

# **ACCESS TO JUSTICE FOR CHILDREN: AFGHANISTAN**

*This report was produced by Child Rights International Network (CRIN) in September 2013. CRIN takes full responsibility for any errors or inaccuracies in the report.*

## **I. What is the legal status of the Convention on the Rights of the Child (CRC)?**

### **A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?**

The status<sup>1</sup> of the CRC in the Afghan national system remains unclear. While the Constitution specifically obligates the Government to observe ratified international treaties and arguably recognises these treaties as a source of law, no provision explicitly clarifies the status of international instruments in the national legal system.<sup>2</sup>

### **B. Does the CRC take precedence over national law?**

As above, it is not entirely clear what position the CRC holds in relation to national law. It seems most likely, however, that national law would prevail over conflicting international provisions. Notably, legislation on the subject of treaty interpretation references the need for additional legislation to give treaties effect in national law, and the Ministry of Justice is tasked with determining whether and how existing laws would need to be amended to be compatible with new treaty obligations.<sup>3</sup> In addition, the Supreme Court is empowered to review international treaties for compatibility with the Constitution upon request by the Government.<sup>4</sup>

### **C. Has the CRC been incorporated into national law?**

The Government is required to implement international treaty obligations in national law under the Law on International Treaties.<sup>5</sup> Nevertheless, it does not appear that the CRC has been directly incorporated into national law;<sup>6</sup> rather, its provisions have been implemented via subject-specific legislation in a piecemeal

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<sup>1</sup> Comments on this report provided by The International Legal Foundation - Afghanistan, October 2015.

<sup>2</sup> Constitution of Afghanistan (2004), Article 7, available at <http://www.afghanembassy.com/pl/afg/images/pliki/TheConstitution.pdf>. See also An Introduction to International Law for Afghanistan, Afghanistan Legal Education Project, Stanford Law School (2012), available at [http://alep.stanford.edu/wp-content/uploads/2011/02/ALEP\\_An-Introduction-to-International-Law-for-Afghanistan1.pdf](http://alep.stanford.edu/wp-content/uploads/2011/02/ALEP_An-Introduction-to-International-Law-for-Afghanistan1.pdf).

<sup>3</sup> Law on International Treaties (1989), Article 16, available in Dari at <http://www.moj-laws.gov.af/en/search-legislations?id=401&view=legislation>; Regulation Governing the Operations and Activities of the Ministry of Justice (1999), Article 7, available in Dari at <http://www.moj-laws.gov.af/en/search-legislations?id=717&view=legislation>.

<sup>4</sup> Constitution, Article 121.

<sup>5</sup> Law on International Treaties, Articles 14, 16.

<sup>6</sup> See, e.g., CRC/C/AFG/Q1/Add.1, *Replies of the Republic of Afghanistan to the Committee on the Rights of the Child*, January 1, 2011, p. 1 (“[T]he Convention is in fact a relevant source of law in Afghanistan even though it has not been incorporated...”), available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-AFG-Q1-Add1.doc>.

manner.

D. Can the CRC be directly enforced in the courts?

As it has not been fully incorporated, the CRC is not directly enforceable in the courts. It appears that Convention provisions may, however, be used as a source of interpretive guidance.<sup>7</sup>

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

Although it does not provide specific examples, the Government reports that the Convention has been used and cited in domestic courts.<sup>8</sup>

II. **What is the legal status of the child?**

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Children under 18 years of age lack the legal capacity to bring lawsuits in civil courts to challenge violations of their rights, but may be represented by a parent or legal guardian in so doing.<sup>9</sup> In certain matters, it is also possible to enforce civil rights through a special department of the Ministry of Justice.<sup>10</sup> The Civil Procedure Code contemplates the filing of special “public interest cases”, but does not elaborate further on the nature of these cases.<sup>11</sup>

Private criminal proceedings may not be pursued where these violations amount to an offence, as all criminal cases must be initiated by the Attorney General.<sup>12</sup>

Children and their representatives may, however, file complaints of rights violations with the Independent Human Rights Commission.<sup>13</sup>

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the

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<sup>7</sup> See, e.g., CRC/C/AFG/Q1/Add.1, *Replies of the Republic of Afghanistan to the Committee on the Rights of the Child*, January 1, 2011, p. 1.

<sup>8</sup> See, e.g., CRC/C/AFG/Q1/Add.1, *Replies of the Republic of Afghanistan to the Committee on the Rights of the Child*, January 1, 2011, p. 1 (“[T]he Convention is being brought into play at the national courts.”).

<sup>9</sup> Civil Procedure Code (1990), Articles 7, 21, 502, available at <http://www.asianlii.org/af/legis/laws/cpc1990169/>; Civil Code (1976), Articles 39, 42, 43, available at <http://www.asianlii.org/af/legis/laws/clotroacogn353p1977010513551015a650/>.

<sup>10</sup> See Law on Procedure of Obtaining Rights (Hoqooq) (1999), available at <http://policy.mofcom.gov.cn/english/flaw!fetch.action?id=8ede4569-f726-4404-a7f2-5854584fbc32>.

<sup>11</sup> Civil Procedure Code, Articles 121 – 127.

<sup>12</sup> Constitution, Article 134; Interim Criminal Procedure Code (2004), Article 22, available at <http://www.rolafghanistan.esteri.it/NR/rdonlyres/0690C80A-4EB1-4AE1-907F-1DEB76D14A37/0/23CriminalProcedureCode.pdf>; Law on the Attorney General's Office (Saranwali) (1967), Article 8, available at [http://afghantranslation.checchiconsulting.com/documents/laws/Law--Attorney\\_Generals\\_Office\\_Saranwali\\_1967--OG-73\\_ET.doc](http://afghantranslation.checchiconsulting.com/documents/laws/Law--Attorney_Generals_Office_Saranwali_1967--OG-73_ET.doc).

<sup>13</sup> Law on the Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission (2005), Articles 5, 23, available at [http://www.aihrc.org.af/media/files/Laws/Law\\_AIHRC.pdf](http://www.aihrc.org.af/media/files/Laws/Law_AIHRC.pdf).

assistance of a representative?

As above, children do not have the legal capacity to bring court proceedings.

Any person who has been sued or arrested has the right to be represented at all times by a lawyer.<sup>14</sup> When a child is arrested, his or her parents or legal guardians must be notified of the arrest, will be expected to attend any hearings alongside the child, and are entitled to immediately challenge the initiation of proceedings with a higher authority.<sup>15</sup> Children involved in juvenile justice proceedings also specifically have the right to be represented by a lawyer during all stages of investigation and trial.<sup>16</sup>

C. In the case of infants and young children, how would cases typically be brought?

Cases to challenge violations of the rights of infants and young children would typically be initiated by their parents or legal guardians. Parents are in most cases considered the legal representatives of their children until they reach 18 years of age, and courts empowered to designate separate legal guardians for any children who are not in the care of their parents.<sup>17</sup>

Guardians are appointed on application to the court, and are granted full authority to take legal action on behalf of children in their care.<sup>18</sup>

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Legal assistance is not typically available to initiate civil lawsuits.

Legal aid is available at Government expense for criminal defendants who cannot otherwise afford a lawyer<sup>19</sup> and indigent women and children named as defendants in civil suits.<sup>20</sup> Article 31 of the Constitution, which provides that in criminal cases the state shall appoint a defence attorney for the indigent, applies equally to adults and children.

In juvenile justice proceedings, the presiding court must appoint a publicly-funded defence lawyer for a child where his or her parents or legal

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<sup>14</sup> Interim Criminal Procedure Code, 2004, Articles 5, 18, 32, 38 available at <http://www.rolafghanistan.esteri.it/NR/rdonlyres/0690C80A-4EB1-4AE1-907F-1DEB76D14A37/0/23CriminalProcedureCode.pdf>; Law on Organisation and Jurisdiction of Courts (2005), Article 11, available at [http://supremecourt.gov.af/Content/Media/Documents/OG\\_0851\\_org\\_juris\\_english572011105435388553325325.pdf](http://supremecourt.gov.af/Content/Media/Documents/OG_0851_org_juris_english572011105435388553325325.pdf).

<sup>15</sup> Juvenile Code (2005), Articles 11, 23, 25, available at [http://afghantranslation.chechiconsulting.com/documents/laws/Juvenile\\_Code\\_2005-04-11\\_Unofficial\\_Translation\\_final\\_ET.doc](http://afghantranslation.chechiconsulting.com/documents/laws/Juvenile_Code_2005-04-11_Unofficial_Translation_final_ET.doc).

<sup>16</sup> Juvenile Code, Article 22.

<sup>17</sup> Juvenile Code, Article 57.

<sup>18</sup> Juvenile Code, Articles 58-60.

<sup>19</sup> Interim Criminal Procedure Code, Article 19; Law on Organisation and Jurisdiction of Courts, Article 11.

<sup>20</sup> Legal Aid Regulation (2008), as cited in Sarah Han, Legal Aid in Afghanistan: Context, Challenges and the Future (2012), Afghan Analysts Network, available at <http://aan-afghanistan.com/uploads/legalaid.pdf>.

representative cannot afford to retain counsel.<sup>21</sup>

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

As children do not have the legal capacity to initiate lawsuits, the consent and assistance of a parent or guardian is in most cases essential to bringing legal proceedings of any sort.

### III. **How can children's rights violations be challenged before national courts?**

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Civil proceedings may be brought by a child's parent or representative to challenge rights violations.<sup>22</sup> Public interest cases and proceedings to enforce civil rights with the Ministry of Justice are both brought by filing petitions with the civil courts.<sup>23</sup> Notably, the Government has the right to become a party to any civil case in which its rights or responsibilities are at issue.<sup>24</sup>

As above, the legal representative of a child accused of committing an offence has the right to contest the initiation of juvenile court proceedings.<sup>25</sup>

Individual complaints of human rights violations may be filed directly with the Independent Human Rights Commission.<sup>26</sup>

- B. What powers would courts have to review these violations, and what remedies could they offer?

Civil courts do not have enumerated powers when making decisions based on written laws, but have the general authority to issue decisions that advance justice in the best possible way.<sup>27</sup> Although all courts make decisions applying the Constitution and national legislation wherever possible, the Supreme Court is specifically empowered to assess the constitutionality of laws and public actions.<sup>28</sup>

Public interest cases appear to offer a simplified procedure to raise claims of rights violations before the courts, allowing judges to rule on matters after receiving basic background information and hearing the statements of the parties

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<sup>21</sup> Juvenile Code, Article 22(1).

<sup>22</sup> Civil Procedure Code, Article 12.

<sup>23</sup> Law on the Procedure for Obtaining Rights (Hoqooq), Articles 6, 9; Civil Procedure Code, Articles 121 - 123.

<sup>24</sup> Civil Procedure Code, Articles 9, 205.

<sup>25</sup> Juvenile Code, Article 23.

<sup>26</sup> Law on the Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission, Articles 21, 23; see also <http://www.aihrc.org.af/en>.

<sup>27</sup> Civil Code, Article 1.

<sup>28</sup> Law on Jurisdiction and Organisation of Courts, Article 24.

involved.<sup>29</sup>

The Independent Human Rights Commission has the power to collect documents, interview witnesses and review other evidence related to human rights violations.<sup>30</sup> The Commission can work with the Government to resolve complaints or, where necessary, refer cases to judicial or law enforcement authorities.<sup>31</sup>

- C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Civil cases require the disclosure of the complainant's identity.<sup>32</sup>

There do not appear to be specific rules or requirements on the identification of individual victims in filing complaints with the Independent Human Rights Commission, although this may be expected as a matter of practice.

- D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Where more than one party has a legal claim related to the same matter, multiple plaintiffs may jointly file a single case to resolve the dispute.<sup>33</sup>

- E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

Civil courts are permitted to request the assistance of outside experts in reviewing cases.<sup>34</sup> Third parties and organisations may actively participate in judicial proceedings, and can also request the right to formally intervene in existing legal disputes.<sup>35</sup>

IV. **Practical considerations.** Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

- A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

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<sup>29</sup> Civil Procedure Code, Articles 121 - 123.

<sup>30</sup> Law on the Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission, Articles 21, 23, 24.

<sup>31</sup> Law on the Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission, Articles 21, 23.

<sup>32</sup> Civil Procedure Code, Article 13.

<sup>33</sup> Civil Procedure Code, Article 14.

<sup>34</sup> Civil Procedure Code, Articles 129, 175.

<sup>35</sup> Civil Procedure Code, Articles 205, 240. See also Hossein Gholami, Basics of Afghan Law and Criminal Justice, p.26, available at

<http://www.auswaertiges-amt.de/cae/servlet/contentblob/343976/publicationFile/3727/Polizei-Legal-Manual.pdf> ("The opinions of experts in any field of knowledge may not be legally binding, but the courts can take them into account when formulating their decisions.").

The Afghan justice system is divided into Primary Courts, Courts of Appeals, and the Supreme Court.<sup>36</sup> Within the Primary Courts, there are specialised tribunals including Juvenile and Family Courts.<sup>37</sup> Civil, criminal and family cases are all initiated before Primary Courts.<sup>38</sup>

In most cases, civil claims must be brought in the jurisdiction in which the defendant resides.<sup>39</sup> Criminal cases are initiated before the district court where the offence was committed,<sup>40</sup> and juvenile courts in provincial capitals hear cases involving children accused of offences or in need of protection.<sup>41</sup> Public interest cases may be filed in the Kabul city court, state courts, or main district courts.<sup>42</sup>

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

The Government does not fund legal aid to initiate court proceedings, but legal assistance is available at public expense to defend indigent persons in criminal cases and also indigent women and children in civil cases.<sup>43</sup> Legal aid is overseen and regulated by the Legal Aid Board and administered through the Ministry of Justice's Department of Legal Aid.<sup>44</sup>

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Lawyers are not authorised to base their fees on the outcome of a case.<sup>45</sup>

A number of organisations may be able to provide free legal assistance for children and their representatives, including Da Qanoon Ghushonky,<sup>46</sup> Humanitarian Assistance for the Women and Children of Afghanistan,<sup>47</sup> the

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<sup>36</sup> See Law on Organisation and Jurisdiction of Courts.

<sup>37</sup> Law on Organisation and Jurisdiction of Courts, Article 40.

<sup>38</sup> Law on Organisation and Jurisdiction of Courts, Article 48; see also Civil Procedure Code, Article 79.

<sup>39</sup> Civil Procedure Code, Article 81; Law on the Procedure for Obtaining Rights (Hoqooq), Article 9.

<sup>40</sup> Interim Criminal Procedure Code, Article 25.

<sup>41</sup> Juvenile Code, Articles 26, 29; Law on Organisation and Jurisdiction of Courts, Article 44.

<sup>42</sup> Civil Procedure Code, Article 121.

<sup>43</sup> Interim Criminal Procedure Code, Article 19; Law on Organisation and Jurisdiction of Courts, Article 11; Juvenile Code, Article 22; see also Legal Aid Regulation.

<sup>44</sup> Advocates Law (2007), Article 19, available in Dari at

[http://www.aiba.af/english/AL-Law.pdf?rcv\\_main=presedentmsg2.html](http://www.aiba.af/english/AL-Law.pdf?rcv_main=presedentmsg2.html); see also Legal Aid in Afghanistan; <http://moj.gov.af/en/page/1674>;

[http://afghantranslation.chechiconsulting.com/documents/aiba/IBN\\_Advocates\\_Law.pdf](http://afghantranslation.chechiconsulting.com/documents/aiba/IBN_Advocates_Law.pdf).

<sup>45</sup> See Code of Conduct, Afghan Independent Bar Association, Article 22, available at

[http://afghantranslation.chechiconsulting.com/documents/aiba/AIBA\\_Code\\_of\\_Conduct.doc](http://afghantranslation.chechiconsulting.com/documents/aiba/AIBA_Code_of_Conduct.doc).

<sup>46</sup> <http://www.dqg.org.af/pages.php?id=339>.

<sup>47</sup> <http://www.hawca.org/main/>.

International Legal Foundation,<sup>48</sup> the Legal Aid Organisation of Afghanistan,<sup>49</sup> Medica Mondiale Afghanistan,<sup>50</sup> and the Norwegian Refugee Council.<sup>51</sup>

Advocates are also expected to defend at least three criminal cases each year free of charge as part of the Government's legal aid programme.<sup>52</sup>

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

Cases must be filed within prescribed time limits that vary according to the nature of the claim<sup>53</sup>; a number of these limitation periods are set out in the Civil Code.<sup>54</sup>

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

Documents, witness testimony and physical evidence may be admitted to prove both civil and criminal claims.<sup>55</sup>

Children may serve as witnesses in both civil and criminal courts. Testimony in civil proceedings must be sworn.<sup>56</sup> In criminal proceedings, children aged 14 and over must take a formal oath, but children under 14 may give unsworn testimony.<sup>57</sup>

Cases must generally be heard in open court,<sup>58</sup> although exceptions may be made in civil cases where a hearing would “lead[ ] to the exposure of the secrets of...people's lives”<sup>59</sup> and in criminal cases “for reasons of morality, family confidentiality or public order.”<sup>60</sup>

Juvenile court proceedings are held behind closed doors, but final decisions are read publicly. The publication of documents related to juvenile court proceedings is prohibited, as is the release of identifying information about any children involved in these proceedings.<sup>61</sup>

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<sup>48</sup> <http://theilf.org/our-programs/ilf-afghanistan>.

<sup>49</sup> <http://www.laoa.af/>.

<sup>50</sup> <http://www.medicamondiale.org/en/where-we-work/afghanistan.html>.

<sup>51</sup> <http://www.nrc.no/?did=9169435>.

<sup>52</sup> Advocates Law, Article 13, available at [http://afghantranslation.checchiconsulting.com/documents/aiba/Advocate\\_Rights\\_and\\_Responsibilities.d](http://afghantranslation.checchiconsulting.com/documents/aiba/Advocate_Rights_and_Responsibilities.d) [OC](#).

<sup>53</sup> See, e.g., Code of Civil Procedure, Article 21.

<sup>54</sup> See Civil Code, Articles 965 – 990.

<sup>55</sup> Civil Code, Articles 991 – 1030; Civil Procedure Code, Articles 272, 281; Interim Criminal Procedure Code, Article 37.

<sup>56</sup> Civil Procedure Code, Article 321.

<sup>57</sup> Interim Criminal Procedure Code, Article 50.

<sup>58</sup> Constitution, Article 128; Law on Organisation and Jurisdiction of Courts, Article 8.

<sup>59</sup> Civil Procedure Code, Article 40.

<sup>60</sup> Interim Criminal Procedure Code, Article 52.

<sup>61</sup> Juvenile Code, Article 32.

Similarly, all evidence, documents and testimony filed or given before the Independent Human Rights Commission may be considered confidential.<sup>62</sup>

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

There are no set time limits for resolving cases in civil or criminal courts, although courts cannot postpone civil proceedings without justification.<sup>63</sup> It may also be possible to request a speedy civil trial in certain circumstances.<sup>64</sup> There are reports of long delays in the civil courts, with even relatively simple proceedings taking months or even years to resolve.<sup>65</sup>

In contrast, cases before juvenile courts must in most circumstances be resolved within 10 days' time.<sup>66</sup>

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

The dismissal of civil cases at initial stages may be appealed within 20 days' time, and final decisions on the merits may be challenged within one month's time.<sup>67</sup> Cases decided by lower courts "in a preliminary manner" may be appealed to the Supreme Court within two months' time, and family cases may be appealed within three months.<sup>68</sup> All appeals must be heard within three months of filing.<sup>69</sup>

Criminal appeals may be filed within 20 days to challenge the court's application of the law, evaluation of facts and circumstances, or imposition of sentence.<sup>70</sup> Where a criminal case is dismissed for lack of evidence, the victim may challenge this decision by filing a complaint within 10 days' time.<sup>71</sup>

Decisions issued by the juvenile court must be appealed within 21 days in the first instance, and appellate decisions may be further challenged before the Supreme Court within 30 days.<sup>72</sup>

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<sup>62</sup> Law on the Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission, Article 25.

<sup>63</sup> Civil Procedure Code, Article 197.

<sup>64</sup> Civil Procedure Code, Articles 28, 493.

<sup>65</sup> Martin Lau, Afghanistan's Legal System and its Compatibility with International Human Rights Standards, International Commission of Jurists (2003), p. 50, available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=48a3f02c0>; see also <http://iwpr.net/report-news/afghanistans-creaking-court-system>; <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2009-Assessing-Gendered-Access-to-Justice-in-Afghanistan.pdf>; [https://www.cimicweb.org/Documents/CFC%20AFG%20Justice%20Archive/Monthly\\_Informal%20Justice%20System\\_November%202010.pdf](https://www.cimicweb.org/Documents/CFC%20AFG%20Justice%20Archive/Monthly_Informal%20Justice%20System_November%202010.pdf); <http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0717-e.htm#court>.

<sup>66</sup> Juvenile Code, Article 30.

<sup>67</sup> Civil Procedure Code, Articles 358-59, 361, 363-65; see also Law on Organisation and Jurisdiction of Courts, Article 6.

<sup>68</sup> Civil Procedure Code, Articles 436-37, 488.

<sup>69</sup> Civil Procedure Code, Article 489.

<sup>70</sup> Interim Criminal Procedure Code, Articles 63, 66.

<sup>71</sup> Interim Criminal Code, Article 39.

<sup>72</sup> Juvenile Code, Article 42.



In both civil and criminal proceedings, appellate courts have the power to affirm, modify, overrule or invalidate decisions of the lower court.<sup>73</sup> In limited circumstances, they are also permitted to admit and review new evidence.<sup>74</sup>

In public interest proceedings, the government retains the right to file an appeal along with all other parties to the case.<sup>75</sup> Decisions in public interest cases may be immediately or eventually appealed to the Supreme Court.<sup>76</sup>

Final appeals to the Supreme Court are generally limited to cases where a mistake has been made in the application or interpretation of the law.<sup>77</sup>

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Court decisions are primarily based on the direct application of the Constitution, domestic legislation and the principles of Islamic law to the particular circumstances at issue rather than decisions in relevant prior cases.<sup>78</sup> This means that precedent is of limited value, and the long-term impacts of either positive or negative decisions for children's rights may be in some instances be similarly limited.

In addition, there is a lengthy history of political involvement in judicial activity, which has raised serious questions on the independence of courts from the Government.<sup>79</sup>

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

Although the Government is obligated to execute court decisions under the Constitution<sup>80</sup>, there are many reports of extensive corruption in the Afghan

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<sup>73</sup> Civil Procedure Code, Articles 398 – 400, 449, 452; Interim Criminal Procedure Code, Articles 70, 76 – 80; Law on Organisation and Jurisdiction of Courts, Articles 26, 33.

<sup>74</sup> Civil Procedure Code, Articles 480-82; Interim Criminal Procedure Code, Article 69.

<sup>75</sup> Civil Procedure Code, Article 439.

<sup>76</sup> Civil Procedure Code, Articles 124; 431-32.

<sup>77</sup> Law on Organisation and Jurisdiction of Courts, Articles 6, 24; Civil Procedure Code, Articles 361, 451; Interim Criminal Procedure Code, Article 71.

<sup>78</sup> See Constitution, Article 130; Law on Organisation and Jurisdiction of Courts, Article 7. Courts may, however, tend toward adopting the same view of a particular legal issue, which can create an expectation that this issue will be addressed in a similar manner when next raised. See Basics of Afghan Law and Criminal Justice, pp. 25-26.

<sup>79</sup> See International Crisis Group, Reforming Afghanistan's Broken Judiciary (2010), available at <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afghanistan%20Broken%20Judiciary>.

<sup>80</sup> Constitution, Articles 75, 129.

Government and judiciary that may present challenges to enforcement.<sup>81</sup>

- V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

In Afghanistan Sharia is the source of all laws. Where an issue is not addressed in the Constitution or any other written laws, courts are authorised to apply Sharia to resolve disputes in the interests of justice.<sup>82</sup> It has been reported that courts rarely have access to written laws and instead apply Islamic law with regularity.<sup>83</sup> However, in most criminal cases, the written laws are used.

There is also documented judicial confusion over the current state and applicability of potentially conflicting national laws.<sup>84</sup>

*This report is provided for educational and informational purposes only and should not be construed as legal advice.*

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<sup>81</sup> See, e.g., Reforming Afghanistan's Broken Judiciary; United Nations Office on Drugs and Crime, Corruption in Afghanistan: Recent Patterns and Trends (2012), available at [http://www.unodc.org/documents/frontpage/Corruption\\_in\\_Afghanistan\\_FINAL.pdf](http://www.unodc.org/documents/frontpage/Corruption_in_Afghanistan_FINAL.pdf). See also <http://www.khaama.com/afghan-judges-arrested-and-tried-for-corruption-charges-774>; <http://www.bbc.co.uk/news/world-us-canada-21547542>.

<sup>82</sup> Constitution, Articles 130-31. See also Civil Code, Article 1; Civil Procedure Code, Article 501.

<sup>83</sup> See Afghanistan's Legal System and its Compatibility with International Human Rights Standards, paras. 58-59; Martin Lau, Islamic Law and the Afghan Legal System, available at <http://www.ag-afghanistan.de/arg/arp/lau.pdf>.

<sup>84</sup> See Basics of Afghan Law and Criminal Justice, page v.