

Position Paper
Bifurcation of the EAW Decree and Incorporation into the Penal Code
Medica Afghanistan

13 July 2016
Kabul, Afghanistan

A. Introduction

1. This Position Paper has been prepared to address all parties involved in the ongoing revisions to the draft Penal Code (“Penal Code”), in particular on the following issues:
 - (a) The inclusion of the Elimination of Violence Against Women Decree (“EAW decree”) into the Parliamentary agenda which is scheduled to take place sometime between July 2016 – September 2016 and which therefore is a matter of urgency; and
 - (b) The bifurcation of the EAW decree into its preventive and punitive parts and incorporation of *only* the latter into the Penal Code.

B. On the issue of the inclusion of the EAW decree into the Parliamentary agenda

2. We strongly oppose the inclusion of the EAW decree into the agenda of the Lower House for debate. There have been suggestions to re-open the debate on the EAW decree as a “test” or barometer of the Lower House’s position. In our opinion, such an approach is inappropriate given that the Lower House’s position was unequivocal following the debates that took place in 2013 when the EAW decree was first considered by the Lower House. If the EAW decree is re-opened for debate in the Lower House, that is likely to result in the decriminalization of child marriage, forced marriage, polygamy et al, reignite unproductive debate and draw unwanted attention to the EAW decree.
3. Further, we stress that the rights guaranteed under the EAW decree are non-negotiable. The articles may be amended to strengthen the protection of women from violence, but not otherwise.
4. In particular, we remind all parties that offences in relation to grave forms of physical and psychological violence, such as forced and early marriage, physical abuse and rape, should not be reopened for Parliamentary debate. The Committee Against Torture has specifically mentioned that these forms of violence may amount to ‘torture and other cruel, inhuman and degrading treatment’ under the Convention Against Torture. We remind all parties that under the said Convention, the prohibition of these crimes is **absolute and non-derogable**, i.e. there are no exceptional circumstances whatsoever which may be invoked to decriminalize these acts. **As such, it would be a breach of the Convention to allow for offences in the EAW decree to be reopened for Parliamentary debate for the purposes of decriminalization.** In this regard, we urge all parties to review the Committee Against Torture’s List of Issues dated 21 July 2010 ([CAT/C/AFG/Q/2](#)) to which our government replied to in the affirmative on 1 April 2016 ([CAT/C/AFG/2](#)).

5. In view of the above, we **urgently** request the European Delegation and its Member States present in Afghanistan, representatives of the international community, the Afghanistan Independent Human Rights Commission and Ministry of Women’s Affairs to take effective steps to prevent the ERAW decree from being tabled into the Parliamentary Agenda which is scheduled to take place sometime between July 2016 – September 2016 and which is therefore, time-sensitive.

C. **On the issue of bifurcation and incorporation**

6. We were informed that consensus between the government and the EU and its Member States, had been reached to incorporate *select* articles from the ERAW decree into the Penal Code. The civil society was not party to this consensus.
7. It has always been Medica Afghanistan’s position that the ERAW decree should remain as a standalone legislation separate from, but read in conjunction with, the Penal Code.
8. However, in view of the ongoing incorporation of the ERAW decree into the Penal Code and in the interest of preserving the spirit and form of the ERAW decree, we are open to *discussing* legislative possibilities. We welcome the priority given by the Legislative Department of the Ministry of Justice, the EU and U.S. Justice Sector Support Program (JSSP) to legislate protections for women and thank them for the work done thus far to strengthen some of the articles in the Penal Code which criminalize violence against women.
9. Notwithstanding our extension to discuss legislative possibilities, we reserve our aforementioned position until such time we are satisfied with a legislative ‘solution’ which unreservedly conforms to the spirit and form of the ERAW decree and Afghanistan’s international legal obligations.
10. There is global consensus that violence against women can only be adequately eliminated through comprehensive legislation containing *punitive, preventive* and *positive* measures and which address the *particular* needs of women complainants and survivors of violence (see CEDAW General Recommendation 19). Punishment alone, which emphasis is *post-facto*, is inadequate.
11. We urge all actors to appreciate and recognize that as a result of the historically unequal power relations between men and women in Afghanistan and the endemic rates of violence and discrimination against women, it is imperative that Afghanistan’s obligations to *respect, prevent, protect* and *punish* is legislated comprehensively in one piece of legislation. Indeed, many countries including Pakistan, India, Indonesia, Malaysia have enacted comprehensive laws to specifically eliminate violence against women and address women’s specific and multi-faceted needs. This has included, *inter alia*, the recognition of the criminal courts’ competence to order civil remedies which are “survivor-centered” and which prioritize women’s immediate and long-term needs.
12. Only recently in April 2016, our government reiterated its commitment to implement comprehensive actions to *respect, prevent, protect* and *punish* violence against women pursuant to the ERAW decree (CEDAW Concluding Observations [[CEDAW/C/AFG/CO/1-2/Add.1](#)] dated 26 May 2016). Indeed, pursuant to the same, our government established, *inter alia*, specialized prosecution units in 24 provinces. Our government is making slow but

gradual progress in recognizing its legal obligations under the EVAW decree to *prevent*, as well as, punish. As such, it is of the utmost importance that there is uninterrupted continuity and progress in this regard.

13. Lastly, whilst we note some positive amendments in the Penal Code, we are of the opinion that the Penal Code has a number of shortfalls. We stress that *all* forms of violence against women should be punishable and that such punishment should be commensurate with the gravity of the offence concerned. Women survivors must be afforded adequate legal protections and remedies, including civil remedies, which take into account of and accommodate the reality of their personal situations. We can provide recommendations on the same once the legal standing of the EVAW decree as mentioned in paragraphs 7, 8 and 9 above, is clarified and agreed upon.
- 14. In view of the above, we call upon all parties and our government to maintain its commitment to the EVAW decree, to preserve its autonomy and to prevent it from being bifurcated and its punitive parts, incorporated into the Penal Code.**
- 15. Further, we invite parties to approach us for constructive discussions on legislative possibilities which conform to the spirit and form of the EVAW decree and request for a platform and more time to substantively comment on the same.**
16. In the interim, we reserve our position on the EVAW decree.

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We strive to end violence against women in Afghanistan.