

Corporal punishment of children in Afghanistan: Briefing for the Universal Periodic Review, 32nd session, January 2019



GLOBAL INITIATIVE TO
**End All Corporal
Punishment of Children**

From the Global Initiative to End All Corporal Punishment of Children, July 2018

The legality and practice of corporal punishment of children violates their fundamental human rights to respect for human dignity and physical integrity and to equal protection under the law. Under international human rights law – the Convention on the Rights of the Child and other human rights instruments – states have an obligation to enact legislation to prohibit corporal punishment in all settings, including the home.

In Afghanistan, corporal punishment of children is still lawful, despite recommendations to prohibit it by the Committee on the Rights of the Child, the Committee Against Torture and the Committee on Economic, Social, and Cultural Rights.

We hope the Working Group will note with concern the legality of corporal punishment of children in Afghanistan. We hope states will raise the issue during the review in 2019 and make a specific recommendation that Afghanistan enact legislation to explicitly prohibit corporal punishment of children in all settings, including in the home and as a sentence for a crime under religious law, and repeal all legal defences for its use.

1 Review of Afghanistan in the 2nd cycle UPR (2014) and progress since

- 1.1 Afghanistan was reviewed in the second cycle of the Universal Periodic Review in 2014 (session 18). Although the issue of corporal punishment of children was raised in the summary of stakeholders' information,¹ no specific recommendation was made on the issue. The Government did however support several general recommendations on human and children's rights.²
- 1.2 Since the review, there has been no change in the legality of corporal punishment of children. We have been unable to examine the text of the Penal Code 2017 but there is no indication it addresses corporal punishment.
- 1.3 **We hope the Working Group will note with concern the legality of corporal punishment of children in Afghanistan. We hope states will raise the issue during the review in 2019 and make a specific recommendation that Afghanistan enact legislation to explicitly prohibit corporal punishment of children in all settings, including in the home and as a sentence for a crime under religious law, and repeal all legal defences for its use.**

¹ 8 November 2013, A/HRC/WG.6/12/AFG/3, Summary of stakeholders' views, paras. 34, 35 and 38

² 4 April 2014, A/HRC/26/4, Report of the working group, paras. 136(1), 136(3), 136(4), 136(5), 136(6), 136(7), 136(107), 136(108), 136(109), 136(112) and 136(130)

2 Legality of corporal punishment in Afghanistan

Summary of current law and reforms needed to achieve prohibition

Corporal punishment in Afghanistan is prohibited in schools but it is still lawful in the home, in alternative care and in some day care settings, in penal institutions and as a sentence for a crime. Legislation should be enacted to explicitly prohibit all corporal punishment in all settings, including in the home and as a sentence for a crime under Shari'a law, and all legal defences for its use, including in the Shiite Personal Status Law 2009, should be repealed.

- 2.1 **Home (lawful):** Corporal punishment is lawful in the home. Article 7 of the Constitution 2004 states that “the state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights” and during examination by the Committee on Economic, Social and Cultural Rights in 2010, the Government indicated that corporal punishment is prohibited in the family.³ But there is no explicit prohibition of all corporal punishment of children in national law. On the contrary, article 194(6) of the Shiite Personal Status Law 2009 states: “Parents and legal guardians can discipline their children to the extent that does not require dia [blood money/ransom] or [compensation for injury]; however any kind of extreme discipline can result in liability.” Provisions against violence and abuse in the Law on the Elimination of Violence against Women 2009 are not interpreted as prohibiting all corporal punishment in childrearing. The Juvenile Code 2005 prohibits “contemptuous and harsh punishment, even if for correction and rehabilitation purposes” (art. 7), but does not prohibit all corporal punishment. A new Penal Code was adopted in 2017 but we are yet to examine the text: we do not know whether the “right of punishment” recognised in article 54(1) of the Penal Code 1976 has been reiterated.
- 2.2 At a meeting of the South Asia Forum in July 2006, following the regional consultation in 2005 of the UN Secretary General’s Study on Violence against Children, the Government made a commitment to prohibiting corporal punishment of children in all settings, including the home. In 2010, Government representatives in SAIEVAC (South Asia Initiative to End Violence Against Children) developed a national action plan to achieve prohibition and in 2011 endorsed a report on progress towards prohibiting corporal punishment in South Asia states which included an analysis of the reforms required in Afghanistan.⁴
- 2.3 The Government reported to the Universal Periodic Review in 2014 that the Civil Code, Juvenile Code and other laws were under review as part of the process of law reform in light of international human rights obligations.⁵ A comparative review of national laws in light of the Convention on the Rights of the Child has been carried out⁶ and a comprehensive Law on Children is being drafted and a new draft Shiite Personal Status Law is under discussion.⁷ In

³ 21 May 2010, E/C.ER/2010/SR.17, Summary record, para. 9; 15 November 2010, E/C.12/2010/SR.16, Summary record para. 33

⁴ SAIEVAC (2011), *Prohibition of corporal punishment of children in South Asia: a progress review*

⁵ 20 November 2013, A/HRC/WG.6/18/AFG/1, National report to the UPR, paras. 11 and 12; 4 April 2014, A/HRC/26/4, Report of the working group, paras. 17 and 132

⁶ 20 November 2013, A/HRC/WG.6/18/AFG/1, National report to the UPR, para. 9

⁷ 20 November 2013, A/HRC/WG.6/18/AFG/1, National report to the UPR, paras. 15 and 87

2013, a draft Family Protection Law was under consideration.⁸ We do not know if prohibition of corporal punishment has been proposed in the context of these reforms.

2.4 Alternative care settings (lawful): There is no explicit prohibition of all corporal punishment in alternative care settings. The “right” to discipline in article 94 of the Shiite Personal Status Law 2009 presumably applies to all persons with parental authority for children. The Juvenile Code applies to children in need of care and protection and prohibits harsh punishment (art. 7), but it does not explicitly prohibit all corporal punishment.

2.5 Day care (partially lawful): Corporal punishment is unlawful in preschool provision under article 39 of the Education Act 2008 (see below) but there is no explicit prohibition of all corporal punishment in other early childhood care or in day care for older children. The Juvenile Code applies to children in need of care and protection and prohibits harsh punishment (art. 7), but it does not explicitly prohibit all forms of corporal punishment.

2.6 Schools (unlawful): Corporal punishment is prohibited in schools in article 39 of the Education Act 2008: “Every kind of physical and psychological punishment of students is prohibited even for their correction and chastisement. Violators shall be prosecuted in accordance with the legal provision.” Provisions contrary to the Act are repealed (art. 52). Despite this ban, there are reports of corporal punishment being still prevalent in schools.⁹

2.7 Penal institutions (lawful): Corporal punishment is lawful as a disciplinary measure in penal institutions. Severe punishment is prohibited under the Juvenile Code (art. 7) but there is no explicit prohibition of all corporal punishment. The Law on Prisons and Detention Centres 2005 does not provide for corporal punishment and states that force can be used only if “the detainee or prisoner is escaping, resisting or attacking others or causes disorder which cannot be prevented by any other means but use of force” (art. 46), but it does not explicitly prohibit corporal punishment. The Law on Juvenile Rehabilitation Centres 2008 provides for observations on children’s rights in these centres: we do not know if it includes prohibition of corporal punishment.

2.8 Sentence for crime (lawful): Corporal punishment is lawful as a sentence for crime under Shari’a law. Article 29 of the Constitution 2004 prohibits “punishment contrary to human dignity”, the Juvenile Code 2005 prohibits “contemptuous and harsh punishment” (art. 7) and there appears to be no provision for corporal punishment in the Interim Criminal Code for Courts 2008. However, under article 39 of the Juvenile Code, children aged 12-17 are subject to reduced sanctions specified in the Penal Code.

2.9 We have been unable to examine the Penal Code 2017. It reportedly does not provide for judicial corporal punishment but according to article 2 it applies only to *Tazeeri* crime and penalties: *hodod*, *qassass* and *diat* crimes are punished in accordance with Islamic religious law.¹⁰ Under Shari’a law, these offences are punishable with corporal punishment, including flogging and amputation. Under the previous Penal Code for example, articles 426 and 427 provided for imprisonment as punishment for sexual intercourse outside marriage (*zina*), but only when the conditions of *hadd* have not been met or the charge of *hadd* is dropped. The Government confirmed in 2010 that under Shari’a law, *zina* was punishable with harsher sentences including whipping and stoning.¹¹ The Constitution provides for sentencing under Shari’a law in article

⁸ 30 July 2013, CEDAW/C/AFG/CO/1-2, Concluding observations on initial/second report, paras. 11 and 43

⁹ See <https://iwpr.net/global-voices/afghan-boys-still-beaten-school> and <https://www.savethechildren.net/article/save-children-calls-end-corporal-punishment-afghanistan-after-death-high-school-student>, accessed 4 July 2018

¹⁰ See <https://law.utexas.edu/humanrights/projects/afghanistans-new-penal-code-whether-or-not-to-codify-hudud-and-qisas/>, accessed 4 July 2018

¹¹ 13 June 2010, CRC/C/AFG/1, Initial state party report to the Committee on the Rights of the Child, para. 334

130: “In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.” Shari’a law typically regards the onset of puberty as the age at which liability for criminal punishments is attained.

3 Recommendations by human rights treaty bodies

- 3.1 **CRC**: In 2011, the Committee on the Rights of the Child recommended that Afghanistan prohibit corporal punishment in homes, schools and institutions for children.¹²
- 3.2 **CAT**: The Committee expressed concern at the absence of a clear legal ban of judicial corporal punishment and at its use by armed groups present in the country. It recommended that Afghanistan clearly prohibit in legislation all forms of corporal punishment, including as a sanction for a crime of “honour”.¹³
- 3.3 **CESCR**: The Committee on Economic, Social and Cultural Rights recommended in 2010 that Afghanistan prohibit corporal punishment in all settings.¹⁴

Briefing prepared by the Global Initiative to End All Corporal Punishment of Children
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The Global Initiative to End All Corporal Punishment of Children has regularly briefed the Committee on the Rights of the Child on this issue since 2002, since 2004 has similarly briefed the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, and since 2011 the Committee on the Rights of Persons with Disabilities.

¹² 8 April 2011, CRC/C/AFG/1, Concluding observations on initial report, paras. 35, 36, 37, 38, 47 and 61

¹³ 12 June 2017, CAT/C/AFG/CO/2, Concluding observations on second report, paras. 21, 23, 24, 39 and 40

¹⁴ 7 June 2010, E/C.12/AFG/CO/2-4, Concluding observations on second to fourth report, para. 28