

"Neither a woman consent and nor a court order can pave the scientific and legal and validity basis to Gynecological Examinations"

To: Judicial and Law Committees – Afghan Cabinet

21/07/2020

Afghanistan Independent Human Rights Commission, Afghan Women's Network, Medica Afghanistan and Women for Justice Organization are among advocacy bodies who have been working towards protection of individual's human rights specially women and girls to provide legal and religious access ground for this vulnerable group and avoid violation of their rights.

The afore-mentioned organizations have been jointly working towards protecting human dignity, avoid degrading and contemptuous acts and to generally prevent violence against women, and immediately call on the Government of Afghanistan to prevent gynecological examinations.

Based on valid international findings, virginity or gynecological examinations have been proven as non-scientific, and there are internationally conventions which have defined such examinations as an act against human dignity, torture and violence against women and called on the member states including Afghanistan to stop such a examinations.

Indeed, gynecological, and rectal examinations are considered as one of the acts of torture. Based on article 450 of new penal code such acts are committed by the public servant officer or any other official, either by his order or consent and silence that cause severe physical or mental pain or torture to the suspect, accused, convicts or any other person. It is aimed at discovering facts and measuring the decency of the woman or girl. As stated above, from a medical point of view, these examinations have no scientific basis. As these examinations have no scientific and medical basis, then how can our judicial system invoke these examinations to convict and punish a person? This is an illegal act and torture.

The article 640 of the Penal Code was not a comprehensive and precise article. Firstly, it has indirectly legitimized virginity examinations with the consent of the woman or a court order which paves the way for further commitment of the act of torture which is rooted in culture. From one hand we talk about the baselessness and illegality of these examinations, and on the other hand, we legalize them by referring to a woman consent and a court order, from one hand, we try to preserve the right of consent or lack of that, which is the basic right of the examinee, but on the other hand, we clearly violate this basic right of the person being examined by stipulating the court order. Secondly, the article was only limited to virginity examinations, while women and girls are not only taken for virginity examinations, but they are also referred to check for new sexual intercourse, sodomy, sperm availability and a swab test for spermatozoa, a number of men who are suspected or accused of sodomy are also examined. Thus, in general, the human dignity of both men and women is violated by the judicial institutions, so we can claim that the government applies torture against its citizens.

on 05/05/1397, in the judicial committee meeting chaired by s-voice president Sarwar Danish the following decision was made: "Afghanistan independent human rights commission's proposal about amendment of article 640 of penal code should be discussed in a meeting attended by representatives from human rights commission, attorney general office and ministry of women

affairs and their proposal for legal process of the amendment of this article should be submitted to administrative office of the president”.

At the time being, in addition to comments expressed by the human rights organizations, the judicial committee regardless of the recommendation from human rights bodies especially women rights activists has made the decision that: "**Such examinations are only applicable under court order**". Such an amendment for article 640 of penal code is not convincing and has not solved the problem but multiply increased it. In case of amending the article, such unscientific examinations will not only find legal aspect but will also compulsorily be carried out on examinees. We demand that Article 640 of the Penal Code should be amended in a way that the above-mentioned examinations are firstly criminalized, and then in Rape cases, the exact scientific standards should be set according to the Gender-Based Violence Treatment Protocol and the Istanbul Protocol.

Our most important reason on the amendment of this article and criminalization of gynecological and rectal examinations is that the article mentioned in paragraph eighth of the first chapter of the Penal Code, entitled "**rape and its punishment**" was too short in definition which is contrary to the baseless, being unscientific and illegality dimension of that. On the one hand, we have all agreed that these examinations have no scientific or medical basis and are illegal, but on the other hand, we have limited the article only to rape cases and the law did not pay attention to cases of adultery and sodomy which is a clear vacuum of law. The cases of adultery and sodomy are practically asked for medical examinations without the relevant institution's attention being paid to its illegality and unscientific root.

The prohibition of these examinations must be precisely and comprehensively mentioned under a separate article to include all cases like adultery and sodomy, excluding rape cases.

Whereas, the examination has no scientific basis and is mostly executed on women and girls considered the chastity criterion of women and girls and is the clear contempt of human dignity of women and it one way the other reveals gender discrimination. As in adultery cases and attempt to commit adultery only women and girls are referred for these examinations, not their co-responder, and a swab test for spermatozoa is quite baseless and illogical, because with the existence of spermatozoa in the vaginal or rectal areas, how can it be proved that this sample was taken from the arrested man or from somebody else. The spermatozoa may be from her husband.

Article 134 of the Constitution has clearly indicated that discovery and investigation is the duty of the police and prosecutors. Article 19 of Criminal Procedure code has clearly listed the proof of evidence and the expert's opinion is symmetry who can collect proof of evidence in their discretion and they can't choose a way to reach this goal, beside that it has no legal and scientific root, it's also called a psychological and physical torture. Based on Anti-Torture Law, the government has no right to claim that these examinations are necessary to prove a crime, as the Article 7 of the same law has provided that "the state of war or the risk of war being taken place, lack of political stability or any other state, the order of an stakeholder cannot be reason for the legalization of torture) The legitimacy of torture is prohibited in all cases, even in a state of emergency, we are in a normal situation, so, why torture?

In rape cases, if we go through pages 56-57 and 62-64 of the Gender-Based Treatment Protocol for health workers, all cases and methods of examinations in cases of rape is clear there, as the victim is treated with respect for his human dignity in this important document. and the focus is

not only to the examination of the genitals, but there is a serious attention also paid to the psychological aspect of the victim.

These examinations result in serious physical and psychological damages, even there are cases that the victim decided to suicide.

Considering above remarks, we, the organizations under the single application want that this application be included in the Judicial and Law Committee's agenda, so that the issue is discussed where both Judiciary institutions and Human Rights (women right) defenders can express their opinions and comments to reach a final conclusion towards preventing torture and violence against women.



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