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End 'Moral Crimes' Charges, 'Virginity' Tests

(Kabul) – Afghanistan's government should urgently act to end [wrongful imprisonment](#) and humiliating, scientifically invalid "[virginity exams](#)" of women and girls, Human Rights Watch said today. Despite a pledge from President Ashraf Ghani in a February 2016 letter to Human Rights Watch to "prevent the imprisonment of women accused of running away from their family," [Afghan](#) police and prosecutors continue to engage in the abusive practice.

"President Ghani's promise to end the practice of arresting women and girls for 'running away' is an important step forward for women's rights in Afghanistan," said [Heather Barr](#), senior women's rights researcher at Human Rights Watch. "But to make a real difference, the president needs to issue a clear and binding order that immediately changes how every police officer and prosecutor handles complaints against women and girls. For too long, women and girls fleeing violence have been treated as criminals while their abusers go free."

The government should take concrete steps to implement the promised reform and ensure that women and girls who have been the victims of violence are protected by the legal system, Human Rights Watch said.

In Afghanistan today, hundreds of women and girls are imprisoned on charges of "moral crimes," Human Rights Watch said. These so-called crimes include "running away" from home, and committing or attempting to commit *zina*, or having sex outside of marriage. Human Rights Watch estimated in 2013 that half of all women in prison and about 95 percent of girls in juvenile detention in Afghanistan have been arrested on "moral crimes" charges. Human Rights Watch [research](#) found that in most cases, the women and girls accused of these "crimes" were fleeing forced child marriage or domestic violence. In some cases, women and girls who have been raped were charged with *zina*, alongside their rapist.

In a March 2016 letter to President Ghani, Human Rights Watch outlined five steps the government should take to fully implement the president's commitment to end imprisonment of women who run away from their families (see appendix). The steps include reforming the law so that "moral crimes" are no longer grounds for arrest. *Zina* is currently a crime under the Afghan Penal Code and is punishable by five to 15 years in prison. "Running away" is not a crime under Afghan law, but police and prosecutors often treat it as a crime, sometimes bringing charges as "attempted *zina*."

The Afghan government is currently drafting a new penal code. The new penal code should bring Afghanistan into compliance with international law by ending criminalization of consensual sex between adults, Human Rights Watch said. It should also include comprehensive penal provisions providing a clear and inclusive definition of sexual assault, incorporating rape and marital rape. The penal code should also adopt a clear provision regarding the age of consent to sex identical for boys and girls, set tough penalties for an adult who

has sex with a child below the age of consent, and ensure that such children are treated as crime victims and not targeted for *zina* accusations.

"Adopting a modernized penal code would be a crucial advance for Afghan society," Barr said. "President Ghani should ensure that the new law upholds women's rights under both the Afghan constitution and international law, by removing all references to 'moral crimes' and adding new provisions to protect women and girls from abuse."

Human Rights Watch also called on the government to ban all use of "virginity examinations." At present, women and girls accused of "moral crimes" are routinely subjected to invasive vaginal and rectal examinations by government doctors. These examinations purport to provide information regarding whether the woman or girl is a "virgin" and whether she recently or habitually engaged in sexual intercourse. Reports describing these findings are used in criminal prosecutions and frequently contribute to convictions and long sentences for women and girls found guilty of "moral crimes."

In reality, so-called "virginity tests" have no scientific validity. Their use is based on the mistaken belief that "virginity" can be determined by examining a woman or girl's hymen to determine whether it has been broken during sexual intercourse. In fact, some girls are born without a hymen, hymens often break during daily non-sexual activities, and some hymens remain intact after sexual intercourse. These factors make "virginity examinations" so unreliable that the World Health Organization has said that they have no scientific validity and health workers should never conduct them.

"President Ghani can end the abusive and unscientific use of 'virginity exams' with the stroke of a pen," Barr said. "It's well past time he did so."

Human Rights Watch letter to Ashraf Ghani regarding "moral crimes" and "virginity exams"
Appendix to March 17, 2016 letter from Human Rights Watch to the Government of the Islamic Republic of Afghanistan responding to the January 29, 2016 "Statement by the Government of Afghanistan on the Human Rights Watch Report"

Re: Government of Afghanistan reforms regarding "moral crimes" charges

This memo is a response to the following passages in the statement issued by the Afghan government:

In order to prevent the imprisonment of women accused of running away from their family, the President recently asked the Supreme Court to issue a ruling on the application of article 130 of the Constitution that is the basis for the courts' decision to sentence such women. In December 2015, the Supreme Court issued a judicial ruling that bars judges from imprisoning women for running away from family.

Running away from home is not defined as a crime by law, but from the misinterpretation of a constitutional provision that has created a wrong practice, which is now being stopped.

Since the statement was issued, Human Rights Watch has made requests to the President's Office for a copy of the Supreme Court judicial ruling alluded to above, and has received some clarifications regarding the contents of the ruling, but not a copy of the actual ruling.

We understand that it is accompanied by a second document, a paper prepared by the research and studies directorate of the Supreme Court that responds to questions from the President's Office regarding whether *zina* charges should be brought against victims of rape. Our understanding is that this paper states that the scholars have reached a consensus that a haram act of *zina* has occurred only when a mature person with full consent has committed it, therefore a person who has not consented to *zina* but has been forced to engage in sexual intercourse is instead under law a victim of rape.

We would be very grateful if you could share with us a copy of the full text of these two documents. Our comments below are based on the statement above and the clarifications we have received from the President's Office.

We commend the Afghan government, and in particular President Ghani, for taking up these two important issues: 1) the practice of charging women and girls with the so-called offense of "running away"; and 2) the practice of charging women and girls with the offense of *zina* when they have been the victims of sexual assault or statutory rape.

Human Rights Watch has been calling for reform on these issues for many years, including most recently in a 2012 [report](#) based on 58 interviews with women and girls imprisoned for "moral crimes," as well as several follow-up [statements](#), which documented a sharp [increase](#) in the number of women and girls imprisoned on these charges.

The previous administration had been unwilling to pursue reform on this issue. We also noted with dismay the memos issued by the Supreme Court in 2010 and 2011, in which the Court advised that "running away" should be treated as a crime if a woman or girl flees somewhere other than to a relative.

We appreciate the steps that your government has now taken, and hope that the government will follow through vigorously to ensure that the proposed changes are fully implemented and have the desired effect of ending these harmful and illegal practices. The following are some key steps that we believe are necessary in this regard:

1) **Reform the Penal Code provisions on "moral crimes" and sexual assault**

Under international law, Afghanistan has an obligation to end all arrests and prosecutions of "moral crimes." International law does not support the criminalization of consensual sex between adults. As part of the revision of the Penal Code, the government should remove articles 426 and 427 from the Penal Code, and replace them with comprehensive penal provisions providing a broad and inclusive definition of sexual assault, incorporating rape and marital rape. The government should also adopt clear law regarding the age at which a young person can consent to sex, set tough penalties for an adult who has sex with a child below the age of consent, and ensure that such children are treated as crime victims and not targeted for zina accusations. We urge the government to consider the guidance from the [United National Handbook for Legislation of Violence Against Women](#) in regard to formulating these provisions.

Until Afghan law is reformed to abolish "moral crimes," we recommend that the government take the following steps to stop the harmful practices of charging women and girls with "running away" and charging rape and statutory rape victims with the offense of zina.

2) **Abolish not only "running away" charges but also "attempted zina" charges**

As the Supreme Court has noted, "running away" is not an offense under the Penal Code, and should never be used as grounds for arrest, detention, prosecution, or conviction. However, Human Rights Watch's research indicates that ending the practice of charging women and girls with "running away" will not be sufficient to end abuses by justice officials in "running away" cases. The use of "running away" charges seems to have diminished in recent years, in recognition that "running away" is not an offense under statutory law, but that does not appear to mean that women and girls who would have been charged with "running away" now go free. Instead, police, prosecutors and judges appear to be moving ahead with arrest, prosecution and conviction in many of these cases, but doing so under the rubric of "attempted zina" rather than "running away."

Police, prosecutors, and judges have argued to Human Rights Watch that, in their view, "attempted zina" charges are justified when there is evidence that a woman or girl left their family's home without permission, or was in a location where "shady things are happening," or was in the company of a man who is not a halal relation.

In our view, this is a misapplication of Afghan law, as well as a violation of Afghanistan's obligations under international law. None of these circumstances meet the requirement of Penal Code article 34, which requires that in order for a finding of criminal intent, "the will of the doer to commit an act which produced the crime." Charging an individual with a crime based on the attempt to commit any offense, including zina, also requires that the facts satisfy the following requirements of article 27 of the Penal Code:

(1) Initiation of a crime is the starting of an act with the intention of committing a felony or misdemeanor, but whose effects have been stopped or offset by reasons beyond the will of the doer.

(2) Only the decision to commit a crime or performance of preliminary works is not considered initiation of crime.

The fact that a woman or girl has fled her home, has spent time in an unsafe or unsupervised location, or has been in the company of a man who is not a halal relation cannot reasonably be seen as sufficient evidence that this woman or girl has "started the act" of committing zina. It is very difficult, in fact, to identify circumstances in which zina has not occurred, but the evidence would legitimately support a finding that an individual has started "an act with the intention of committing" zina.

Charging individuals with attempted crimes makes sense in cases where it can be clearly determined that an attempt has taken place but has not been completed: for example, a murderer fires a gun at the intended victim, but misses, or a burglar breaks the window of a home but is attacked by a dog before entering. There is no comparable set of facts in regard to the offense of zina; rather the charge of "attempted zina" has been used by prosecutors to continue the practice of prosecuting women and girls for "running away."

The government's decision to end the prosecution of women and girls for "running away" will not have its full effect – or perhaps even an incremental effect – unless the government also prohibits police and prosecutors from pursuing "attempted zina" charges. We urge you to do so.

3) **Direct justice officials to inquire into consent in all zina prosecutions**

The government has taken an excellent step by instructing that victims of rape should not be charged with zina. However, this reform should not require rape victims to bear the burden of defending themselves from a charge of zina by raising lack of consent. Instead, the government should instruct all police and prosecutors that in all zina cases they should investigate whether women and girls gave their consent to sex, from the earliest stages of arrest and throughout the duration of the case. Judges should be offered training on this issue.

In the event that evidence indicates that one or more individuals did not consent to sexual intercourse or were below the age of consent, those individuals should be treated as crime victims. There should be no criminal charges brought against victims, and any pending charges should be dropped immediately and victims informed of this. As warranted by the evidence, the perpetrator or perpetrators should be charged with sexual assault (under a revised Penal Code) or rape under the Law on the Elimination of Violence Against Women (article 17).

Police should also be informed and trained regarding their responsibility to detect cases of sexual assault and rape and to refer for prosecution all matters where evidence suggests that a rape or sexual assault has been committed.

4) **Inform justice officials of new rules on “running away” and rape cases, and ensure full compliance.**

In Afghanistan, as in many countries, there are often significant gaps between the instructions issued by the central government and the practice of police and prosecutors at the provincial and district level. In order to ensure that full implementation of the government's ban on the use of “running away” charges and the charging of rape victims with the offense of zina, the government should take steps to distribute clear and compulsory guidance on these two issues to all police station and prosecution offices. Justice officials who do not comply with the new rules should face employment sanctions up to and including dismissal.

This information should also be made available to judges at the provincial and district level.

5) **Ban all use of “virginity exams”**

As the Afghanistan Independent Human Rights Commission (AIHRC) documented in a recent report, the vast majority of women and girls accused of “moral crimes” are subjected to vaginal and rectal examinations – sometimes repeatedly – performed by government doctors. These doctors then prepare reports, which are used in criminal prosecution, which purport to provide information regarding whether the woman or girl is a “virgin” and whether she recently or habitually engaged in sexual intercourse. In the AIHRC study, out of a sample of 53 women and girls as young as 13 who had been accused of “moral crimes,” 48 had been sent for “virginity exams.” Twenty were examined more than once – up to four times in two cases. One woman said that there were six people in the room watching the examination.

So-called virginity examinations have no scientific validity. Many people mistakenly believe that virginity can be determined because the hymen is always broken when a woman or girl has sexual intercourse for the first time. In fact, some girls are born without a hymen; hymens often break during daily non-sexual activities; and some hymens remain intact after sexual intercourse. Purported virginity exams are so unreliable that the World Health Organization has said that they have no scientific validity and health workers should never conduct them.

There is no requirement in Afghan law that “virginity exams” be conducted or submitted into evidence in criminal proceedings. President Ghani should immediately, by decree, ban all government doctors from performing “virginity exams” and ban all prosecutors from submitting reports gathered through such exams into evidence.