

Flygtningenævnets baggrundsmateriale

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Titel:	Legal Aid Board. "What is the penalty in Afghan law (for the man) if an unmarried man has a sexual relationship with an unmarried Woman where..."
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What is the penalty in Afghan law (for the man) if an unmarried man has a sexual relationship with an unmarried woman where...

- **the unmarried woman becomes pregnant;**
- **parties are of different ethnicities;**
- **parties are of different branches of Muslim religion (one Shia muslim and other party Sunni muslim);**
- **parties are both minors (is there an age of majority in Afghanistan for women and men with regard to sexual relationships. Is a sexual relationship considered rape when parties are minors?)**

Specific information on different penalties for non-marital sexual relationships where parties are of different branches of Muslim religion or different ethnicities was not found among sources consulted by the Refugee Documentation Centre within time constraints.

Article 427 of the Penal Code states in a typewritten document which has been scanned in as follows where some letters are ambiguous:

- “(1) A person who commits adultery or pederasty shall be sentenced to long imprisonment.
- (2) In one of the following cases commitment of the acts, specified above, is considered to be aggravating conditions
- a. In the case where the person against whom the crime has been committed is not yet eighteen years old.
 - b. In the case where the person against whom the crime has been committed is a third degree relative of the offender.
 - c. In the case where the offender is a tutor, teacher, Or servant of the person against whom the crime has been committed or the latter has, one way or another, has authority or influence over the former.
 - d. In the case where the person against whom the crime has been committed is a married woman.
 - e. In the case where the Offender deflowers a maiden.
 - f. In the case where two or more persons have assisted each other in committing the crime or that the offenders have committed the act one after another.
 - g. In the case where the person against whom the crime has been committed is affected by genital disease.
 - h. In the case where the person against whom the crime has been committed becomes pregnant.” (Afghanistan (22 September 1976) *Penal Code No. 1980*)

Article 429 of this Law states:

“(1) A person who, through violence, threat, or deceit, violates the chastity of another (whether male Or female), or initiates the act, shall be sentenced to long imprisonment, not exceeding seven years.

(2) In the case where the person against whom the crime is committed is not eighteen years old, or the person who commits the crime is one of the persons specified under paragraph 2 of Article 427 of this Law, the offender shall be sentenced to long imprisonment, not exceeding ten years.” (Ibid)

Sections 334 to 336 of a report by the UN Convention on the Rights of the Child state in relation to statutory rape and other matters:

“334. Article 427 of the Penal Code makes sexual intercourse outside the marriage (*zina*) or adultery punishable by “long term” imprisonment. Those who sexually abuse children are currently jailed and sentenced according to this article, which can bring a jail sentence of six to ten years. Article 426, however, provides that *zina* shall be punished under article 427 only if it is not punished as *hudud*. *Hudud*, not defined in the Penal Code, thereby refers to another source of law (Sharia Law) for the harshest punishment of *zina* (including whipping and stoning).

335. Article 429 arguably criminalizes rape by providing for punishment, not exceeding seven years of imprisonment, for anyone who ‘through violence, threat, or deceit violates the chastity of another’. The crime of statutory rape, which protects girls under the age of consent, is unknown in Afghan law. The Penal Code does not contain provisions regarding domestic violence.

336. Article 517 of the Penal Code provides that “a person who gives in marriage a widow or girl who is 18 years or older against her will or without her consent” shall be punished by a short term of imprisonment. Paragraph 2 of the article provides that where this is done as compensation for a wrong doing (i.e. as *baad*), the defendant shall be sentenced to up to two years’ imprisonment.” (UN Convention on the Rights of the Child (13 June 2010) *Consideration of reports submitted by States parties under article 44 of the Convention Initial report of States parties due in 1996 - Afghanistan*)

The Hands Off Cain report states, as quoted in the United Kingdom Home Office Country of Origin Information Report of 2010:

“On January 4, 2004, after three weeks of ferocious debate, the 502 members of the Loya Jirga – or grand council - adopted a new constitution. The 160 articles make no explicit reference to Sharia law, but the constitution declares Afghanistan to be an ‘Islamic republic’ and states that ‘no law shall be contrary to the beliefs and provisions of the sacred religion of Islam.’ – and the Islamic provisions do foresee capital punishment, namely for crimes against Islam (armed robbery, adultery, and apostasy or blasphemy), and for crimes against the person (murder). However, another constitutional provision, article 27, requires the existence of an approved law for the qualification and punishment of a crime, and it may be argued that the Islamic provisions on death penalty are not approved laws. In fact, since the end of the Taliban regime, in Afghanistan no judicial death sentences have been issued for crimes, such as adultery and apostasy, which are foreseen by Islamic principles and have no correspondence in positive laws.” (Hands Off Cain (undated) *Afghanistan*)

The UNHCR Eligibility Guidelines state:

“Persons accused of committing crimes against Sharia law, such as blasphemy, apostasy, homosexuality and adultery, are at risk not only of social rejection and violence at the hands of family or community members,⁴⁵ but also of formal prosecution.” (UNHCR (July 2009) *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, p.16)

These Guidelines also state:

“Women continue to be prosecuted for adultery (zina) including in instances of rape, thus deterring them from reporting such crimes. Detention on the ground of vague ‘morality crimes,’ such as running away from home (often escaping domestic violence), or refusing marriage, also occurs. Both adultery and “morality crimes” may elicit honour killings, and on occasion authorities claim that the detention of women accused of these acts is to protect them from being killed..” (Ibid, p.16)

The United States Department of State Country Report states under the heading ‘Arbitrary arrest or detention’:

“ ‘Zina’, a criminal act under the penal code, defined as heterosexual penetration between persons not married to one another, technically means adultery or fornication. In practice police and legal officials often invoked zina to justify the arrest and incarceration of women for social offenses such as running away from home, defying family wishes on the choice of a spouse, fleeing domestic violence or rape, or eloping. Police often detained women for zina at the request of family members. UNAMA reported cases of zina in nearly every province. Authorities imprisoned some women for reporting crimes perpetrated against them and some as “proxies,” serving as substitutes for their husbands or male relatives convicted of crimes.” (United States Department of State (11 March 2010) *2009 Country Report on Human Rights Practices - Afghanistan*)

This report also states under the heading ‘Women’:

“On July 19, President Karzai signed the Elimination of Violence Against Women (EVAW) law, criminalizing violence against women, including rape, battery or beating; forced or underage marriage; “baahd” (the giving of a female relative to another family to settle a debt or dispute); humiliation; intimidation; and the refusal of food. Penalties include prison terms of less than six months to the death penalty... Article 17 of the EVAW law specifically punishes rape with life imprisonment, and if the act results in death of the victim, the perpetrator shall be sentenced to death. The law punishes the “violation of chastity of a woman... that does not result in adultery (such as touching)” with imprisonment of up to seven years. Rape does not include spousal rape. Shari’a law, as interpreted in the local context and influenced by tribal customs, although uncodified, impeded successful prosecution of rape cases. The Koran does not specifically mention a punishment for rape, but under one interpretation of Shari’a, local tribal elders or religious leaders may treat rape as a form of adultery, punishable by stoning to death or 100 lashes of the whip, although there were no reports of such cases during the year. Under some interpretations of Shari’a, a woman who brings a charge of

rape sometimes must produce four witnesses to prove that the rape occurred as a result of force. Accused men often claimed the victim agreed to consensual sex, which resulted in an adultery charge against the victim.” (Ibid)

A report by Radio Free Europe Radio Liberty states:

“Afghanistan's largest gathering of clerics has called for the revival of strict Islamic law as a way to achieve reconciliation with the Taliban, RFE/RL's Radio Free Afghanistan reports.

About 350 members of the Council of Ulema, or religious clerics, gathered on August 12 in Kabul and subsequently released a statement in which they appealed to the Afghan government to implement a strict interpretation of Shari'a, or religious, law, including punishments such as death by stoning for adultery and the cutting off of thieves' hands and feet.” (Radio Free Europe Radio Liberty (15 August 2010) *Afghan Clerics: Peace Process Stalled Until Shari'a Implemented*)

A report on IRIN News states:

“Human rights groups are calling on the Afghan government to adopt a new law which would more clearly differentiate rape, a criminal offence, from consensual adultery, considered a serious crime in the country.

"Rape and adultery are two different issues and should be separate in law. Rape is an act of violence and coercion and the inflicting of suffering on a victim, and is not consensual, whereas adultery is consensual, freely chosen," Sonya Merkova, a researcher at London-based Amnesty International, told IRIN.

Parwin Rahimi, an official of the Afghanistan Independent Human Rights Commission (AIHRC), and Ajmal Samadi from the Afghanistan Rights Monitor (ARM) echoed this standpoint.

"Rape needs to be legally recognized as a heinous crime and must be dealt with separately from Islamic adultery penal codes," Samadi told IRIN.

Many Afghan judges confuse rape with adultery which, rights activists say, adds insult to injury for the victims.

Mawlawi Mohammad Qasim, a member of the Penal Bureau in the Supreme Court, for instance, describes rape as "an illicit sexual relationship between a man and a woman who are not married to each other".

Judicial officials and the police are unaware - or not convinced - that rape is a serious crime, according to a report by the UN Assistance Mission in Afghanistan (UNAMA)." (IRIN News (3 September 2009) *Afghanistan: "Differentiate rape from adultery" - rights groups*)

Avert.org, the international HIV and Aids charity states that the age of consent for male-female sex is "18/Married" (Avert.org (undated) *Worldwide Ages of Consent*)

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This response was prepared after researching publicly accessible information currently available to the Refugee Documentation Centre within time constraints. This response is not and does not purport to be conclusive as to the merit of any particular claim to refugee status or asylum. Please read in full all documents referred to.

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