

Remedies for Violence Against Women Workshop

medica mondiale – IDLO defense lawyers

Background: Legal Remedies

Criminal remedies: The *Penal Code*, 1976, Book II, Section 2 sets out criminal sanctions for “Beating and Laceration” (Chapter 5), beating causing abortion (Article 402), “Accidental Murder through Beating” (Chapter 2), and “Murder” (Chapter 1). These provisions and others apply to violence against women.

Civil remedies: The *Civil Code* does not explicitly include violence as a grounds for divorce. (Articles 183-185, regarding “Separation Due to Harm”, speak only to situations: “Where the wife receives any harm from intercourse with the husband, and if this makes the continuation of intercourse between the couple impossible”. However, it is the practice of lawyers to argue this as grounds. Although judges recognize domestic violence as grounds for divorce in principle (presumably on the basis of *shari’ah*), there is a reticence among judges to grant divorce in practice (generally, and on grounds of violence in particular).

Case studies

Case of Zakia Ibrahim Khail

Client married a man who was already married and have five children and wife. After seven years from her marriage unfortunately she doesn’t have any child and during this period she was under pressure and beating of her husband and his first wife. One day her husband put her in the well which was located in the yard with a presser cooker and inside of presser cooker put a hand bomb and he goes with his children and wife to relative house and then she start shouting and yelling neighbors heard her voice and they informed the police district and then police officers came and took her out of the well. The bomb did not explode so the wife did not die.

Before the criminal court, the husband argued in his defense that his wife was not obeying him. The husband’s relatives testified that the husband had another wife, and did not want to live with the wife he had put in the well. The criminal court convicted the husband to six months in prison. The court did not indicate whether he was convicted for beating and laceration (*Penal Code*, 1976, Book II, Section 2, Chapter 5) or initiation of murder (*Penal Code*, 1976, Book II, Section 2, Chapter 1 regarding murder, and Articles 29-33 regarding initiation of a criminal act, which is relevant to determining the material element of a crime). The court also did not indicate whether his sentence was motivated by the husband argument.

After the husband's release the client went to family court and ask for divorce from her husband and as a defense Lawyer I run her case in family court and her husband give her divorce, but she couldn't have her *maher* from him because she asked for divorce.

Case of Aziza Adalutkhowa Kohistani

A woman went to the police, accompanied by her father and brother-in-law, to make a complaint of beating against her husband. She was visibly bleeding and serious bruising later appeared on her arm. The police referred her to the hospital, where she spent one night. The police arrested the husband. A criminal court sentenced him to 3½ months in jail.

The woman then came to medica mondiale to file for divorce. Aziza requested the criminal file from the saranwal, in particular so as to access the medical report, which could provide strong proof for the civil case. The saranwal refused, stating Aziza could get the file from the criminal court. Aziza filed for divorce on grounds of beating. Before the family court, the husband stated that, if this was the only reason the wife was requesting divorce, he would write a letter to the court promising not to beat his wife. The wife, and the family court, accepted this resolution as an alternative to divorce.

As the wife lacked the requisite identification card for this resolution to be endorsed officially by the court, and as it would have taken a long time to get this identification card, the resolution was referred to a community of elders of Karabakh, where the husband and wife were from, for witnessing and endorsement. A two-day discussion was held with the elders of Karabakh, the wife and her parents, the husband, his brother, his uncle and the wife of his uncle. The gathering endorsed the husband's promise that he would not beat his wife. The gathering witnessed the husband's signature of a statement to this effect.

Issues for Discussion

1. Lack of criminal prosecution of domestic violence

It is commonly understood that domestic violence is widespread in Afghanistan. However, there are very few criminal prosecutions. Why is this?

According to Article 476 of the *Penal Code*, 1976, criminal prosecution under most relevant articles of the *Penal Code*, 1976 requires a complaint and cooperation of the victim when the violence is committed by a spouse, or one of the roots or branches of the victim.

Article 476: (1) In crimes, specified under the chapters of this Section, which harms the spouse or one of the roots or branches, filing of claim or other actions against them are not permitted, except on the basis of the complaint of the person against whom the felony is committed. Prosecution shall be dropped upon desistance of the person against who the felony has been committed.

(2) If the desistance is made after the final decision of the court, execution of the verdict shall be stopped.

- (3) In cases where objects pertaining to the location of the crime have been brought under custody, by virtue of court verdict or concerned authorities, or lent to someone else or has become the interest right of someone else, provisions stated in this Article shall not be applicable.

The lawyers of medica mondiale have indicated that victims prefer to seek civil remedies (i.e. divorce) rather than criminal remedies, and have suggested various reasons:

- The standard of proof of violence in criminal prosecutions – which require proof beyond a reasonable doubt – is very difficult to meet. The burden is lower in civil cases – which require proof only on a balance of probabilities. In practice, according to medica mondiale, this means that in family court, four witnesses are required, whereas in criminal cases, there must be testimony from all of the family members of the husband and wife. See discussion below.
- Victims do not like to go to the police station. Police are almost all men. Victims feel ashamed before them. Police are not aware of women’s rights, and make insulting statements such as: “A woman who enters a police station is a bad woman”. There is a perception that only criminals deal with the police. Because of the years of conflict, Afghans do not have confidence that police will help them. There is a perception that police are unprofessional.
- Criminal cases take too long.
- Victims see a divorce, which is shameful to the husband in Afghan culture, as satisfactory punishment.
- In some of police districts, staff are not professional.
- Women don’t want criminal prosecution because if a man is punished or sentenced, after he is released, he will go back to home and the violence against women will not have been stopped, and therefore it will not be solution of the issue for women.

Are there other obstacles to criminal prosecution?

Is criminal prosecution and punishment desirable?

How could these obstacles to criminal prosecution be addressed?

2. Proof required to establish violence

What type of proof is required to establish that there has been violence, either in a criminal case or in a civil case?

- Must injuries be visible to the police or saranwal?
- Must there be a medical report or pictures?
- Is testimony from third parties such as neighbors accepted? What weight is it given?

- Is testimony from the victim accepted? What weight is it given?

3. Are sentences in criminal cases of violence against women too lenient?

Were the sentences in the two case studies discussed above appropriate?

Consider the sentences to which the offenses of beating and laceration, attempted murder, etc. are subject, and the following provisions of the *Penal Code*, 1976:

Article 100:(1) [...] The duration of long imprisonment cannot be less than five years and more than fifteen years.

Article 101:(2) The duration of medium imprisonment is not less than one year and more than five years.

4. Relationship between the formal justice system in Afghanistan (i.e. the criminal and civil courts) and the informal justice system (i.e. *jirgas* of elders) in addressing violence against women.