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AFGHAN JUVENILE CODE IN PRACTICE: ASSESSING AGAINST INTERNATIONAL JUVENILE LAW

Christopher W. Carlson, Jr.

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Abstract:

The post-2001 reconstruction of the Afghan state has provided a unique opportunity for the international community to examine how Muslim states may seek to establish formal laws which are consistent with international and Sharia law. This accompanying Article provides the first legal analysis focusing upon the merit of the statutory guidelines enacted in the Afghan Juvenile Code of 2005, which also statistically examines their effectiveness nearly a decade after their publication.

This Article assesses and compares Afghanistan’s juvenile procedures with the systems and norms advocated by the United Nations (“UN”). The Afghan Juvenile Code of 2005 is compared with the UN Convention on the Rights of the Child’s four key guidelines. The four guidelines include: (1) imprisonment of juveniles “shall be used only as a measure of last resort”; (2) any such imprisonment shall be “for the shortest appropriate period of time”; (3) juveniles who are in prison shall be “separated from adults”; and (4) they shall have the right to maintain “family contact.” These guidelines serve as a medium through which the international community can illustrate the broad principles of protection and rights for children that should universally be upheld.

The most striking contrast between the Afghan system and the systems in most member countries of the UN is the dominant role that autonomous Afghan tribes play within the criminal justice system. These tribes, which internally administer the criminal justice system, are deeply ingrained within the Afghan state and will likely never be fully centralized. Taking this into consideration, this essay focuses on Afghanistan’s formal adjudication model and explores methods of connecting existing informal and formal adjudication structures to achieve transparency and legitimacy the tribally focused system.

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DO IT FOR THE KIDS: THE AFGHAN JUVENILE CODE IN PRACTICE

Chris Carlson¹

I. INTRODUCTION

Intense light entered his eyes as a black cloth bag was lifted off his head.²³ Regaining awareness of his surroundings, a door swung open, and he was led within the Afghan courtroom by the National Directorate of Security (NDS).⁴ The 16-year-old was alone and lacked legal representation.⁵ The indictment, which alleged charges of suspected terrorism, stated that the teenager was traveling with several strangers when a weapon was found inside his taxi.⁶ The officer of the court read a confession, which had been composed by the NDS.⁷ This confession was signed by the illiterate teenager.⁸ This teenager claimed to have signed the confession while being beaten.⁹ The accused displayed visible marks on his hands and arms to the three-judge


² Juvenile Code, Government of Afghanistan, Art. 22 (2005), available at http://www.asianlii.org/af/legis/laws/jlcogn846p2005032313840103a495/, (illustrating that publishing the general courtroom procedure is legal, but names of children “shall be kept confidential in order not to prejudice their reputation and interests”).

³ Kimberly Motley, Final Sentencing Guidelines, 4 (2013) (hereinafter “Sentencing Guidelines”) (eluding to fact that these guidelines were distributed to Afghanistan’s judges informally; a copy of these guidelines are available with author upon request).

⁴ Id. (noting the NDS is the intelligence agency in Afghanistan).

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.
tribunal. However, no active inquiry was made into mitigating factors. Social service factors, such as the child’s family history, were ignored.

This twenty-minute trial lacked both evidence and witnesses. Despite this, the Afghan tribunal sentenced the teenager to eight years in prison – quadruple the statutory maximum punishment of two years. When asked after the trial how they determined the teenager’s sentence, the judges’ answer was simple. The NDS brought the case. The NDS is never wrong.

This case occurred four years after the massive overhaul of Afghanistan’s Juvenile Code was completed in 2005. But even with egregious failures of due process, a formal juvenile system has created the potential for oversight. Unlike adjudication by tribal groups, formal criminal justice hearings and their verdicts must be public, which increases transparency within Afghan adjudication. The aforementioned case prompted Kimberly Motley, the Italian

10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id. at 6; Juvenile Code, supra note 1, at Art. 2.
18 See id. at 4-6; infra part I(A)
Cooperation, the United Nations (UN), and the Afghan government to assist in further reform of the juvenile justice system.\textsuperscript{20} While guidelines may only have a limited impact in reforming the juvenile justice system in Afghanistan, judicial actors will be unable to bring reform and clarity to the Afghan juvenile justice system without such procedures to follow.\textsuperscript{21}

This article assesses and compares Afghanistan’s juvenile procedures with the juvenile justice systems and norms advocated by the UN. The UN serves as a medium through which the international community can illustrate the broad principles of protection and rights for children that should universally be upheld.\textsuperscript{22} The most striking contrast between the Afghan system and the systems used by most member countries of the UN is the dominant role that Afghan tribes play within the criminal justice system.\textsuperscript{23} The autonomous Afghan tribes, which internally administer the criminal justice system, are deeply ingrained within the Afghan state and will likely never be fully centralized.\textsuperscript{24} Taking this into consideration, this essay focuses on Afghanistan’s formal adjudication’s model and explores methods of connecting existing informal and formal adjudication structures to achieve transparency and legitimacy.\textsuperscript{25}

The impact of establishing and following proper formal procedural guidelines for the Afghan juvenile justice system is two-fold. First, the establishment of proper adjudication

\begin{footnotesize}
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\item\textsuperscript{20} Sentencing Guidelines, \textit{supra} note 2, at 37-68 (illustrating the specific sentencing guidelines recommended to the Afghan government and forwarded to each Afghan judge).
\item\textsuperscript{21} \textit{See id.} at 4.
\item\textsuperscript{22} \textit{Infra} part II
\item\textsuperscript{23} \textit{Infra} part I(A)
\item\textsuperscript{24} \textit{Id.}
\end{itemize}
\end{footnotesize}
methods will provide credibility to the Afghan system within urban areas. These areas will be more likely to accept a formal judicial construct. Second, the Afghan juvenile justice system will mirror both the UN’s standards for children’s rights as well as the Muslim traditions established by the Qur’an. As a result, the Juvenile Code will serve as a benchmark for other Muslim nations to publish their own systematic code for treatment of juvenile offenses. To date, no Islamic state aside from Afghanistan has published a juvenile code.

II. AFGHANISTAN’S JUVENILE JUSTICE SYSTEM

The Bonn Agreement, which authorized the Afghanistan Judicial Commission (hereinafter “Commission”), was ratified after the collapse of the Taliban regime in 2001. The Commission was assisted by the UN and other international state actors in its effort to “rebuild the [Afghan] domestic justice system in accordance with Islamic principles, international standard, the rule of law and Afghan legal traditions.” The previous justice system, established

26 Id.


28 Id.


31 See id.

32 Id.
by Afghanistan’s Constitution of 1964, was predicated upon internal adjudication of disputes by tribal jirgas. Even though the Commission was given the broad duty of rebuilding the Afghan judicial system, in effect it was called upon to create the first formal justice system within Afghanistan. Despite the challenges inherent in such a mandate, the Commission has successfully introduced positive changes in the Afghan legal system.

A. The Adjudication of Disputes through Tribal Jirgas

As mentioned, the vast majority of legal disputes in Afghanistan are resolved outside of the formal state justice system. These autonomous, locally based assemblages of elders, known as jirgas or shuras, adjudicate legal disputes informally and internally. The Bonn Agreement recognized the important role of this informal justice structure by specifying that their use was supported as long as their laws were consistent with Islam.

Afghanistan’s Islamic culture emphasizes autonomy and the individual responsibility of each household, which often results in juvenile offenses being dealt with within the home.

Many opinions have arisen regarding the benefits and consequences for those adjudicated by


35 See Bonn Agreement, supra note 29.


38 Wardak, supra note 24, at 1154.

39 Bonn Agreement, supra note 29.

40 Wardak, supra note 24, at 1154.
tribal jirgas. Harsher punishments seem to prevail in serious matters, such as violent crimes, because adjudication focuses on the well-being of the group as a whole.

On the other hand, a jirga provides accessible, credible, and comprehensive adjudication to the majority of Afghan citizens because of the unit’s inherent legitimacy on a local level. A jirga also places strong emphasis upon a restorative approach to criminal adjudication that focuses upon restoration and reconciliation.


The Afghan Juvenile Justice Policy is based on the Afghan constitution, statutory laws, domestic regulations, and the human rights conventions that Afghanistan has recognized. Afghanistan is a signatory state of the UN Convention on the Rights of the Child (“CRC”) and has obliged itself to abide its conditions.

The Juvenile Code of Afghanistan was approved and published by the Government of Afghanistan in 2005. It serves as a safeguard to protect the rights of Afghan children while also

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43 Wardak supra note 24, at 1156.

44 USAID, supra note 41, at 6.

45 See Juvenile Code, supra note 1, at Preamble (noting that this compilation of sources combines to establish the “usual code of conduct” in Afghanistan).


48 Juvenile Code, supra note 1.
fulfilling the treaty obligations as a signatory of the CRC. The Juvenile Code is rehabilitative in nature and seeks to return incarcerated juveniles back into a productive role in society. Under the Juvenile Code, juvenile offenders are categorized under three titles of “those who come in conflict of the law,” “at risk,” or “in need of care and protection.”

In 2010, Afghanistan’s major criminal justice actors signed a “Letter of Agreement” illustrating their increased commitment to detaining juveniles as a last resort and outlining each agency’s responsibility in regard to juvenile offenders. This letter also initiated the introduction of social workers in Afghanistan into the rehabilitative process. However, progress takes time, and as of 2011, there were only six autonomous juvenile justice courts throughout Afghanistan’s 34 provinces.

C. The Foundation of the Islamic Criminal Justice System: Sharia Law

Sharia law is the moral code and religious law established by the Muslim religion. This essay focuses on Sharia law only in the context of its impact on the Muslim legal environment.

49 See id. at Art. 1.

50 Id. at Art. 2 (noting the Code’s first objective is “rehabilitating and re-educating children”).

51 Id. at Art. 1.


53 Id.


56 US AID, supra note 41, at 9; see Sayyid Muhammad Husayn Tabataba’l, The Qur’an in Islam Its Impact and Influence on the Life of Muslims (2009) (noting the Qur’an is not merely a religious document, but provides insight into political, civil and criminal matters and even everyday etiquette).
There are two primary sources of Sharia law: the precepts within the Qur’an, which constitute the unalterable word of God,⁵⁷ and the Sunnah, the Islamic spoken tradition established by the holy Islamic prophet Muhammad.⁵⁸

Though differing schools of thought have arisen⁵⁹, the Qur’an is seen as the “infallible law of God.” Because of this, human interpretation (fiqh) is not binding.⁶⁰ For example, hodud (adultery crimes) are seen as crimes directly against Allah, the Supreme Leader of the Muslim nation. Thus, Islamic judges may not alter the Qur’an’s prescribed punishment of death or life imprisonment for this offense.⁶¹ As a result, the international norms for punishing juveniles directly conflict with the Qur’an’s teachings.⁶²

D. The Covenant on the Rights of the Child in Islam

The Covenant on the Rights of the Child in Islam (“ICRI”)⁶³ originated from Islamic nations’ efforts to harmonize the UN Covenant of the Rights of the Child⁶⁴ with Muslim

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⁵⁹ Rochelle Bonello, Comparing and Contrasting the Criminal justice systems of Iran and Australia (2012), available at file://C:/Users/User/Downloads/Comparative_criminal_justice_systems-libre.pdf. (noting Muslim tradition also espouses some authority to the Igjâma (“collective reasoning” among scholars) and Kiias (analogical deduction of the Quran)).


⁶² Id.; Stop Child Executions, HUMAN RIGHTS WATCH (2010)


The document illustrates the importance of the family (ummah) in both protecting children and pursuing just punishment. Article 1 broadly defines a child as a “human being, who according to the law applicable to him/her, has not attained maturity.” Without establishing an objective age for a “child,” each Islamic nation is tasked with determining its own method of instituting the “minimum age under which the child may not be tried.” Article 19 of the ICRI is entitled “Justice” and affirms many criteria in the CRC, including the right to “be separated from adults in special places for delinquent children” and receive “access to a lawyer or interpreter if necessary.”

III. FOUR JUVENILE JUSTICE GUIDELINES CREATED BY THE UN CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH AFGHANISTAN’S JUVENILE CODE OF 2005

In this essay, the definition of a child and the rights according to them are defined by the CRC. The CRC was the first legally binding instrument ratified by the UN that applied specifically to children. Once a nation has adopted domestic legislation that is consistent with CRC provisions, the nation can be a signatory. Each signatory nation has the continuing obligation to report its compliance to the CRC’s monitoring mechanism, the Committee on the

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64 See infra, part II.

65 Juvenile Code, supra note 1, at Preamble.; ICRI, supra note 61.

66 See ICRI, supra note 61.

67 Id. at Art. 1.

68 Id. at Art. 19(3)(g).


70 Convention on the Rights of the Child, supra note 45 at Art. 19(3)(a-c).

71 Id.
Rights of the Child. Every nation in the world except the United States and Somalia is a signatory to this treaty.

The CRC supports the implicit assessment that legal standards in the international framework should focus upon “the best interests of the child.” The CRC expresses this sentiment through the following four key guidelines: (1) imprisonment of juveniles “shall be used only as a measure of last resort”; (2) any such imprisonment shall be “for the shortest appropriate period of time”; (3) juveniles who are in prison shall be “separated from adults”; and (4) they shall have the right to maintain “family contact.”

A. Juvenile Detention’s Role: A Measure of Last Resort

Both the Juvenile Code and the CRC maintain that juvenile detention should be a measure of last resort. The Juvenile Code emphasizes that deprivation of liberty should be imposed after all other available methods of rehabilitation have been utilized. It lists as an objective the provision of probation and rehabilitation of child offenders through providing physical, moral, and social support.

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72 Id. (noting binding influence is established through potential UN sanctions).


74 Id.

75 Convention on the Rights of the Child, supra note 26, at Art. 37(b).

76 Id.

77 Id. at Art. 37(c)

78 Id.

79 Juvenile Code, supra note 1, at Art. 8, 37(b).

80 See id.

81 Id.
Judicial actors may have provided such support. In 2007, a juvenile prosecutor was interviewed and stated that, in every case, his primary purpose was to seek reconciliation between the victims or his/her family and the accused.\textsuperscript{82} He further noted that this technique often led to successful outcomes without detaining the offender, as it often resulted in compensation in the form of monetary damages.\textsuperscript{83}

Another study reported that judges often seek to use informal alternatives to detention, but sometimes to the detriment of their own welfare.\textsuperscript{84} Judges often use these methods for charges against female runaways.\textsuperscript{85} Running away is a crime under the Qur’an.\textsuperscript{86} One such case involved a 15-year-old girl who was charged with running away from home due to physical abuse by her 40-year-old husband.\textsuperscript{87} When she was caught, the judge chastised her husband and told the girl to report to him if she was beaten again.\textsuperscript{88} When questioned further about this case, the judge credited not hearing back from the girl within the past nine months as sufficient evidence that the beatings have stopped.\textsuperscript{89} While judges are applying informal discretionary

\begin{itemize}
  \item \textsuperscript{83} Id. at 39.
  \item \textsuperscript{84} Kimberly Motley, An Assessment of Juvenile Justice in Afghanistan, TERRE DES HOMES 58 (2010) (hereinafter “Juvenile Justice in Afghanistan”).
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id.
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} Id.
\end{itemize}
measures, such methods do not always comply with the international standards for individual rights.\textsuperscript{90}

Even when juvenile offenders are not detained, the lack of rehabilitative infrastructure undermines this victory.\textsuperscript{91} The lack of rehabilitative programs for juveniles and a shortage of social services to support these programs are the main culprits.\textsuperscript{92} In 2010, the Letter of Agreement introduced the first social workers in Afghanistan.\textsuperscript{93} While this is encouraging, employing a few social workers does not provide the infrastructure needed to create a functioning rehabilitative framework throughout Afghanistan.\textsuperscript{94}

Furthermore, juvenile offenders remain unaware of the existence of rehabilitative programs aside from detention.\textsuperscript{95} According to a UN Office of Drugs and Crime assessment, only 4 of 60 current juvenile detainees in Kabul were aware that they were eligible for non-custodial sanctions.\textsuperscript{96} The fact that less than 7\% of juveniles eligible for non-custodial sanctions within Afghanistan’s capital city were aware of this fact illustrates a lack of correlation between what the law is and how it is practiced.\textsuperscript{97}

\begin{footnotesize}
\textsuperscript{90}Id.

\textsuperscript{91}UNODC, \textit{supra} note 81, at 31.

\textsuperscript{92}Id.


\textsuperscript{94}Id.

\textsuperscript{95}UNODC, \textit{supra} note 81, at 31, 47

\textsuperscript{96}Id. at 47.

\textsuperscript{97}Id. at 47-48.
\end{footnotesize}
1. The overwhelming majority: pre-trial detention of juveniles

The Beijing Rules, another international agreement signed by Afghanistan, state that “detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement within a family or in an educational setting or home.” Again, the Juvenile Code complies with this international norm by giving courts the authority to consider alternatives to pre-trial detention. Additionally, any child under 12 years old who does not commit a misdemeanor or minor felony cannot be detained during the investigation stage. However, the prosecutor must obtain a “guarantee” – a small amount of money similar to bail – in order for the child to be released. Children between ages 12 and 18 may be surrendered to their parents upon the prosecutor’s request and the authorization of the court. The Juvenile Code makes no mention of a guarantee requirement under this circumstance.

According to interviews conducted in Kabul, however, most juveniles who are eligible for release remain detained because they do not have a family to be surrendered to or because their legal representative did not apply for bail. The interviews’ analysis noted that there

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99 Id.

100 Juvenile Code supra note 2, Art. 10.

101 Id. at 20(1).

102 Id. (noting ambiguously, that “a guarantee could include a person or a property”).

103 Juvenile Code, supra note 1, at Art. 20(2).

104 See Id.; UNODC, supra note 81, at 32.

105 UNODC, supra note 85, at 32 (citing Interview with Judge A. Rasuli, 12 December 2007)
seemed to be considerable confusion by both juvenile offenders and judges surrounding which juveniles had cases that qualified for guarantees.\textsuperscript{106}

The problem of having a large population of juveniles who are unaware of their eligibility for parole is compounded by the large number of pre-trial detainees. As of 2007, there were a total of 455 juveniles in prison; only 18 of these cases were confirmed by the Supreme Court of Afghanistan.\textsuperscript{107} This means that 96\% of all juvenile detainees were deemed pre-trial or under-trial detainees.\textsuperscript{108}

2. **Criminal repertoire: noting specific criminal acts charged against juveniles in Afghanistan**

Many of the crimes that were charged against juveniles have punishments that follow the Qur’an’s teachings rather than international norms. In 2011, a statistical poll of incarcerated juveniles within Afghanistan was undertaken to determine the nature of juvenile offenses leading to incarceration.\textsuperscript{109} A few criminal acts that run contrary to international law are noted below.

a. **“Murder” or “being related to a murderer”**

In 2011, 13\% of all incarcerated juveniles were held on murder charges.\textsuperscript{110} While interviewing these juveniles, “many…reported that they did not participate in the actual act of murder but were basically guilty by association due to a family member or friend committing the act.”\textsuperscript{111} This charge is not synonymous with the international justice system where an individual

\textsuperscript{106} Id. at 31-32.

\textsuperscript{107} Id. at 35 (noting that all juvenile cases mandatorily must be examined on appeal Afghanistan’s Supreme Court).

\textsuperscript{108} Id.

\textsuperscript{109} Id. at 27-31.

\textsuperscript{110} Reinventing the Rules, supra note 2, at 17.

\textsuperscript{111} Id.
may be charged as an “accessory to a crime.”\textsuperscript{112} They were charged simply based on their relationship to the individual who actually committed the crime.\textsuperscript{113}

b. “Moral” or “ethical crimes” created by the Qu’ran

In February 2012, 25.2\% of all juvenile detentions were based on “moral” or “ethical offenses.”\textsuperscript{114} These actions include “running away,” adultery or \textit{zina} (sex outside marriage), pederasty (sex between an adult male and a child), kidnapping, and improper accompaniment or prostitution.\textsuperscript{115} These “offenses” were tried against the victim of the abuse rather than the perpetrator because Afghanistan does not recognize the child’s inability to consent.\textsuperscript{116}

In 2012, the most common offense for girls was running away, even though it was not a criminal action according to a statement made by the Afghan government.\textsuperscript{117} Judges, however, viewed running away as a precursor to adultery (\textit{zina}).\textsuperscript{118} In 2010 and 2012 respectively, the


\textsuperscript{113} Id.

\textsuperscript{114} \textit{Afghanistan Child Justice Brief}, Justice Studio, at 4 (2012), http://justicestudio.org/CJBrief%20Afghanistan%20June%202012.pdf, (last visited Mar. 6, 2015) (citing Table 1, illustrating the Ministry of Justice’s national juvenile count by province according to gender, including crime categories).


\textsuperscript{117} Juvenile Justice in Afghanistan, \textit{supra} note 83, at 6-7.

\textsuperscript{118} Id.
Afghan Supreme Court and Attorney General’s office held that running away should not and would not be charged against girls if no additional crimes occurred.  

B. **Length of Detention: For the Shortest Appropriate Period of Time**

1. **Age of criminal responsibility**

In Afghanistan, any person who has not reached age eighteen legally remains a child and is treated in accordance with the Juvenile Code. When determining the age of a child for the purposes of prosecution, the age of the juvenile when the criminal act occurred is the age that will be used, whereas the age when the juvenile was tried will not be used. The Afghan Juvenile Code recognizes three classes of children: non-discerning children (under age seven); discerning children (between ages seven and twelve); and adolescents (children between ages thirteen and eighteen).

Even if a child is presumed over the age of criminal responsibility, these juveniles are treated differently from adults under the law. The emphasis of juvenile justice is rehabilitation. Therefore, prosecution and incarceration of juveniles should be a measure of last resort in order to comply with the CRC’s desire that “[w]henever appropriate and desirable,

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120 Juvenile Code, *supra* note 1, at Art. 7(1).

121 *Id.* at Art. 22.

122 *Id.* at Art. 7(1-3).

123 See Walther, *supra* note 50.

124 Juvenile Code, supra note 1, at Art. 1.
measure for dealing [with juveniles]…[should be taken] without resorting to judicial proceedings.125

a. Infancy – moral incapability for liability

Under international law, in order to be guilty of a particular offense, it is not enough to have completed the criminal act; rather, there must be the requisite mens rea (guilty mind) in addition to the actus reus (wrongful act).126 The defense of infancy helps a child escape criminal liability through showing that the child lacked a guilty mind based upon the child’s limited mental development and consequent moral irresponsibility for his/her actions.127 The CRC provides that nations shall seek to establish a minimum age below which a child shall be presumed not to have the capacity to infringe the criminal law.128 However, no age has been stipulated and regulation has been left to each state.129 While signatory states are left without international standards to determine a relevant age of infancy, this age should be fixed and not determined on an individual basis by referencing the accused’s personal characteristics.130

125 Convention on the Rights of the Child, supra note 67, at Art. 40.3(b).


128 Id. (noting some have argued the CRC’s Article 77(2), through setting a minimum age for criminal responsibility for war crimes at fifteen, sets a recommended age of infancy, but this has been illustrated to focus rather on military conduct); Convention on the Rights of the Child, supra note 67, at Art. 40(3a).

129 Matthew Happold, supra note 126.

130 Id.
Juvenile Code Article 5 sets the bar of infancy at seven years old. Thus, Afghanistan adheres to the international standard, which is set at seven years of age for a child.

**b. Benchmark age: distinguishing juveniles from adults**

The CRC defines a child as “a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.” Afghanistan also conforms to this international standard. In all 34 provinces, a juvenile is any individual under the age of 18. While 18 is the latest age that a child will possess responsibility, multiple international proposals have sought to establish other criteria or standards for a minimum age of criminal responsibility. Since there is little guidance, nations seem free to regulate culpability through statute on an individual basis.

**c. Staggering sentences: proportioned based upon age**

The Afghan juvenile justice system staggers sentences based upon age. Children between 13 and 16 may not exceed one-third of the sentence given to adults prescribed within the Penal Code. Children between 16 and 18 years old may only be incarcerated for half the

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131 Juvenile Code, *supra* note 1, at Art. 5(1) (illustrating a person who has not completed the age of 12 is not criminally responsible).

132 *Id.*


134 Juvenile Code, *supra* note 1, at Art. 5.1.


136 Matthew Happold, *supra* note 126.


138 *Id.* at Art. 31(1)(a).
sentence of similar adult cases.\textsuperscript{139} Regardless of how egregious the crime, children under the age of 18 may not be tried as adults.\textsuperscript{140}

d. \textbf{Identification cards or medical diagnosis: determination of age}

The Juvenile Code states that “age…is determined according to their citizenship ID Card.”\textsuperscript{141} However, it is estimated that only 10\% of children in Afghanistan have proper documentation.\textsuperscript{142} If a child has no ID card, “the opinion of a physician should be requested.”\textsuperscript{143} The justice system often relies on the Forensic Medical Office to conduct x-rays on juveniles to determine their age based on bone or teeth development.\textsuperscript{144} The reliability of these x-ray determinations is suspect at best, prompting critical assessment of its reliability up to three years deviation for juveniles.\textsuperscript{145} When a small group of juveniles were interviewed, 30\% indicated the x-ray was correct, 33\% were unsure of their own age, and 37\% indicated their disagreement with the Forensic Medical Office’s determination.\textsuperscript{146}

\begin{itemize}
\item \textsuperscript{139} \textit{Id.} at Art. 31(1)(b).
\item \textsuperscript{140} \textit{Id.} at Art. 21 (noting that judicial transfer may only be accomplished if a suspect was found to be older than 18, at the moment of the commission of the crime).
\item \textsuperscript{141} \textit{Id.} at Art. 13.
\item \textsuperscript{142} UNODC, \textit{supra} note 81, at 202.
\item \textsuperscript{143} Juvenile Code, \textit{supra} note 2, at Art. 13(2).
\item \textsuperscript{144} Juvenile Justice in Afghanistan, \textit{supra} note 83, at 52; UNODC, \textit{supra} note 26, at 206 (illustrating frustration that “far more reliable” methods of asking witnesses or consulting family history are not sought prior to an expensive and flawed medical opinion).
\item \textsuperscript{145} Letter from American Leaders in Dentistry, Medicine, and Psychology Expressing Concern Over Irresponsible Age Determination Practices Affecting the Lives of Young Immigrants, Including Asylum Seekers To Department of Homeland Security (DHS), June 2, 2004.
\item \textsuperscript{146} Juvenile Justice in Afghanistan, \textit{supra} note 83, at 52.
\end{itemize}
Because Afghanistan creates a sentence that is proportional to the juvenile’s age, the inaccuracy of x-ray testing could lead to a greater sentence than a juvenile actually deserves.\textsuperscript{147} For example, an adolescent actually age 16 could be determined to be 18 years old. Here, an adolescent who should receive one-half the punishment of an adult, could instead receive the full incarceration, being wrongly tried as an adult.\textsuperscript{148}

Further, Kim Motley has argued that DNA testing provides an accurate and cost effective option.\textsuperscript{149} The accuracy has a direct effect on the individual juvenile as well as the juvenile justice system itself.\textsuperscript{150} Accuracy gives technological credibility to decisions by the formal juvenile justice framework.

2. Overwhelming discretion: sentencing criteria or lack thereof in juvenile sentencing

Afghanistan’s judges have tremendous discretionary power in sentencing.\textsuperscript{151} Broad statutory provisions establish maximum penalties and available punishments for individual crimes. Within these boundaries, the judiciary has broad powers to determine sentencing and the method of punishment. The Juvenile Code states that judges should consider aggravating circumstances when determining the length or severity of sentences.\textsuperscript{152}

\textsuperscript{147} \textit{See id.}

\textsuperscript{148} \textit{See id.}

\textsuperscript{149} Juvenile Justice in Afghanistan, \textit{supra} note 83, at 52 (illustrating “at the cost of $600, while more expensive, it is less than the price of inaccurately incarcerating a juvenile”).

\textsuperscript{150} \textit{See id.}

\textsuperscript{151} Sentencing Guidelines, \textit{supra} note 2, at 4-6.

\textsuperscript{152} Juvenile Code, \textit{supra} note 1, at Art. 17 (stating that, “a juvenile prosecutor is obliged to take into consideration the following points while investigating crimes related to children for preparing grounded reasons:}

\begin{enumerate}
\item Age (day, month, and year of birth)
\item Degree of psychological development
\end{enumerate}
In June 2011, a study of 243 juveniles’ sentences was reviewed. The data collected showed disproportionate sentences. For example, murder accounted for the widest sentencing disparity, with the shortest sentence lasting 9 months and the longest sentence extending for the duration of 15 years. For most charges, excluding traffic violations, the disparity between minimum and maximum punishment was over a year. Kidnapping represented the largest sentencing disparity between a reported one-year sentence and ten-year sentence.

3) Character and aptitude
4) Reasons and causes for committing crime
5) Education level at the time of committing crime
6) Circumstances and living environment at the time of committing crime
7) Disgrace and intensity of crime
8) Previous criminal record
9) Behavior while committing crime and thereafter
10) Type, proofs, means, intention, time, and location of crime
11) Level of danger caused to the victim of the crime
12) Existence of accomplices, and those who encouraged the crime
13) Other circumstances that can affect determining punishment”

154 Id.
155 Id. at 14-15.
156 Id. at 15.
157 Juvenile Code, supra note 1, at Art. 17; Sentencing Guidelines, supra note 2, at 14 (noting that 24% represents 213 juveniles. The data was collected in voluntary interviews as juvenile sentencing data, even generally, is restricted on the basis of Article 32 of the Juvenile Code).
This sentencing disparity also illustrates corruption. Judges have shown their willingness to decrease a sentence if they are paid for it. In one circumstance, two teenage boys were charged with similar murders. One teenager was from a wealthy family and paid the judge $5,000 in restitution, or ihbad, to reduce his sentence to 2.5 years. The other juvenile, who was unable to pay the judges, received a 7.5-year sentence.

The Afghan system should adopt quantitative sentencing guidelines to establish a uniform system for judges to follow. However, judicial discretion must remain intact. Mandatory sentences remove the capacity for judges to adjudicate on a case-by-case basis, which is important for juvenile offenders whose potential for rehabilitation must be decided by the judge. The International Criminal Court Rule 45 is consistent with this principle, stating in relevant part that – in sentencing – the court shall, “[b]alance all relevant factors, including mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.” Thus, the situation calls for a delicate balancing of interests. While it remains important for judges to consider mitigating factors and aggravating factors when deciding a criminal sentence, they should not be given such broad leeway so as to allow for the potential of corruption to overtake a neutral judge’s impartiality.

158 See Sentencing Guidelines, supra note 2, at 19 (noting examples of two teenaged boys charged with similar murders. One teenager able to pay restitution, or ihbad, and received sentence of 2 years and 6 months, while other boy unable to pay ihbad was sentenced to 7 year, 6 month sentence.).

159 Id.

160 Id.

161 See id. at 20-27 for in depth analysis of suggested mitigating and aggravating factors.
3. **Death penalty and life imprisonment: restricting the harshest punishments for juveniles**

Pursuant to the Juvenile Code, life imprisonment and the death penalty are not eligible sentences for Afghan juvenile offenders. Article 39 of the Juvenile Code provides that juvenile offenders cannot be sentenced to death or life imprisonment. Since 2010, the Afghan government has not only refused to execute any juvenile offenders, but has refused to sign any execution orders.\(^{162}\) A new sentencing guideline, which was proffered in 2010, established the maximum punishment for juveniles to be 10 years imprisonment.\(^{163}\)

Afghanistan’s restriction of maximum sentences falls in line with international standards. The CRC establishes that life imprisonment without parole and the death penalty should be prohibited for juveniles. This logic is founded upon juvenile brain development studies that found that juveniles are immature, more vulnerable to environmental factors like peer pressure, and their personality traits remain more transitory and malleable.\(^{164}\) These factors emphasize both reduced culpability and greater possibility of rehabilitation.\(^{165}\) This research concluded that adolescents are indeed different from adults in ways that affect their criminal conduct.\(^{166}\) Further, it has been proven that incarceration within a prison is less effective at limiting recidivism than other “non-secure settings.”\(^{167}\)

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165 See *id*.

166 See *Id*.

167 See *Id*. 
C. Separation from Adults: How Compliance with the Law Leaves Limited Detention Facilities for Juveniles

Afghan children in detention must be separated from adult offenders. Legislation requires that children be detained in special children’s remand homes. Additionally, the Code explicitly states that juvenile detainees must be provided care by specialists in health, social, and educational services.

During the Taliban regime, only one facility for juvenile detention existed in Kabul. This center was a privately owned house brimming over capacity. By 2008, two new facilities were built in the Afghan capital city. One of the facilities was “closed” and the other “open,” the latter being for juveniles who must remain in detention only during the day and return to their families at night. In 2013, a new Juvenile Detention Centre was created in the Helmand province of Afghanistan. The center was created through a combined effort of the UN and the Afghan Provincial Reconstruction Team. The Centre has cells, vocational rooms, and classrooms that comply with international standards.

169 UNODC, supra note 81, at 61. (noting that all suspected, accused, or sentenced juveniles be detained only in juvenile rehabilitation centres.
170 Juvenile Code, supra note 2, at Art. 12.
171 UNODC, supra note 85, at 61
172 Id. (noting that 128 children were detained at the centre which was built to have a capacity of 60).
173 Id. (emphasizing that the author could not detail what method of sentencing would provide for this quasi-detention method).
175 Id.
176 Id.
However, this is only the fourth juvenile detention center within Afghanistan, and the only center outside of Kabul.\textsuperscript{177} Until its creation, juvenile prisoners were detained in adult prisons in a mud cell with no specialized facilities.\textsuperscript{178} This illustrates the limited compliance with Afghanistan’s law that requires special remand homes for juveniles.\textsuperscript{179}

Since the underlying goals of rehabilitation for juvenile detention differ from the punitive goals of incarcerating adults, greater efforts must be placed into creating separate juvenile facilities. It could be argued that all juveniles could be transported and detained with Kabul’s detention centers, but these centers are already overcrowded. Additionally, as noted below, if juveniles are transported across Afghanistan to Kabul, this removes the ability for juveniles to maintain contact with their family members, an essential guideline of the CRC.

D. The Right to See Family: An Area Ripe for More Exploration and Development

The Juvenile Code affirms the international norm that juvenile detainees should remain in contact with their family. The Juvenile Code states that, “[d]uring the detention, maximum opportunities shall be given to relatives of children and to social services to pay visit to them.”\textsuperscript{180} There is virtually no way to quantitatively determine if this right is being provided to juvenile offenders. Determining the extent that this right is being provided to detained juvenile offenders is only possible through the collection of empirical data. Once data has been collected, the right to see family is an area ripe for exploration and development within the formal Afghan system,

\begin{thebibliography}{9}
\bibitem{177} Id.
\bibitem{178} Id.
\bibitem{179} Id. (acknowledging that there was no research found illustrating that any detention centers were composed of two independent areas specific to adult and juvenile detention).
\bibitem{180} Juvenile Code, supra note 1, at Art. 18.
\end{thebibliography}
especially because there is currently a 96% pre-trial detainment rate.\textsuperscript{181} This rate also illustrates that the family members who may actually see their children are not aware of the tangible help they can provide through making efforts to have their children removed from detention and placed back within their homes pending adjudication.\textsuperscript{182}

Another area ripe for development, within the context of the right to see family, would call on authorities to address the stigma associated with female juveniles who are detained.\textsuperscript{183} Islamic culture associates a stigma to girls who are detained, and usually this results in the shunning of detained daughters.\textsuperscript{184} Developing a full right to see family would definitely include ways to address this cultural stigma so that female juvenile offenders are afforded the same level of rights as male offenders.

\textbf{IV. RECOMMENDATION: INCREASED EMPIRICAL DATA COLLECTION IS NECESSARY TO REACH THE LEVEL OF TRANSPARENCY NEEDED TO IMPLEMENT CHANGES IN THE FORMAL SYSTEM}

A greater emphasis must be placed upon collecting empirical data on juvenile justice matters. Transparency provides the ability to make marked changes based upon empirical evidence of failures within the Afghan formal system. To date, the most extensive research has been undertaken by individual research teams who are independent of the Afghan government.\textsuperscript{185} These researchers have been unable to obtain even general data about statistics concerning

\textsuperscript{181} UNODC, supra note 81, at 32, supra note 107

\textsuperscript{182} See UNODC, supra note 81, at 32-33.

\textsuperscript{183} Id. at 63.

\textsuperscript{184} Id.

\textsuperscript{185} See generally part II (A-C) (noting all research has been conducted by international actors).
juveniles. Some Afghan juvenile justice actors have cited Article 32(2) to support keeping all juvenile justice information out of researchers’ hands. Article 32(2) states in relevant part that:

2.) Publication of documents related to proceedings of children’s trial including witnesses’ testimonies and ideas of experts is not allowed in mass media.
3.) Under no circumstances, revealing information about the child’s personality or information that can result in identification of the child is not allowed.

Exceptions must be made for statistical data becoming available for research and analysis. Research into the effectiveness of judicial actors must be encouraged rather than stymied.

Transparency will not only allow for analysis of the progress within the Afghan juvenile system, but also give legitimacy to the Afghan system as a whole, both in the eyes of its own citizens and the international community. While it has been noted that it is very unlikely that Afghanistan will ever be a centralized state, tribal actors must feel comfortable bringing disputes to the formal government if they are not capable of handling issues internally. Some jirgas have already begun to bring complex problems before the formal system, illustrating a growing trust in the Afghan government.

The Bonn Agreement’s recognition of the informal justice system illustrates the importance of synergy between tribal jirgas and the Afghan formal adjudication structure. If internal tribal adjudication formulates their decisions based on Afghan law, their involvement has many practical benefits. For example, it eliminates increased costs to the formal system. The formal system and jirgas will only align based upon the foundation of Sharia law. Developing a common understanding of Sharia law requires education of decisionmakers who profess to rely

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186 Sentencing Guidelines, supra note 2, at 13.
187 Juvenile Code, supra note 1, at Art. 32 (2-3).
188 See infra part I(A)
189 USAID, supra note 41, at 9.
on Sharia but are often uneducated. Education is also important because each tribal region seems to interpret Sharia differently.\textsuperscript{190} To establish a common interpretation of Sharia law, \textit{jirgas} must be educated about its proper interpretation.\textsuperscript{191} According to Aaqa Aziz Ahmad, the head of the Konjan village jirga, “If Sharia is chosen as the guiding principle of the arrangement, members need effective understanding of this source of law.”\textsuperscript{192}

This presents an interesting predicament for the Afghan formal structure, which has shifted from an emphasis on Sharia law to a greater focus on international law.\textsuperscript{193} This shift is illustrated by eliminating the death penalty for juveniles and refusing to punish girls for running away; both are deemed appropriate under the Qur’an.\textsuperscript{194}

If mutual and consistent knowledge of Sharia law can develop, a hybrid system will become an asset for proper adjudication throughout Afghanistan.\textsuperscript{195} There is already precedent for using the formal court system as a quasi-appeals court when \textit{jirgas} are unable to decide a case.\textsuperscript{196} If the formal system and jirga system align, this will give greater legitimacy to the formal system. Additionally, \textit{jirgas} will enable the justice system as a whole to be more focused

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{Id.} at 9-10 (citing Focus Group Discussion with members of the Village Shura in Kunjan, Guzara District of Herat province, December 5, 2005).

\textsuperscript{193} See generally III(C), II(A)(2)(b) (illustrating that Afghan juvenile law has refused to enforce the Qur’an’s teachings that running away is a chargeable offense and that juveniles are eligible to receive the death penalty).


\textsuperscript{195} \textit{Id.} at 9

\textsuperscript{196} \textit{Id.} at 10.

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upon the rehabilitative nature of juvenile offenses as well as their reconciliation with the community.\textsuperscript{197}

V. CONCLUSION

In sum, Afghan children deserve better than mere procedural protections. While the Juvenile Code complies with international norms, it fails to protect the best interests of the child. The Juvenile Code expressly states that detention should be used only as a measure of last resort, but alternative sanctions are minimal and pre-trial detention of juveniles is rampant even when they are eligible to be surrendered to their parents. The Juvenile Code has created effective age procedures and proportionate punishment but is unable to effectively determine the age of juvenile offenders and suffers from sentencing disparities that undermine these measures. The Juvenile Code requires separation of juveniles and adults, but having prisons in only 2 of the 34 provinces makes this goal impossible. The Juvenile Code seeks to encourage familial relationships while juveniles are detained but fails to allow the last majority of juveniles eligible to be surrendered to the care of their families. This shows that, while the Juvenile Code establishes a potentially effective system, judicial and governmental actors are unable to regulate and attain these goals.

But not all hope is lost. Compared with all other Muslim countries, Afghanistan has made major strides in effectuating change within the Afghan legal environment. These strides can be used to bolster further transformation. Through continual training and mentoring of legal professionals, the creation of sentencing guidelines, and the provision of realistic alternatives to detentions, major contributions can be made to the legitimacy of the Afghan juvenile system. These innovations will advance the system into greater compliance with the substantive demands

\textsuperscript{197} Wardak, \textit{supra} note 24, at 1315.
of international accords for juvenile justice. Oftentimes, judges and lawyers themselves do not understand how to adjudicate juvenile offenses and, therefore, are unable to communicate the substance of the law to offenders and their families. Because of the cultural focus on the family, it is unlikely that all of the 96% of juveniles who are eligible for parole would remain in jail. This is especially true considering the small monetary guarantees that are necessary for release. The problem is that these options are not communicated to the offender’s family.

The broad range of sentences from 2.5 to 7.5 years for the same crime illustrates the need for proper sentencing guidelines. These guidelines should limit the maximum sentences that may be imposed based on statutorily mandated mitigating factors that witnesses must present at trial. This will allow judges the opportunity and discretion to seek informal sanctions, while removing unduly harsh punishments and the requisite opportunities for corruption within the legal system.

Creating realistic alternatives to detention presents a huge problem because Afghanistan lacks the infrastructure to implement these programs. Before individual programs can be suggested, international monetary support for these programs must be maintained. As the United States and international forces exit Afghanistan, their monetary support diminishes the possibility for any informal alternatives to detention becoming systematically possible.

Through transparency within the formal Afghan justice system, an integrated model of juvenile justice can be achieved. Allowing tribal jirgas to informally adjudicate claims limits the burden on the formal government and also provides accessible and expeditious adjudication of disputes. If the jirgas are educated on applicable Sharia law, the informal system can align with the formal government. This coordination provides the possibility of a more integrated and legitimate juvenile justice system within Afghanistan.