



Women Support Advocacy and Standard Forensic Examinations Group Position Paper On Cancellation of Paragraph 2 and 3 of Article 640 of the Afghan Penal Code and Criminalization of Gynecological and Rectal Examinations

To: His Excellency Mohammad Ashraf Ghani, President of Islamic Republic of Afghanistan
September 13, 2020

Gynecological Forensic Examinations such as Virginity and Rectal Test Should Be Criminalized because:

- 1. Violation of Constitution and National Laws of Afghanistan:** Performing these examinations is considered discrimination and violation of human dignity in accordance with Articles 6, 7, 22 and 24 of the Afghan Constitution, , a torture in accordance with Article 29 of the Constitution and Article 6 of the Law on Prohibition of Torture, a violence based on article 3 and 5 of the Law on the Elimination of Violence against Women and rape under Article 636 of the Afghan Penal Code, which impose horrible physical, mental, psychological and social consequences on the suspect, accused and vulnerable men and women. To the extent that rape victims expressed their feelings and emotions about this examination as: "When I was examined rectally and for virginity, I felt that I was raped again." likewise, setting the conditions for performing a virginity examination in the Afghan Penal Code is considered a violation of Article 3 of the Afghan Constitution. Because Article 3 of the Constitution states that "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan." In the holy religion of Islam, there are two reasons determined to prove adultery, which are the confession of adulterer and adulteress and the testimony of four wise, mature, and fair witnesses. In the meantime, there are strict conditions have been set out on confessors and witnesses making it impossible to prove adultery. In addition, it has not been mentioned in none of the Islamic and juridical sources about examination of virginity to prove adultery. Even based verse 30 of Surah Noor and verse 233 of Surah Al-Baqarah, these examinations are absolutely forbidden and are not allowed. Our recommendation on the rape cases is that the actions should be taken based on the standard protocol for treatment of gender-based violence and Istanbul protocol.
- 2. Being Illogical and Unjust:** legalizing an examination that is basically unscientific by setting conditions such as a court order and a woman's consent to it looks quite illogical and unjust. While in accordance with the law and international protocols which Afghanistan is part of that, there are basic and scientific reasons to prove the crimes of adultery and rape. In addition, in paragraph 2 of Article 640 of the Afghan Penal Code, this act indeed has not been criminalized, but it has been legitimized by setting these two conditions. However, these two conditions are also against each other. Because the court order negates the consent condition and the consent condition a court order, because consent means that a person willingly and knowingly commits an act, but when there is a court order, the will is not considered. In the meantime, practical and documented cases indicate that the examinees do not have the necessary knowledge about the type of examination, the way conduct and its consequences, and this in fact challenges the principle of consent.
- 3. Being Baseless, Unlawful and Violating Human Rights:** These examinations have no scientific basis and are legally considered a serious violation of human rights and absolutely unlawful from an Islamic

point of view. In addition, that such examination medically cause physical and psychological harm, it has also misled the country's judicial institutions and provide the ground for discrimination, violence, sexual harassment, torture, cruel, inhuman and degrading treatment of women, suspected men, accused and victims.

4. **Unawareness of Intelligence Agencies and Judicial Institutions from the Legal, Religious and Scientific Aspects of these Examinations:** the country's intelligence agencies and judicial institutions citation on these examination results as evidence of proof of crime was the type of their unawareness from the legal, religious and even scientific aspects of these examinations or it was due to their negligence, carelessness and unaccountability. Therefore, the ignorance of any person or institution cannot be considered as a reason for performing these examinations and sentence a person to heavy punishments based on the results of such examinations.

Respected President, Mohammad Ashraf Ghani!

On January 6, 2017, in an interview with New York Times you have stated that: [“virginity tests have been forbidden. However, this is a procedure that has long been inaccurately used against the law by the authorities, especially the police.](#) As Women Support Advocacy and Standard Forensic Examinations Group is in the picture that during several meetings, you have ordered on the relevant institutions to prevent these examinations, but unfortunately, despite the previous orders, such humiliating examinations are still officially and legally performed under Article 640 of the Penal Code, on which we can cite to more than 50 cases handled and represented by Medica Afghanistan and 40 other cases monitored by Afghanistan Forensic Science Organization in Kabul primary courts in which men and women have not only been examined rectally and for virginity, but they have also been sentenced to punishments based on forensic report.

Meanwhile, on April 26, 2017, the Islamic Republic of Afghanistan Attorney General Mr. Farid Hamidi as the Afghan representative at the UN Anti-Torture Committee meeting in Geneva was aware of being torture, cruelty, humiliating and inhumanity of the above examinations, at the meeting he stated that examination has no legal basis. Therefore, why did the Government of the Islamic Republic of Afghanistan legitimize the implementation of these examinations in 2018, and this was one of the serious gaps during the draft of the Penal Code, which instead of criminalization led to the legitimization and recognition of the above examinations.

Position of Group:

Finally, Women Support Advocacy and Standard Forensic Examination Group considering all the above issues explicitly declares its position against the recent decision of the Cabinet's Legal Committee Regarding the execution of virginity examinations in accordance with the court order and the woman's consent as below:

1. Cancellation of paragraph 2 and 3 of the Article 640 of penal code, because such examinations are also performed in the cases of adultery and sodomy, while article 640 of the penal code only provides virginity test in rape cases.
2. The principle should be to prohibit such examinations, and the exception is rape cases. Because the definition in adultery and sodomy cases is completely different from rape, and the examination approach in these cases is basically different.

3. The mentioned examinations should explicitly and without any condition be criminalized under a separate article in the Penal Code. Excluding rape cases which must be subject to the woman consent.
4. For conducting comprehensive examinations in rape cases, it is necessary to impose special and standard conditions based on the Protocol for Treatment of Gender-Based Violence and Istanbul Protocol under separate article in the Penal Code.

With Best Regards,

Women Support Advocacy and Standard Forensic Examinations Group
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