

# New Penal Code in Afghanistan permits virginity testing under the guise of a prohibition

Virginity testing is a painful and inhumane procedure, routinely conducted in criminal proceedings in Afghanistan. Though the practice is scientifically unsound, prosecutors and judges often pass orders for women and girls accused of “*moral crimes*” (such as sexual intercourse outside of marriage or running away from home) to undergo invasive and humiliating vaginal and rectal exams to try to ascertain their sexual history. The doctors’ forensic reports are tendered as evidence in court and have led to many lengthy prison sentences for women, including those who have survived sexual violence.

The government has passed Circulars down the various Ministries to prohibit “forced gynecological examination” and made numerous statements publicly condemning the practice. It shows willingness for reform at a high level of government, and we do not doubt that senior officials do stand by their condemnations. But the government’s obligations under the law is whether it has conducted itself and responded to a violation with due diligence. Has the government done all that can be reasonably expected of it to ensure that virginity testing is not forced on women? Public statements, even Circulars, may well fall short of that standard. Certainly, when the government is notified that its practice of virginity testing amounts to such a serious crime under national, Islamic and international laws — we expect a response proportional to the severity of the practice.

As the international community celebrates the alleged “prohibition against virginity testing” under Article 640 of the Penal Code, the sad truth is, if you read between the lines, virginity testing, which was once unregulated, has now been legalized under the guise of a prohibition. Under Article 640, virginity testing is not a crime if it can be shown that the victim consented to it or it was ordered

by a court. This, to some extent, sounds reasonable on paper. But it is a classic case of law being deliberately blind to what happens in reality. There are virtually no consent procedures in Afghanistan. There are no proper avenues to verify or contest consent. Lawyers are too few and far in between. Most women remain unrepresented or are represented by inadequate counsel. Corruption is at an all-time high. Gender-discrimination is endemic. Of course women will consent. Women will consent under the threat of prosecution. Without a question, women will consent. To not consent is to imply that they are hiding something, or indeed, lying. That's the reality. When an adverse inference will be readily drawn against a woman exercising the right to say "no" — then that right is no right after all.

What is doubly shocking is that under Article 640 a court may be able to bypass a victim's consent.

For these above reasons, we contend that Article 640 has not effectively prohibited virginity testing. It has merely put into law what ordinarily happens in practice. A prohibition is no prohibition if it is plagued by easy exceptions for the government to maneuver.

Perhaps Article 640 was well-intended by drafters. Perhaps it was a necessary compromise. But these are not simple crimes. There is a large-scale, nation-wide commission of torture by government actors across Afghanistan specifically targeting women who are vulnerable — as they so often are in the justice system. So a compromise provision is not good enough.

A court will always issue an order for examination. Women will always be forced to consent. So what Article 640 of the Penal Code has done is simply to endorse that de facto position. What was practiced culturally is now permitted by law. The prosecution can now tell us that our client had consented; after all they got her fingerprint down on a piece of paper that she, all too often, does not fully comprehend. Or otherwise, the court has passed an order. By the time we are appointed, by the time we verify and contest

consent, even in the smallest chance that we may win, the damage is already done.

We missed the mark. The objective of a Penal Code is to punish crimes against women and not permit easy exceptions. The law should have and indeed could have inherently recognized and corrected this.

We haven't yet got the fundamentals right. And for as long as Article 640 remains, the government remains complicit in violations of significant magnitude.

Written By: Natasha Latiff & Humaira Rasuli

Edited by: Alana Chloe Esposito & Shannon Raj Singh