



REPORT OF CONFERENCE JUSTICE FOR SURVIVORS OF GYNECOLOGICAL EXAMINATIONS

4, MARCH 2018



A. INTRODUCTION

1. On 4 March 2018, with the kind support of the German Foreign Office, Medica Afghanistan held a National Conference on Justice for Survivors of Gynecological Examinations. The Conference was held in cooperation with the Committee to Prohibit Forced Gynecological Examination established in the year of 2016 with the participation of 30 Afghan civil society organizations including World Health Organization (WHO), Afghanistan Independent Human Rights Commission (AIHRC) and Afghanistan Forensic Science Organization (AFSO). The Conference was part of our contribution to the Committee's collective advocacy, awareness raising, and law reform work.

2. As lawyers, our role in the Committee and our duty to our clients who have suffered from virginity examination is to do the right thing, i.e. justice. Our role is to also identify and take quick actions to women at-risk, especially those in conflict with the law and who as a result of being under the custody of the police or prosecution are most



2. vulnerable to coercion to “consent” to such examinations. This has to come to a stop. Above all, any woman who have been violated as a result of virginity examination are entitled to compensation by the government and offenders should be put on notice that further actions can result in a criminal action.
3. In addition to the awareness-raising and law reform efforts of the Committee, Medica Afghanistan intends to apply for compensation to victims of virginity testing besides taking other preventative measures together with the Committee to prevent these humiliating violations.
4. The aim of the Conference was to bring together doctors, lawyers, prosecutors, judges and activists to initiate a deeper discussion into the medico-legal issues which plague gynecological examinations. In particular, we wanted to clarify 4 specific issues:
 - a. If a woman consents to virginity examination, can the examination still constitute a form of torture or cruel, inhuman and degrading treatment and punishment (“torture”). This can occur, for instance, in the event that a consenting examinee is humiliated by examiners, or in the likely event that the consenting examinee, believing that the examination will eventually prove her innocence, end up suffering serious social and psychosocial repercussion as a result of a unfavorable forensic report on her hymen/laxity status.
 - b. Whether informed and voluntary consent procedures is realistic in cases of suspected adultery and moral crimes where women are often coerced by authorities.

- c. Critical differences between the current practice of virginity examination, and, genitalia examination set out under the Ministry of Public Health Gender-based Violence Treatment Protocol, and, why the latter is a more dignified procedure.
- d. Whether Article 640 of the Penal Code which has prohibited virginity examination in the absence of woman's consent or court order, complies with the Convention Against Torture and Afghanistan Constitution; whether a court order can (or should be able to) bypass a woman's consent to undergo an invasive examination of her body; whether in the event of a complaint by an aggrieved woman, she would be able to prove that consent was not voluntary and obtain remedy against the State.

B. BACKGROUND OF MEDICA AFGHANISTAN'S INVOLVEMENT IN VIRGINITY EXAMINATION

1. Medica Afghanistan has been an active and proud member of the Committee on Prohibition of Forced Gynecological Examination.
2. Over the course of 2017, our lawyers have represented over 40 women who were forced to endure exceptionally humiliating gynecological examinations in Kabul, Mazar-e-Sharif and Herat. Their cases were documented and preliminary statements recorded.
3. Gynecological examinations are usually conducted by a doctor on women defendants during arrest or detention, and, on women victims of sexual violence. In most cases, the examination is conducted by a government doctor at the Forensic Medicine Commission of the Ministry of Public Health. Occasionally, the examination is conducted by a private doctor. Gynecological examinations are routinely conducted as part of criminal investigations for the discovery of evidence in relation to "moral crimes", sodomy, rape and adultery.
4. The results of the examinations are reported in a Forensic Medical Report. The reports are brief and typically observe 3 things: status of hymen, laxity of anus and presence of sperm (e.g. "hymen is intact" or "no signs of anal laxity"). The reports are admitted as evidence at trial. As courts consider the examinations to be medically and scientifically sound, and therefore irrefutable, they rely on them heavily at trial and consider them to be decisive on the issues.



5. Our government has confirmed that these examinations are a cultural practice with no basis in law. The Ministry of Public Health and Ministry of Interior issued circulars and letters to all staff directing an immediate stop on forced gynecological examinations. This was followed by a number of public statements.

“We have issued direction to our police that no one is authorized to send someone for examinations to forensic units unless there is a direct claim, or the crime is evident or the woman shows willingness for it,” MoI spokesman Najib Danish

6. Subsequently, for the first time, Article 640 of the Penal Code crystallized the prohibition of virginity examination as constituting an aggression of woman’s namuz - barring two caveats: examinee’s consent and court order are defences to this crime. Both caveats are deeply troubling.
7. Forensic and medical experts in Afghanistan and internationally have confirmed that there is no scientific basis for the determination of virginity and recent or prior sexual intercourse.
8. The Afghanistan Ministry of Public Health has confirmed in its Gender-Based Violence Treatment Protocol that:

“These women are routinely required to undergo medical examinations to determine whether she is a virgin and whether she recently/previously engaged in penetrative sexual activity. **Such examinations have no scientific validity in determining “virginity” or sexual history.**

9. Forensic Medical Reports stemming from forced gynecological examinations are routinely admitted as evidence at trial. Courts rely on them heavily at trial and consider them to be decisive on the issues. We have started to file petitions to “strike out” these forensic reports on the basis of torture. All 3 petitions were included in the case file and in two of the cases, the prosecution and judge demonstrated willingness and agreement that the examination was conducted illegally against our clients. This is a positive step. These cases are ongoing and we wait to see if positive action is taken to exclude the forensic reports.
10. Medica Afghanistan is working to bring justice to clients who have survived these examinations. Over the last few months, we have counselled clients, spoken with judges and prosecutors and filed petitions and official letters to put an end to this unlawful practice. Our commitment is to ensure that our clients will be adequately compensated.

C. DOCUMENTS

1. Medica Afghanistan compiled a **Dossier on Medico-legal Perspectives on Gynecological Examinations** to set out our position on the issue and respond to questions which commonly arise and which have not yet been dealt with.



2. The Dossier was written in Q&A format to make it easy for readers to read and use. It references several medical and forensic studies, and, the Ministry of Public Health Gender-based Violence Treatment Protocol. It also compiled together the opinions of Afghan health and legal experts on the issue of:
 - How the examination constitute a form of torture and cruel, inhuman and degrading treatment
 - The physical, social and psychosocial consequences of the examination on victims
 - Shariah perspective
 - Case studies and experiences of our clients
3. The Dossier also summarized key actions that the government have adopted in 2017 and set out what else needs to be done.
4. The Dossier is accompanied by a **Table of Laws**. The Table of Laws is a go-to compilation of all official documents which relate to virginity examination: all related laws, official statements, protocols and reports from Afghanistan and globally on this subject. It was intended for human rights lawyers to use in their advocacy and casework.
5. The Table of Laws lists:

a. Key articles from the Penal Code, Criminal Procedure Code, EVAW Law, Law on Detention of Suspects, Afghanistan Constitution and international laws.

b. Official statements made by the President of Afghanistan, Attorney General, Chief Justice of Supreme Court and Commissioner of Afghanistan Independent Human Rights Commission.



c. Key excerpts from Afghanistan's GBV Protocol and medical studies on hymenal examination and medical ethics.

d. Key excerpts from Special Rapporteur reports, UN General Assembly resolutions and judgments from international courts.

D. WHO ATTENDED THE CONFERENCE

1. We had invited key individuals from President Office, First Lady Office, Ministries and several institutions including judges, prosecutors, lawyers and medical professionals and Sharia Experts. Some of them included:

- Dr. Sima Samar
Chair-person of AIHRC
- Dr. Alima
Deputy Minister of Refugees and Returnees
- Dr. Abdul Qadir Qadeer
Head of Policy and Planning of MOPH
- Mr. Wahid Halimyar
Head of Legal, Legislative and Judicial Affairs of President's Office
- Mr. Ashraf Rasuli
Head of Legislation Department of MOJ and Technical Advisor of MOJ
- Ms. Aziza Adalatkha
Head of Legal Aid Department of MOJ
- Ms. Spozmai Wardak
Deputy Minister of MOWA

- Ms Habiba Wahaj
Youth and Women's Affair Advisor of Second Vice-President's Office
- Ms. Nadia Saleh
Legal Advisor for Her Excellency First Lady of Afghanistan
- Dr. Suraya Suhbrang
Human Rights Commissioner of AIHRC
- General Farid Afzali
Head of Criminal Department of MOI
- General Zarghona Sarmast
Head of Monitoring of the Implementation and Enforcement of Sentences at the AGO

E. SPEAKERS

1. Humaira Rasuli Executive Director, Medica Afghanistan

Humaira Rasuli delivered the opening speech. In her speech, she mentioned that at least 40 of our clients were forced to endure humiliating gynecological examinations in Kabul, Herat and Mazar-e-Sharif during the course of 2017. These tests have been traumatic and in violation of women's rights. Over the last few months, we have counselled clients, engaged with judges and prosecutors and filed various petitions and official letters to put an end to this unlawful practice. We are preparing ourselves to find a way to remedy the situation for our clients and ensure they are adequately compensated. At the same time, we recognize that even amongst us who are against VT, there are differences when it comes to the details.

One example of this is in the question does a woman's consent change the criminal nature of VT? Another example is: should VT on victims of rape be an exception?



We believe that before we can move forward, we as a collective should come together to clarify the issues. Essentially, in our cause towards justice, clarification of the issues is the first step, from the point of law and from the point of medical ethics. Therefore we have deliberately selected lawyers, prosecutors, judges and human rights activists to attend this Conference due to your position and expertise in the fields of medicine, law and advocacy

as such issue requires technical intervention in medico-legal field, boosted by the power of civil action and advocacy.

Medica Afghanistan is concerned that the examinations are causing irreversible trauma to our clients who are disowned by their families, divorced, driven to poverty, and, subjected to insults and name-calling.

The examinations constitute a form of torture or cruel, inhuman and degrading treatment:

Physical harm: The examinations are exceptionally painful. Further, when performed under pressure, stress, and when done wrongly, existing injuries can be aggravated. In rape cases, victims are not clinically managed and treated.

Psychological harm: The stressful experience begins at the point when the victim is told that she will be examined. The anticipation of the pain; the experience of the pain and the recall of pain are each significant contributors to psychological harm. Clients have shared extreme fear and anxiety before the test; shouting, crying, begging and fainting during the test and loss of dignity, violation of privacy, intense shame, stigma, feelings of low self-esteem and convulsion attacks. Many of our own clients have shared with us that during these examinations, doctors and nurses laugh at them and humiliate them. These exacerbate traumatic stress. Victims of rape have also shared that they feel as though they were being raped again. In cases where forensic reports observe intact hymen, it can be truly devastating for a victim who feels that she is unfairly denied justice.

Social harm: The social consequences of gynecological examinations are particularly severe in Afghanistan where the honour of a woman can be a matter of life and death or otherwise determinative of a woman's worth. The shame tied to dishonor can lead to social ostracism, divorce, separation from children, ineligibility to marriage, social stigma and risk of further sexual assault or revenge (out of the perception that these women are "ruined"). When women and girls are alienated from society, this also affects their access to education, safety at work and in public places where they may be humiliated through name-calling.

2. Dr. Sima Samar, Director, Afghanistan Independent Human Rights Commission

"We should strive to create a mechanism so that the people in Afghanistan feel safe and live with human safety, because forced gynecological tests very rarely helps to determine criminal cases."



3. Dr. Alema, Deputy Minister of Refugees and Returnees

“We thank Medica Afghanistan for being pioneer to break such taboos. We have seen hymenal examinations performed on women and girls which is clearly an issue of discrimination and gender-based violence. Why when both men and women are suspected, only women have to pay the big sacrifice even when there is no medical utility to these examinations?

It is the fundamental duty of doctors to act in the best interests of their patients while some of our doctors hold the view that women and girls who are suspects of zina or “sinners” can be treated differently. We have to change these perceptions. I have to say that together we can bring such

changes through steady advocacy and capacity building and reforming of laws and sensitization of police and legal professionals.”



4. Mr. Ashraf Bakhteyari, Founder and Director Afghanistan Forensic Science Organization

Mr Bakhteyari is a founding member of the Committee for the Protection of Women Against Forced Gynecological Examinations. He is an expert in criminal law and criminology and completed professional training on forensic archeology, forensic anthropology, investigation and documentation of human rights violations based on forensic science and modern technologies.

Mr Bakhteyari’s speech laid down fundamental perceptions around hymenal anatomy. He clarified that people and authorities wrongly uphold gynecological examinations as a true criteria of women’s chastity. They believe that the criteria states that if a woman is virgin therefore her chastity is proved. And if not, she is suspected of having committed moral crimes. Judicial authorities also approach the issue of chastity in the same way. If a woman is seen to be a virgin solely through her hymenal anatomy, she is not guilty and acquitted. Otherwise, she is assumed to be a

criminal and sentenced to punishment.



For centuries, women have faced all kinds of violence and have always suffered as victims. Gynecological examinations are a form of discrimination, violence and torture.

It is a discrimination, as although both men and women are arrested by the police, only the woman is referred for such examinations.

It is a form of torture as the definition provides that any act committed by government officials which cause physical and psychosocial harm to a person, for the purposes of obtaining information, is a form of torture. The insertion of two fingers, for instance, causes physical and psychosocial harms to the examinee and it is like a form of rape because it involves the insertion of an object in the vagina of woman.

Gynecological examinations do not comply with scientific principles and criteria. There is no scientific measure to prove Zina. Even in Islam, we only have two ways to prove Zina, i.e. confession and testimony of witness under strict conditions. Islam does not advise us to prove Zina through medical examinations. Such examinations are also rejected by modern jurists who have confirmed that such medical examinations cannot prove Zina and will not help the judiciary. Instead, it misguides the judiciary and causes traumatization of examinee.

It is our duty to put an end to this humiliating practice.

5. **Ms. Aziza Adalatkha**, Head of Legal Aid Department of MOJ

“Such examinations are in contravention of Articles 2 and 3 of Chapter 640 of the Afghan Penal Code in which the law calls for the prosecution of those involved in

such illegal activities. “



6. Yalda Ahmadi, Lawyer, Medica Afghanistan

Yalda Ahmadi clarified the role of forensic medical examination in zina and rape cases. In cases of rape, she pointed out that virginity examination (current practice) and genitalia examination (in the GBV Treatment Protocol) are two different examinations both in terms of purpose and manner. The former focuses exclusively on presence/absence of hymen and anal laxity – both of which have been deemed by forensic and medical experts are scientifically invalid and medically insignificant. The latter, on the other hand, requires doctors to conduct multiple systematic steps beginning first with a first line of support, history-taking of the victim, minute physical and genitalia examination, and, finally treatment. Whilst current practice focuses on hymen determination and laxity, the GBV Treatment Protocol requires a whole body examination including the mons pubis, inner thighs, perineum, anus, labia majora and minora, clitoris, urethra, introitus and hymen. This is done for the purposes of identifying and recording scarring, injury, infection.

In particular, preceding treatment, the GBV Protocol also requires proper informed and voluntary consent procedures to be followed. She stressed that consent of victim is required for each part of the examination. GBV Protocol also require doctors to observe the victim's mental condition and record comprehensive findings in a Medico Legal Certificate.

Yalda also clarified that in most rape cases, there is a popular belief that rape/sexual assault will definitely cause visible harm to the genitalia. However, identifiable damage exists in less than 50% of cases which are reported within 72 hours of the incident; and the existence of damage is significantly lesser in cases which are reported after 72 hours. The Protocol recognizes that after 72 hours, there may not be any recognizable signs or injuries. This is an important point as the Protocol instructs doctors to explain to courts

that not all sexual assault cases lead to injuries.



This raises the questions if identifiable damage exists in a minority of cases, what evidence should the Prosecution be looking for. Yalda stressed that in almost all cases of rape, victims will demonstrate signs of post-traumatic stress – and this has to be properly documented in the Medico-Legal Certificate. Yalda also shared that courts around the world admit expert and layman evidence of post-traumatic stress as relevant to the Prosecution’s case.

In the case of zina, Yalda set out Medica Afghanistan’s position that virginity examinations should be completely abolished on two grounds: medical invalidity and on grounds of torture. A number of participants of the conference were of the view that innocent women may choose to consent to the examination to “clear their name”; and therefore only “forced” examinations should be prohibited. However, Medica Afghanistan firmly disagrees with this position as the examinations are medically invalid and therefore serves no purpose in proving or disproving the crime. We also explained that the innocent should not have to go through such a degrading procedure in order to prove innocence – it is the State’s responsibility to prove their case and if they fail to do so, the suspect should be released immediately. Medica Afghanistan also firmly disagreed with the exception of consent as there are no proper consent procedures in Afghanistan and ultimately all women suspects will be forced to consent; their failure to do so will lead to adverse inference drawn by the prosecution and judges. In circumstances of arrest and detention, women cannot be said to give voluntary consent. And it would be close to impossible for aggrieved women to seek remedy and prove that she was coerced to consent.

To this regard, Medica Afghanistan also firmly disagreed with Article 640 of the Penal Code on grounds that a court order cannot bypass a woman’s consent or law on torture.

F. WORKING GROUP

1. After keynote speeches were delivered, conference participants were divided into 4 groups comprising doctors and lawyers.
2. Both lawyers and doctors were given a case study of a 10 year old rape victim who underwent virginity examination, 21 days after the rape incident. The case study closely resembles one of our own cases.



3. The group of doctors were tasked to compare the examination conducted on the victim in light of the GBV Protocol and identify where the doctors in the case study may have breached the Protocol. They discussed issues of confidentiality, informed consent, manner of examination, purpose of the examination keeping in mind that the examination took place 21 days after the victim was raped (and therefore, injuries would have healed by then). Doctors was also tasked to compare the forensic findings of the doctors against what they should have reported according to the Medico-legal Certificate set out in the Protocol.
4. The group of lawyers was also given the same case study of the 10 year old rape victim. One group of lawyers was tasked to draft one petition to summon the forensic doctors for cross-examination of the medically invalid forensic medical report on the victim's

hymen, pursuant to Article 46 of the Criminal Procedure Code.



5. The second group of lawyers was tasked to draft a petition to strike out evidence (the forensic medical report), pursuant to Article 21 of the Criminal Procedure Code.
6. There was consensus within the group that forensic medical report obtained as a result of virginity examination, should be removed from the case file and should not be admitted and considered at trial. The inclusion of illegal evidence would constitute a breach of both Criminal Procedure and Constitutional law.
7. Some of the members recommended that we should not detail out what happens during the examination. In reply, we informed them that the details are important to create a persuasive visual image for prosecutors and judges to really understand what clients really go through.
8. All members recommended that more advocacy is necessary to eliminate these examination in zina cases. They agreed that we cannot rely on illegal documents such as forensic medical reports on hymen and laxity. They are simply not reliable.
9. For rape cases, members recommended that it is of urgent importance to build the capacity of the staff at Forensic Medicine. It is important that they conduct themselves professionally and in accordance with the GBV protocol.
10. Lastly, they recognized the inconsistency within Article 640 of the Penal Code. It is not in line with constitutional law Convention against Torture. The article creates a backdoor to legitimizing virginity examination.

G. NEWS AND MEDIA REPORTS

The Conference was widely reported on every single national TV channel in Afghanistan on 4 March 2018:

- BBC
- Voice of America
- Tolo News
- One TV
- Khurshed
- Metra
- Etlaat Roz
- Ariana Television News
- Negah TV
- Bakhtar TV
- Shamshad TV
- Rahe farad TV
- Afghanistan TV
- Noor TV
- Radio Kilid
- Radio Azadi
- Radio Saday Watandar
- Yash news
- Mashal TV
- Zhuwandon TV
- Pazhwak 8 subh news paper



Voice of America and Tolo TV also reported on the Conference. The translated reportage are annexed.

H. RESULTS OF CONFERENCE

1. Follow up with Ministry of Interior, Attorney General Office and Ministry of Public Health

The Ministry of Interior and Attorney General Office made promising statements in terms of their willingness to put an end to forced gynecological examination. These statements were reported on the news. On the basis of their statements, we intend to follow up with them on behalf of 40 of our clients. We will point out contradictions in their position and request as to why despite the issue of Circular and public acknowledgments, 40 of our own clients were forced to undergo gynecological examination which demonstrates orders coming from the top is not being trickled down to the districts and the forensic medicine department, and that, senior officials must personally look into the issue.

2. Filing of Official Letters on an urgent stop order

Next, on behalf of our clients and in cooperation of the Committee Against the Prohibition of Forced Gynecological Examination, we will be filing an official letter to the Ministry of Interior, Attorney General Office, Ministry of Public Health to issue an urgent stop order to all front-end staff who are referring or conducting gynecological examinations on women suspects and victims of rape.

3. Submission of report to Presidential Palace and First Lady Office

We also had a discussion with advisors to the President Palace and First Lady Office on further urgent practical actions that we ought to take in respect of Article 640 of the Penal Code, and, implementation measures on the ground.



I. RECOMMENDATIONS

1. There is still much to be done to stop the routine practice of gynecological examinations, and, provide redress to victims.
- There are issues in Article 640(2) and 640(3) of the Penal Code and its compatibility with the Afghanistan Constitution and Convention Against Torture. A court cannot bypass a woman's consent to forensic examination of her own body. This must be reflected in the Penal Code or must necessarily shape its interpretation.
 - Lawyers should strike out forensic medical reports of gynecological examinations on the grounds that such reports have been illegally obtained, pursuant to Article 21 of the Criminal Procedure Code.
 - Courts should take positive action to strike out Forensic Medical Reports of gynecological examinations on the grounds that such reports have been illegally obtained.
 - Police and prosecutors should not refer women suspects for forensic gynecological examination.

- Ministry of Public Health should prioritize training for Forensic Medicine on the GBV Treatment Protocol.
- Forensic Medicine should, in their reports, clearly explain to courts that in most cases of rape and sexual assault, signs of injury are not identifiable but that the absence of signs cannot rule out sexual assault.
- The Attorney General Office and Ministry of Interior should take positive actions to stop their staff from referring women for gynecological examinations, and, take disciplinary actions for breach of duty.

Annex A:

News and Media Report

<http://bit.ly/2oIsCdX>

در سال گذشته میلادی -۴۰ دختر در افغانستان آزمایش بکارت -
اند E2%80%8E شده

<http://bit.ly/2td2Fya>

https://www.darivwa.com/amp/verginity-test-afghan-girl/4280028.html?__twitter_impression=true

Annex B: Working Group Scenario

Annex C: Dossier on Gynecological Examinations in Afghanistan- Medico-Legal Perspectives

Annex D: Table of Laws on Gynecological Examinations in Afghanistan





Working Group to draft petition to summon the forensic doctors for cross-examination of the medically invalid forensic medical report on the victim's hymen



Working group to draft a petition to strike out evidence (the forensic medical report)



Presentation of doctors group to compare the current VT examination on the victim in light of the GBV Protocol by Dr. Fahim Mohad (WHO)