

11 Years of the Elimination of Violence Against Women (EVAW) Law

A Literature Review of the Implementation of the EVAW Law (2009-2020)

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On 20 July 2009, the Elimination of Violence Against Women (EVAW) Law was adopted through Presidential Decree No. 91. At the time, the law seemed like a “breakthrough.” (Human Rights Watch, 2018). It includes protection for women against violence, as well as forced marriages, underage marriages and polygamous relationships. The law is based on a universal legal framework of three Ps: prosecution, protection and prevention. Almost a decade after the law’s enactment in 2018, Human Rights Watch and the United Nations Assistance Mission in Afghanistan (UNAMA) have regretted that, despite a strong text, violence against women is still largely ignored by the Afghan justice system, which turns victims away or pushes them to accept mediation, in clear violation of the EVAW law (Human Rights Watch, 2018 ; UNAMA, 2018). Eleven years after the law was adopted, what do we know of the current state of implementation and the impact of the EVAW law for the women it was designed to protect from violence?

This literature review offers insights in the progress made, but also on the challenges that remain to allow for the full implementation of the EVAW law. Many gaps in research remain, which are highlighted in section III of this document.

1. Debates about the EVAW Law

The EVAW law defines 22 types of violence against women.¹ At the time when the law was adopted, women activists and human rights circles generally considered it an important step. At the same time, there were weaknesses, including “the failure to criminalize ‘honour’ crimes, clearly define rape to distinguish it from consensual zina (sexual intercourse outside of marriage, a crime under Islamic law) and the requirement that a victim initiate or maintain judicial action.” (UNAMA, 2010) The law was also criticised for being excessive in its criminalisation of the violation of women’s civil rights and for unclear provisions, such as forcing someone to commit suicide (Wimpelmann, 2017). Self-immolation was noticed by Raj, Gomez, and Silverman as one recurring form of suicide, with the Afghanistan Independent Human Rights Commission (AIHRC) and the Ministry of Women’s Affairs reporting 106 cases of self-immolation in 2006 (Raj, Gomez, Silverman, 2008).

1 These 22 forms are: Sexual assault; forcing into prostitution; recording and publishing the identity of the victim; burning or using chemical substances; self-ignition and suicide; injury and disability; beating; selling and buying women for the purpose of or on the pretext of marriage; giving baad; forced marriage; prohibiting from the right of marriage; underage marriage (under the age of 15); abusing, humiliating and intimidating; harassment/persecution; forced isolation; forced addiction; depriving from inheritance; prohibiting to access personal property; prohibiting from the right to education; work and access to health services; forced labor; marrying more than one wife; denial of relationship. Murder is not included in the EVAW law, but was already a crime under the 1976 Penal Code and remains one under the new Penal Code adopted in 2017.

The law's adoption by decree meant that, by law, it would need to be presented to the Afghan parliament within 30 days of its first session for ratification. At this time, however, this requirement was frequently ignored; new legislation was regularly passed by presidential decree during parliamentary recess and these laws were typically not presented to the parliament within 30 days but were still considered to be binding and legitimate law (Hamidi and Jayakodi, 2015). The EVAW law was not presented to Parliament until the fall of 2009 and then May 2013. The process of seeking parliamentary approval is covered in detail in research by Wimpelmann, including her 2017 book. She argues that women's rights activists were split by the question of the strategic need to send this law to the Parliament, "with the majority seemingly strongly against the idea" as the chances of ratification without modification were seen as being very low (Wimpelmann, 2013). On the one hand, being ratified by the Parliament might have granted the law more legitimacy and thus a better implementation; on the other hand, presenting the law to the Parliament meant risking having to dilute it to reach consensus, or even having the Parliament declare it null and void.

Before being presented for plenary debate in Parliament, the law was reviewed by a joint commission, where discussions took place to try to get a consensus. Concessions were asked by conservative Members of Parliament concerning punishments for fathers arranging the marriage of their underage daughters, wife beating, punishments against rape, or polygamy under certain conditions. The impossibility to get to an agreement put the process on hold until 2013. In May 2013, the draft law was presented to the Parliament by Fauzia Koofi, head of the women's rights commission, but was sent back for further review after 15 minutes of debate, due to the opposition of conservative elements who denounced the law as against Islam (Osman, 2013, Wimpelmann, 2013, Qaane, 2017). Today, the law remains a presidential decree not ratified by the Parliament, which leaves it in legal uncertainty and can be used as an argument against its full implementation. (Wimpelmann, 2017) It is worth noting, however, that many Afghan laws have the same procedural history and are treated as being fully in force (Hamidi and Jayakody, 2015).

Another challenge arose in 2012 when the Ministry of Justice decided to consolidate all existing penal provisions and laws into an amended and consolidated

penal code, including the EVAW law. Opponents argued that integrating the EVAW law into the penal code would create resistance from conservative decision-makers in the Ministry of Justice and in the Parliament, and that keeping the EVAW law as a separate text made it more likely to remain intact and in force, whereas supporters of integrating the EVAW law argued that it would be easier to have the Parliament adopt its provisions as it would be part of a bigger package (Wimpelmann, 2017). In November 2017, the Ministry of Justice announced that the EVAW law would remain a separate law (Pajhwok, 2017). Wimpelmann indicates about this new penal code that it contained more substantive provisions on sexual violence and rape: stronger definition, inclusion of threats and coercion, stricter punishments for rape, and additional condemnation of "virginity tests" as a sexual assault (Wimpelmann, 2017).

Out of the list of violence criminalised by the EVAW law, a 2018 UNAMA report found that the provisions under which prosecutions take place most frequently are those prohibiting battery and laceration, followed by murder of women (UNAMA, 2018). The 2015 Afghanistan Demographic and Health Survey (DHS) found that the lifetime prevalence of domestic violence for women and girls between the age of 15 and 49 years old was 56%, and as high as 92% in some provinces. (MoPH, 2015). Of particular importance as well should be the prohibition on child marriage, although there seem to be few prosecutions brought under this provision: no official figures are available but studies cited by UNICEF show that 8% of Afghan girls are married before the age of 15, and 35% before the age of 18 (UNICEF, 2019).

Cases of violence overwhelmingly take place at home. In its last available report in 2018, the AIHRC reported 4,340 cases registered in fiscal year 1396 of which "94% of all cases of violence against women, occurred in the home." (AIHRC, 2018). In 2020, the MoWA reported over 3,800 cases of violence against women (VAW (Reporterly, 2020). Cases of VAW were also overwhelmingly committed by family members, especially by the husband: "94.3% of all cases of violence against women, has taken place by the family members of the woman. The results of this report show that the husbands of the women are the most violent person against the women." (AIHRC, 2013 ; see also UNAMA, 2018).

2. Implementation of the EVAW law

Obtaining transparent and comprehensive data on cases of VAW and, in particular, the processing of such cases by the police, the prosecutors and the courts continues to be a challenge due to the lack of a systematic framework and national data collection system. Each actor, the police, the attorney general, the courts, as well as the AIHRC and the MoWA, keep their own records of the cases they register, which means that data that trace these cases across institutions—and therefore prosecution or conviction rates—have generally not been available. Today, the main sources of statistical information on the implementation of the EVAW law are UNAMA reports,² and reports by MoWA and the AIHRC, as well as a few reports by the Afghan Women’s Network. As Qazi Zada notices, “The lack of research and scholarly writings also illustrates the limited attention that has been given to this area.” (Qazi Zada, 2020). The United Nations Rapporteur on violence against women, its causes and consequences visited Afghanistan in 2014, issuing recommendations pertaining to better support of MoWA and AIHRC, strengthening the implementation of relevant legislation and regulating the use of mediation in VAW cases (Special Rapporteur, 2014).

In 2013, a Samuel Hall report found that “implementation throughout the country has plummeted in mid-2013, indicating a significant lack of will on the part of the Government of the Islamic Republic of Afghanistan to implement the law, despite a demonstrated capacity to do so only one year prior” and attributed this to “i) a lack of will within the government, and ii) cultural attitudes that attach shame to victims rather than perpetrators of VAW.” (Samuel Hall, 2013). In 2014, MoWA published a detailed report on cases registered internally, or with the police, or the prosecution for the year 1391 (March 2012 to March 2013). The report found that, of more than 4,000 cases, 18 percent were referred to the courts and 13 percent led to a criminal conviction.³ Although there was an intention to produce yearly reports thereafter, this did not happen. Another report from 2015 analysed 2,958 cases from the specialized prosecution units in eight provinces. It found slightly higher conviction rates than the MoWA report (20 percent), but stark regional differences, with Kabul’s rates of conviction and prosecution being comparatively low (Wimpelmann, 2014). In sum, there appears to be little statistical data available on prosecution and conviction rates, particularly for recent years. Available studies also do not provide

information about the legal aspects of cases, such as whether the EVAW law or the Penal Code were the basis for prosecution or conviction.

After the signing of the EVAW law in 2009, the International Development Law Organization (IDLO) supported the establishment of special prosecution units dedicated to the implementation of the EVAW law. The first few months of implementation were challenging, with “the UN estimating that by autumn 2012, only 4 percent of all reported incidents were adjudicated on the basis of the new law.” (Wimpelmann, 2013). Six years after the signing of the law, a study found that only 20 provinces out of 34 had prosecutors dedicated to addressing VAW cases, with varying degrees of operationalisation (Wimpelmann, Shahabi, 2016). In 2018, UNAMA concluded that “state officials frequently fail in investigating, prosecuting and punishing perpetrators and providing reparations to victims. (...) Women’s access to justice remains limited, and women continue to face inequality before the law.” (AAN, 2018). Qazi Zada in 2020 describes an unchanged situation: “numerous cases of VAW remain unregistered and convictions are a rarity. The formal justice system remains unsupportive of women’s rights and is dysfunctional in handling of VAW cases.” (Qazi Zada, 2020).

The study found that prosecution offices demand evidence such as physical marks or witnesses to register a crime. However, a 2016 study found that “prosecution offices differed in their practices in this respect,” with prosecutors in Badakhshan refusing to register a case of beating despite physical marks as proof, as opposed to prosecutors in Herat registering all cases, even those without evidence of injury or eyewitnesses, and other provinces such as Kabul in between these two ends of the spectrum of practices (Wimpelmann, Shahabi, 2016). The authors highlight that these disparities in registering crimes are also found in indictment rates, which varies starkly from one province to another and “points to systemic problems in the legal process designed to address violence against women.” (Wimpelmann, Shahabi, 2016, p.16). The UN Special Rapporteur further noted these differences, particularly with lower implementation of the EVAW law in rural areas compared to urban areas (Special Rapporteur, 2014).

2 These reports were published in 2009, 2010, 2011, 2012, 2013, 2015, 2018 and 2020, and are all available at: <https://unama.unmissions.org/women%27s-rights-reports>.

3 For a brief assessment of data presented in this report see Shahabi and Wimpelmann, 2016. Prosecution of Acts of Violence Against Women in Afghanistan A Closer Look at the Data January 2016.

The same authors (Wimpelmann, Shahabi, Elyasi. 2016) also published a detailed ethnographic study of the Kabul Prosecution unit, based on fieldwork in 2014. This study highlights the role played by the support or lack of support of the woman's family, guided by the weight of social norms and stigma surrounding VAW. In many cases, pressures from the complainant's family or the accused's family, as well as suggestions from the prosecutor, played a role in the complainant withdrawing their cases. (Wimpelmann, Shahabi, Elyasi. 2016.) Prosecutors would pose as guarantors of negotiated resolutions that led to withdrawing of formal charges, even keeping a written copy of these arrangements: "In a sense, the prosecutors defined their professional duty more in terms of 'solving' disputes than implementing the law." (Wimpelmann, Shahabi, Elyasi. 2016, page 14)

Another reason explaining cases being withdrawn before a decision is made is the use of complaints in order to gain leverage to obtain something from the accused, whether this is a commitment to stop the violence, a divorce, or other. After obtaining what the complainant or their family wanted, the complaint would be withdrawn (Wimpelmann, Shahabi, Elyasi, 2016.) By providing women with leverage, the EAW law would effectively be used by women as a "bargaining tool" to obtain the outcome they wanted, and in this sense, the low court referral rates cannot always be understood as disempowering to women. (Wimpelmann, Shahabi, Elyasi, 2016). This highlights the lack of other options for women seeking to escape abuse or end an unhappy marriage, such as the ability to seek divorce and options for financial independence or obtaining child custody, alimony, property, etc. (Wimpelmann, Shahabi, Elyasi, 2016)

Several studies highlight how prosecutors have had an inclination towards using mediation in VAW cases, often due to it being the preferred resolution method for prosecutors and families, both of the complainant and of the accused, as mediation is seen by some, particularly by those not supportive of gender equality, as being more in line with traditional norms. AWN noted this trend in a 2012 report (AWN, 2012), that was confirmed in a 2014 report which indicated that MoWA "appeared to approve of the widespread use of mediation, asserting that 'mediation (...) has emerged as the most preferred and commonly used method of resolution of cases of violence against women because it respects the sanctity of "family" as a unit and is in consonance with cultural traditions'." (Wimpelmann, 2014). In a 2018 study, UNAMA and the UN Office of the High Commissioner for Human Rights studied in detail the mediation processes and highlighted the fact that there is no provision allowing for mediation in the EAW law, and that mediation cannot replace

the judicial protections provided to women by the laws of Afghanistan (UNAMA, 2018). The report further noted "great disparity of standards, procedures, referral of cases by EAW institutions and capacity of the mediators" as well as the fact that "the women's choice about the matter is not properly taken into account." (UNAMA, 2018). Thus, the use of mediation, which presumes in theory that both parties have equal bargaining power, is unsuitable for the resolution of criminal offences of violence against women, and does not offer women the necessary protection of their rights. (UNAMA 2018). UNAMA added that "the two different types of mediation carried out by traditional dispute resolution mechanisms related to violence against women (...) are both unlawful and constitute human rights abuses." (UNAMA, 2018). The UN Committee on the Elimination of Discrimination against Women expressed similar concerns in its review of the initial and second periodic reports of Afghanistan in 2013 (CEDAW, 2013).

An additional harmful practice highlighted by UNAMA, the Special Rapporteur on Sexual Violence, and the AIHRC is the use of "virginity tests", which have been frequently imposed on women by police, prosecutors and judges, despite being prohibited unless a court orders it or the person examined consents to it. Human Rights Watch has called virginity examinations "degrading, discriminatory, and unscientific," and said that they may constitute sexual assault. In 2014, the World Health Organization stated that health workers should never use "virginity tests." (Human Rights Watch, 2014). In 2020, NGOs, the AIHRC, and the UN Committee on the Elimination of Discrimination Against Women continued to call for the end of this practice (AIHRC, 2020 ; CEDAW, 2020 ; Human Rights Watch, 2020).

Several studies highlight the use of influence over prosecutors or judges, where "some perpetrators were able to influence the prosecution through bribes or political connections," (Wimpelmann, Shahabi, Elyasi. 2016, also noted by Special Rapporteur, 2014), which would lead to cases where "officials reluctant to pursue a case have recorded outcomes such as 'not followed up by victim' or 'defendant escaped' in order to conceal other realities" (Wimpelmann, Shahabi, 2016).

As in other places where consensual sexual relations are criminalised, victims of rape face particular difficulties in the justice system in Afghanistan. Charges of zina, or sexual intercourse outside marriage, has sometimes been introduced by conservative prosecutors or judges in rape cases. Lawyers for the legal aid NGO Medica reported several instances of judges introducing a charge of zina when prosecutors had not done so (Medica, 2018). This would serve as a strong deterrent

when it comes to reporting cases of rape, especially in the absence of family support. In recent reports, the issue of charging women for unspecified “moral crimes,” which is not codified as a crime, or with attempted zina, continued to be highlighted as a specific issue of concern (Special Rapporteur, 2014 ; UNAMA, 2018 ; UNAMA, 2020). In earlier years, women and girls were frequently charged with “running away,” which was not a crime under the penal code. While the number of these prosecutions seems to have fallen, the number of moral crimes prosecutions has not. It seems that, rather than “running away” cases no longer being charged, they are likely still charged but as “attempted zina” instead of “running away.” (Human Rights Watch, 2013).

As Wimpelmann (2017) explains in a 2017 study, the Afghan government largely leaves the control or management of women’s sexuality to their family, meaning that both rape and “moral crimes” are primarily seen as family matters. The fact that the government has made frequent arrests of and

prosecuted women who “run away from home” testifies to the fact that it sees women as belonging under family control, since evading such control is often treated as a crime in itself. UNAMA adds that the police and judiciary “often pursue cases where women are perceived to have transgressed social norms and fail to act when women report violence or in cases of child marriage claiming these are ‘private matters’,” (UNAMA, 2010, Special Rapporteur, 2014), which was confirmed by subsequent reports (Special Rapporteur, 2014). It was estimated in 2010 that half of the women detained in Afghan prisons were there for “moral crimes,” which includes intention to commit zina, which is not a crime under Afghan law but is used against women who ran away from their home. (UNAMA, 2010 ; Human Rights Watch, 2012). Ten years after this report, UNAMA continues to note that “most violence against women and girls is not a concern for the State, but a private family matter.” (UNAMA, 2020).

3. Gaps in the Literature and Suggestions for Further Research

This year, the reported case of violence against women increased significantly due to the COVID-19 pandemic. Oxfam, in an April 2020 Briefing Note, noted that 97% of women interviewed reported an increase in domestic violence since the start of the pandemic (Oxfam, 2020). In Afghanistan, it is evident that violence against women goes on regardless of being at war and experience general violence on daily basis and or experiencing the effects of the global pandemic. It is therefore crucial to keep a close look at how the overall developments and latest challenges also affect the way government and non-government institutions respond to VAW using (or not using) the EVAW law.

The legal frameworks for special laws such as the EVAW law are expected to cover all three dimensions of a legal document: Prevention, Prosecution and Protection. As reflected in the review of literature in earlier sections, the existing data cannot help us clearly understand whether the EVAW law itself helped with preventing violence cases, prosecuting perpetrators and protecting victims of violence against women. It is therefore very important to look into more systematic processes that involve cases of VAW and examine this process through the above mentioned three ‘P’s lens in order to get a clarity on the effectiveness of implementation of the EVAW law in practice.

Identifying the key factors leading to VAW cases would be a separate matter of concern and requires more research in order to be able to unpack more on the

preventive aspects of the EVAW Law. Hence, a separate study is recommended to unpack the structural, sociocultural, economic and even socio-psychological roots of violence against women by looking at broader community and societal levels, including looking at how the attitudes and gender biases of the justice actors are hindering the effective implementation of the law.

The data on prosecution and convictions need to be gathered in ways that ensure a reference is made to what laws have been applied over the prosecution cases. This way, a distinction could be made on whether the EVAW law, the penal code, and/or other laws are being used in dealing with cases of VAW. Recent and comprehensive data are especially needed. Designing data collection tools requires professional and technical skills to first have a well-defined methodology, consult on all aspects of ethics (for example, respecting the privacy and the dignity of victims), and adapt it to each institution’s working system. For instance, the role and function of MoWA is different from that of the prosecution’s special units or from the police family response units, hence the need to refine accordingly the tools used for gathering data. Data processing and analysis is another phase of the process that needs a full, in-depth understanding of the matter, technical skills, and time. Once data from all units are gathered, they need to be analysed; at this stage, triangulation and verification of data are crucial. The technical team needs to define such processes.

Court case observation is another way of monitoring the EAW law implementation, where the researcher sits at the court proceedings and observes the lawyers', prosecutor's and judge's responses to a case, examining it against the legal framework being used to handle it; this can be complemented by an analysis of the court records themselves and of the process of cases through the justice system. This would also allow exploring the dynamics between women's access to civil rights such as those linked to divorce, custody, inheritance, and their access to protection against VAW.

Finally, there is a gap concerning comprehensive research on victims of VAW's protection mechanisms, as well as on their reintegration into the society. As the literature review reflected, scholars critique

mediation due to concerns on harmful traditions being applied where primary victims' fundamental rights may be compromised. However, an unexplored aspect is the issue of stigmatisation linked to public cases, where going to court can affect the future of victims of VAW and particularly their reintegration into society. To complement this research, it would be relevant to explore the changing perceptions of VAW prosecution, including comparing different groups such as legal officials, Islamic scholars and ordinary people, among others. A better understanding of these dynamics and perceptions is crucial to better inform protection mechanisms for victims of VAW.

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