



8 March 2019

**MEDICA AFGHANISTAN POSITION PAPER ON  
AMENDING ARTICLE 640(2) OF THE PENAL CODE ON VIRGINITY TESTING  
AND CRIMINALISING GYNECOLOGICAL AND RECTAL EXAMINATIONS AS TORTURE  
IN A SEPARATE PROVISION UNDER THE PENAL CODE 2018**

In a meeting on 15 August 2018, the Judiciary Committee under the lead of 2nd Vice President Mr Sarwar Danish discussed the amendment of Article 640 of the Penal Code. The members of the session reached the conclusion that the implementation of Article 640 which allows gynecological and hymenal examinations based on “consent” and “court order” violates human rights, values, constitutional law and international conventions.

The Judiciary Committee decided that the recommendations of the Afghanistan Independent Human Rights Commission (“AIHRC”) on Article 640 will be considered in a session constituting the AIHRC, Ministry of Women’s Affairs and the Attorney General’s Office, and, their recommendations on the legal proceedings for the amendments will be submitted by the General Administrative Department of the Presidential Office to the Ministry of Justice.

Based on the information we have received, some members of the Committee have a differing opinion which is in support of gynecological examinations. They believe that if we prohibit the examinations:

- The rights of a woman would be breached in the event that she herself out of her own will consents to an examination.
- It would be impossible to discover evidence of rape in rape cases.

As a women’s rights support organisation whose mission is to eliminate violence against women, Medica Afghanistan (“MA”) has submitted [recommendations to amend Article 640](#). The recommendations are based on MA’s experiences providing legal aid to women in moral crimes and rape cases. MA has submitted recommendations to the Presidential Administrative Department for consideration.

Medica Afghanistan intends to address the above two points on two basis: First, we state *why* Article 640 should be amended. Second, we state *why* such examinations would constitute torture. We explain our points, as follows.

On the first issue:

1. The examinations have no scientific basis. They contradict scientific rules. How can we allow these examinations and cause physical and mental damages to a woman, if it has no scientific basis?
2. Is it logical or acceptable that in order to legalize something unscientific, we provide for exceptions such as “consent” and “court order”? Under the false excuse of trying to discover facts, we are playing with the lives of Afghan women.
3. Based on subsection Article 640(2), this heinous act, though illegal, has been legalized by “consent” and “court order”.

On the second issue:

1. These examinations are not only unscientific, illegal and degrading, but they constitute torture that will cause a lifetime of trauma for the person who has been subjected to it. Most of our clients who have undergone these examinations have reported that it was like rape to them and they never forget it.

Judicial authorities believe that these examinations constitute proof of crime based on Article 19 of the Criminal Procedure Code. Our question is: how can examinations which are unscientific constitute proof of crime?

Further, how can we act against Islamic rules? As an Islamic country, based on Article 3 of the Constitution, no law which contravenes Islamic rules can be enacted. In Islamic law, there are two methods of proving adultery: the confession of the perpetrator or the testimony of 4 witnesses. In which part of the Islamic rules is it mentioned that gynecological examinations constitute proof of zina or sodomy?

We, with our illegal acts, not only stamp on and disrespect constitutional provisions but we are also not adhering to Islamic law. In plain sight, we have tortured women and girls. These examinations are nothing else but torture and degrading treatment. Based on Article 29 of our Constitution, torturing even for the discovery of crimes is prohibited. Article 6 of Anti-Torture Law also states:

“Police, officials of the National Directorate of Security and Ministry of Defense, the prosecutors from the Attorney General’s office, the judge, public officials or any other person acting in an official capacity, **under no circumstance**, during the judicial processes shall torture the suspect, defendant, the convict, or any other person.”

2. Judicial authorities are committing inhumane acts for the discovery of crimes without considering the scientific and legal basis for them and without recognizing that they cause severe physical and mental damages to victims. These examinations are not proof of crime but are in themselves crimes of torture.

3. In relation to rape cases, we have clearly mentioned in our recommendations outlined under our Table of Amendment that rape cases must be examined based on the Ministry of Public Health's Gender-based Violence Treatment Protocol 2014. Pages 56 and 59, covers the medico-legal certificates which are to be used in rape cases and which are based holistic examination measures. This is not being implemented currently.

Your Excellency and Respected President Ashraf Ghani, during your interview with the New York Times dated 6 January 2017, Your Excellency's Office mentioned that ["The virginity test has been banned. However, it's a long-lasting practice used wrongly by law enforcement authorities, especially police."](#) Further, in many meetings you have ordered related authorities to stop these examinations. Unfortunately, we have to say that without considering your Excellency's orders, these examinations are still happening - in a formal and legal way based on Article 640. In more than 50 cases which Medica Afghanistan alone has represented, we have documented that these clients were not only sent for examination, they were also charged based on the forensic reports (from these examinations) and convicted with punishment.

We recall that in 24 April 2017, Attorney General Mr. Farid Hamidi and his delegation stood before the Committee Against Torture in Geneva and was informed that virginity testing is a form of torture and inhumane and degrading treatment. If the government has been aware since June 2017 that this is so, how is it that in 2018, the government ended up legalizing virginity testing by consent and court order? There was a serious gap in the drafting process that led to a prohibition on virginity testing to be worded as a permission instead.

With consideration of the above mentioned points, Medica Afghanistan clearly puts forward its position on amending Article 640 and criminalizing all forms of gynecological and rectal examinations as acts of torture.

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