore, as long as a woman claimant is able to prove that she has been subject to violence from her husband, adjudicating divorce by the court should not be a problem. As for victim cases, and criminal cases, what matters is evidence. However, Medica Afghanistan lawyers have experienced difficult situations where judges more driven by their cultural bias rather than legal norms were not willing to adjudicate divorces though they have all elements of evidence required in by the family law. This discouraging situation is however evolving. More and more Afghans question violence against women. Medica Afghanistan lawyers should therefore persevere in their efforts. Their flawless professional attitude consisting in providing evidence, pleading cases on legal grounds as much as on facts, lodging appeals when decisions are not satisfactory will necessarily pay more and more in the long term.

5 – Mediation cases

5.1 – Use and purpose of EVAW Law provisions in mediation cases

In 2006 Medica Afghanistan lawyers started to develop their activity of mediation in order to help women solve their problems in the family cell.

Medica Afghanistan social workers and lawyers act as mediators between the woman and the other party(ies) which is most of the time her husband and other members of the family. They listen to each party's opinion and try to come to an agreement between all. After agreement is reached, a document summarizing all parties' obligations and commitments is drafted and signed. Then social workers can start follow-up cases to check if the agreement is respected.

Out of the 457 mediation cases, Medica Afghanistan lawyers used EVAW Law in 44 cases

(3 in Herat, 10 in Kabul and 31 in Mazar), which represent 9.5% of the cases. 28 cases were finalised by a signed agreement between parties summarizing each party's obligations and referring to EVAW Law provisions. 14 cases in Mazar could not be solved by mediation and were directed to the judiciary for civil proceedings.

Medica Afghanistan lawyers have used the EVAW Law for deterrence purposes in their mediation approach. They generally highlight EVAW Law provisions in cases where behaviours of husbands are crimes according to the EVAW Law, so as to make them realise that they have committed a criminal act that is punishable by the laws of Afghanistan, which they generally ignore. According to Medica Afghanistan lawyers, the fear to be possibly prosecuted together with the recognition that violent acts against women are no longer acceptable have very positive effects on husbands' attitudes towards their wives.

Out of these 44 cases:

- 35 cases were about physical violence (battery and laceration as provided in article 23 of the EVAW Law) generally perpetrated by husbands,
- 7 were about abuse, humiliation and intimidation (article 29) involving families in law,
- 5 cases were about forced isolation (article 31) of women not allowed to visit their families by their husbands
- 3 cases were about prohibition from the right of marriage (article 27), forced marriage (article 26) and underage marriage (article 28)
- 3 cases were about prevention from acquisition of inheritance (article 33), and prevention from acquisition of property (article 35).

One case in Mazar however was about a husband forcing his wife to engage in prostitution activities (article 18) and was solved through mediation.

5.2 – Conclusions and recommendations concerning mediation cases

Quoting EVAW Law in mediation has had a very positive effect on men and women. Beyond informing them both about their rights and obligations, it has had a deterrent effect on perpetrators of violence who realise that their acts are crimes according to the law. Medica Afghanistan is definitely recommended to continue to use EVAW Law in the less serious cases of violence against women.

Medica Afghanistan nonetheless is advised to handle mediation with a great prudence, especially in the context where mediation is used by the judiciary to avoid criminal proceeding. Some crimes committed against women are too serious to be dealt through mediation. Therefore whenever Medica Afghanistan lawyers come across such serious cases, they have a duty to inform victims about their rights to initiate a criminal proceeding and obtain justice. Victims should be duly informed of her right to make a complaint and not be compelled to choose mediation. They may refuse, which is their absolute right. And they might request Medica Afghanistan to solve the issue through mediation. Medica Afghanistan must then take a clear stand on whether it is ready to do it or not.

PART IV

Conclusions and Recommendations

Medica Afghanistan practice of EAW Law has shown very positive results that have to be supported and reinforced at two levels : the advocacy level and the case management level.

At the advocacy level

Together with other rights organisations, Medica Afghanistan has been very active in standing against attempts to dismantle women's rights in Afghanistan. Such a struggle has been fruitful since some governmental reforms were reviewed under rights organisations' pressure.

Given the fragility and the possible danger women's rights can face in Afghanistan, Medica Afghanistan is encouraged to continue to be very watchful and to continue its struggle and its every day work for an effective implementation of the EAW Law by law enforcers through training of the police, collaboration with the police and the judiciary, and through appropriate use of the EAW Law in its cases, so as to convince the judiciary.

It should continue to oppose any attempt to destroy the EAW Law or weaken it by other means such as the CPC article 26 draft, the "attempt to Zina" incrimination, the systematic recourse to mediation in EAW cases in order to avoid prosecution of cases, the decrease of prosecuted EAW cases etc... and find the best strategy to do it.

At the case management level

Conclusions and recommendations concerning victim cases, criminal cases, civil cases and mediation cases have been developed in the report. They are reaffirmed below.

- Victim cases

Though limited, the victim cases Medica Afghanistan has managed have shown very positive results.

Medica Afghanistan is therefore encouraged to take on more victim cases, therefore to communicate more about its activities so that they are known by the population and particularly by women experiencing violence. Good relations must be strengthened with EAW units but also police offices for case referrals.

In this regard Medica Afghanistan is strongly recommended together with other legal aid agencies to clarify as soon as possible with the Ministry of Justice the scope of the new legislation enacted in article 6 of the Criminal Procedure Code that provide victims with rights during the prosecution stage in order to redefine the scope of its action and to collaborate with the appropriate authorities to assist victims of criminal acts during this part of the proceedings.

However a major obstacle remains the reluctance or refusal of women to file complaints due to the high risks they are exposed to. There is no much Medica Afghanistan can do about that, as one cannot push a woman to engage judicial proceedings if she is not ready to. But Medica Afghanistan lawyers are encouraged to continue to be transparent and inform as much as possible their clients about the law, the proceedings and their consequences, if possible to talk and provide information to women's families in order to get their support, finally to provide a high quality legal assistance and support in order to obtain from courts the most favourable decisions and to ensure a reinforced follow-up after court adjudication.

Medica Afghanistan team has been right to scrutinize cases submitted to them by EAW units for purposes of mediation, as a strategy to avoid prosecution. In such a context, Medica Afghanistan lawyers are invited to strengthen their vigilance and try as much as possible to

convince women to file complaints in case of serious acts.

The victim cases Medica Afghanistan has had over the period have shown that prosecution services might content themselves with little, even with no evidence. This can only lead to the arbitrary. Medica Afghanistan lawyers have played a great role in collecting evidence to sustain a case and have come over the poor investigation carried out by prosecution services. They are strongly encouraged to continue taking an active role in the investigation process.

In the majority of victim cases, Medica Afghanistan lawyers succeeded in collaborating with prosecutors and having their indictments based on the EAW Law provisions suggested. Moreover, all cases indicted have led to court convictions. This shows that courts generally follow prosecutors' indictments. Medica Afghanistan lawyers are therefore encouraged to reinforce their dialogue and collaboration with prosecution services in order to have violence against women cases prosecuted, indicted and adjudicated on the basis of the appropriate EAW Law provisions but also on the relevant Penal Code ones.

- Criminal cases

Highlighting instances of violence provided for in the EAW Law experienced by their clients in order to mitigate the circumstances of the commission of their acts has proved unsuccessful when courts had sufficient evidence to charge the accused woman or girl and establish their guiltiness. Medica Afghanistan lawyers should however not be discouraged and continue to use this strategy whenever it fits to a case. Such a defence may pay in the long term.

The energy deployed by Medica Afghanistan lawyers to make courts withdraw the charges against women or girls has produced very positive effects as in all cases analysed, accused women and girls were proved non guilty and

were released. But it appears that this success is more due to the demonstration by Medica Afghanistan lawyers of poor evidence from the prosecution, rather than the invocation of violence their clients have gone through. That is why, Medica Afghanistan lawyers must give priority to evidence, and continue to collect evidentiary elements scrupulously. As for victim cases, evidence is fundamental.

However one must not underestimate the great contribution the crime of rape introduced for the first time in Afghanistan by the EAW Law has brought. The introduction of the rape incrimination in the Afghanistan legislation has provided judges with a legal alternative to the crime of adultery and has led to women and girls being declared not guilty of committing the crime of adultery. The next step for Medica Afghanistan lawyers will be to convince prosecutors not to indict on the ground of adultery when rape is established. Again only evidence brought to prosecution services will be able to change their mind.

The two cases of women indicted for inciting their daughters in law to commit suicide based on article 21 of the EAW Law are particularly appalling. Beyond the fact that such a provision has been used to prosecute women, Medica Afghanistan lawyers should be very careful with this EAW Law incrimination which moral element (intent) is difficult to prove. One cannot be attributed the responsibility of a crime he/she didn't intent to commit. Suicide is a personal act and no one can be held responsible for someone else's committing such an act unless it is proved that he/she had the intention to.

- Civil cases

EAW Law is obviously not applicable in civil proceedings. But quoting appropriate provisions in a divorce proceeding can have positive effects. Beyond backing a case, it promotes the idea that violence against woman is a crime. This needs to be highlighted particularly in

family courts where judges who don't deal with criminal offences, are not familiar with the EVAW Law. Medica Afghanistan lawyers are therefore encouraged to continue to refer about the EVAW Law whenever possible to change perceptions.

Divorce for harm is definitely a right according to the Islamic Law applicable in family matters in Afghanistan. Therefore, as long as a woman claimant is able to prove that she has been subject to violence from her husband, adjudicating divorce by the court should not be a problem. As for victim cases, and criminal cases, what matters is evidence. However, Medica Afghanistan lawyers have experienced difficult situations where judges more driven by their cultural bias rather than legal norms were not willing to adjudicate divorces though they have all elements of evidence. This discouraging situation is however evolving. More and more Afghans question violence against women. Medica Afghanistan lawyers should therefore persevere in their efforts. Their flawless professional attitude consisting in providing evidence, pleading cases on legal grounds as much as on facts, lodging appeals when decisions are not satisfactory will necessarily pay more and more in the long term.

- Mediation cases

Quoting EVAW Law in mediation has had a very positive effect on men and women. Beyond informing them both about their rights and obligations, it has had a deterrent effect on perpetrators of violence who realise that their acts are crimes according to the law. Medica Afghanistan is definitely recommended to continue to use EVAW Law in the less serious cases of violence against women.

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