Legislative Commentary

On

Child Rights Protection Law

Legislative Monitoring Advocacy Project

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1 The Context

The Constitution of Afghanistan recognized fundamental child rights as well as the necessity of having a legal document that illustrates these rights and protects the same\(^1\). However, various reasons such as lack of rule of law, instability and lack of understanding about the importance of the child rights protection, have held back the Afghan government for a long time from drafting a comprehensive law on child rights. On the other hand, child right is mentioned in other laws such as the Civil Law. Indeed, there are detailed provision in terms of parents’ responsibilities toward their children, children alimony, inheritance, property ownership and guardianship. Nevertheless, the problem was that child rights were scattered in different laws and regulations\(^2\).

Afghanistan as one of the countries that signed Child Rights Convention on March 1994 with pledges to apply all its contents had the responsibility to draft a comprehensive Child Rights Protection Law.

In addition, the child rights that are envisioned in the laws and regulations are focused more on the rights and duties of others, in particular the parents in regard to the child and up to puberty age. Taking into account contemporary international norms and standards on child rights, the focus has to be shifted its direction from being just on the rights and duties to rather on child’s mental and physical health up to age of puberty and on how to help the children to contribute to their personal growth, fair access to life facilities and enhancing their awareness. Also the emphasize shall be put on how to work towards making the child a responsible citizen, independent in fulfilling social activities and duties, the capability in planning a logical life plan and the ability to choose the negative and positive phenomenon for themselves and society as whole. Setting such a legal framework to be consistent with the needs and realities of today’s society are highly in need of extensive exchange of ideas, legal comparative studies and research and discussion which the current law and the involved process in drafting tried to encompass.

To this end, the draft law on the Child Rights Protection Law has been prepared in one hundred and five articles and fifteen chapters, based on provisions of Article 7 and 54 of Constitution Law of Afghanistan. The purpose of the draft is to determine the obligation of the governmental institutions towards ensuring child rights, to provide education and livelihood, to enable the children to have access to health services, to determine the obligation of parents or legal representatives of the child towards ensuring child rights as well as other material and moral child’s related rights. The draft law, compared to the other related child laws of Islamic countries, is a clear and comprehensive document considering the circumstances both in terms of content and legal perspectives. Like the Child Rights Convention, the focus of Child Rights Protection Law is primarily on fundamental Human Rights issues, providing a better environment for life of child and also State’s obligation in preserving child rights and every individual under 18 years of age is classified as a child.

\(^1\) Article 54, Constitution
\(^2\) Articles 212 to 330, Civil Code
2 The Actors

It is an important law and hence its initial draft was prepared in a joint effort between relevant ministries, and national and international organizations. These organizations including: the Ministry of Justice (MoJ) and its Taqnin Department as the main player, Ministry of Labor and Social Affairs (MoLSA), Ministry of Women Affairs (MoWA)³, the Supreme Court of Afghanistan, The General Attorney Office, the Justice Sector Support Program (JSSP), the United Nations Organization for Drug-Countering (UNODC), the United Nations International Children's Emergency Fund (UNICEF), the United Nations Development Programs (UNDP), and NGOs like Aschiana, Child Fund, Children in Crisis, Family Welfare Focus, Human Rights Research, Advocacy Consortium, Terre des Hommes, Afghanistan Independent Human Rights Commission (AIHRC) and War Child Holland.

3 The Process

The mentioned national and international bodies in their first initiative formed a committee named as Third Subsidiary Committee with primary focus on studying different international laws in a comparative approach. This was the starting point to work on different legal documents including the child rights, women rights, anti-trafficking, terrorism and cybercrime laws. The committee studied different international laws and compared them with local laws before starting to work on the initial draft of the Child’s Right Law. With the participation of members of MoJ, MoLSA, UNODC, JSSP and UNICEF, the Committee during its meetings from July 2012 until January 2013, studied and discussed in detail about 13 international legal documents relevant to different aspects of human trafficking, abduction, cybercrime and child rights. Later, the committee provided their specific suggestions and comments in regards to the law. The Committee studied two international legal documents relevant to Child Rights including the Child Rights Convention and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Although initially it was planned that the Child Rights Protection Law will be developed as part of the Penal Code, with increasing focus and interest from the MoJ and international organizations such as UNICEF and JSSP, the decision was changed to divide the Law into two different criminal and civil parts. The civil part of the Law will be processed separately and the criminal provisions of the Law has already processed within the Penal Code Official Gazette, Extraordinary Issue No.1260.

Regular meetings between authorities in the MoJ and international organizations like UNICEF were being held. The representatives of the UNICEF of the Rule of Law Unit from Geneva, have had regular meetings and helped in drafting the Child Rights Protection Law. The said unit provided their technical information and inputs and submitted it to the MoJ. After a series of

³ https://goo.gl/DV9c5u
meetings and exchanging ideas, the UNICEF provided the MoJ a document of forty pages that contained commentaries and reports prepared after studying different national and international legal documents, including the Afghan Civil Law, Penal Code and the Child Rights Convention. The MoJ stated that after studying and review of this document, they did consider most of the comments and suggestions and ignored those in contradiction to Afghan Constitution and the holy religion of Islam. In addition to this effort, the discussion on the draft was going on and many national and international entities like MoJ, MoWA, MoLSA, Supreme Court, UNDP, JSSP and UNICEF were involved in this process.

There was a three-day workshop on the draft for Child Rights on second week of September 2016 by MoJ. After collecting ideas of these entities, the MOJ could finalize the first draft. The first draft was prepared in 15 chapters and 105 articles which is a combination of child rights envisioned in Islam and international human rights documents. Following that, the MoJ sent the draft law to the Administrative Office of the President for the approval by the Council of Ministers. During a session of the Legislative Sub-committee at the Council of Ministers held on November 27, 2016, the draft of the law was discussed and the draft was approved. This meeting was conducted under the leadership of the second Vice-president with high-ranking officials from relevant ministries such as MoJ, the Legal Advisory Board, and the Head of Afghanistan Independent Bar Association present. The Legislative Committee members approved the draft Law on the Child Rights Protection.

In early April 2017 the MoJ received clearance to send the draft to the Parliament for their discussion and approval.

It is worth mentioning that the criminal responsibility of children is broadly discussed in the Penal Code, Official Gazette, Extraordinary Issue No. 1260. The provisions of the new Penal Code regarding the obstacles of the criminal responsibility can play a critical role in protecting the fundamental rights of the greatest number of children who come into contact with the police and another law enforcement institution.

Additionally, the new Penal Code guarantees the rights of education and access to health services for children and penalties for those who prevent children from the above mentioned rights. The Penal Code also specifies grounds that prevents from using a child for political activities, beating up a child, recruitment of a child in unhealthy places and encouragement and compulsion to immorality.

4 The Factors
The Child Rights Protection Law of Afghanistan contains a number of important elements and considered as the main driving factors behind the draft law. The factors include:
4.1 Fundamental Human Rights of Child

The Afghanistan Child Rights Protection Law has provided viable provisions in line with international human rights norms. According to these norms, children need special precautions and care, including but not limited to appropriate legal protection, before and after birth. The U.N. Declaration on the Rights of the Child states that a child is entitled to have a name and nationality, adequate nutrition, housing, recreation, and medical services, and education. It further stipulates that for those with especial needs such as for handicapped special treatment, education, and care is necessary. The Child Rights Protection Law covers these rights in different chapters and dedicated its Chapter Three to the principle Human Rights such as right to life, citizenship, right to identity, lineage right and birth registration. All of these rights are important and vital for rule of law and prosper society but among all the right to birth registration and identity are important ones that need extra attention in Afghanistan context. As only, a small percent of children in Afghanistan are registered at birth, leaving the overwhelming majority without a legal identity, protected and cared by law. Right to identity and determination of the age are important in preventing social problems and health-related issues like early marriages, access to health care and education, preventing early pregnancy and other basic rights and facilities that the government and society should be responsible for them. Article 24 of the draft Child Rights Protection Law states that, the details about time, day, month, year, sex, parents’ details, and place of birth of child shall be recorded by the health center staffs, and these staffs, with parents and head of the village in the rural areas are obliged to inform the birth registration authorities within one month after the birth of child. Since a big number of services and basic rights that the government is responsible for providing them, are dependent to issue of the registration and identity. Addressing this right can help resolve the relevant problems as well as on giving children the basic rights that they are entitled to.

4.2 Street Working Children

Afghanistan has high number of street working children which is direct result of years of war and instability, absence of rule of law and systematic protection framework for the children. More than 20% of children are expected to work in order to provide and meet their own and their families’ expenses. Children that should enjoy basic life facilities such as access to education, healthcare, food and shelter, spend their time in the streets and working in the places, where they can become subject to abuse, exploitation and these can harm their mental and physical health. The government in every society has the responsibility to develop a child protection system that is a set of usually government-run services and legal framework designed to protect children and young people who are underage and to encourage family stability. The goal of these systems are to prevent the children from the works and activities that can harm their health and become subject to exploitation, violence and abuse.  

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4 https://goo.gl/DV9c5u
5 https://goo.gl/2dHvpX
In Afghanistan, although not enough in itself, the government and international organizations have taken considerable steps to address the issue of street working children. The National Strategy for Street Working Children is one of the first documents that was drafted to cover the issue of the street working children. The Strategy considered different approaches in countering this problem and addressing the issue of street children. One of the key goals of this strategy is working towards creating a legal framework like a law to protect the street working children as well as a mechanism to reduce the number of them in the streets. The Strategy highlighted the need of a legal document in addressing the issue of street working children as it is growing very rapidly. Chapter 9 of the draft Child Rights Protection Law, discussed the issue of street working children and considered some of the approaches such as protection of children against exploitation, prohibiting from entering job services that can mentally or physically harm them. It is the responsibility of the government and private sector to comply with the law in this regard. The Law focused on deterrence and protectionist measures which are consistent with international norms and values and can reduce the number of street children in longer term. A new law banning all forms of harmful activities as well as physical and humiliating punishment in all settings will develop a positive discipline technique and a culture that can facilitate non-violent interactions with children as well as mechanism to stop people from exploiting and abusing children. Despite these virtues of draft Child Rights Protection Law, it still needs to address the practical mechanisms such as reporting the abuses and a legal setup such as a special unit within the children’s court to address them for further protection of children in terms addressing the inequalities and in realizing children’s rights in more comprehensive approach.

4.3 Equal access to Education and Health Care

The Constitution of Afghanistan provides all Afghans with an equal right to access free education and healthcare. However, in practice this is not evident because large number children, both boys and girls, have no access to schools. Access to basic health care is also limited, in particular, in rural areas of the country due to insecurity and lack of funding and human resources. The situation has improved a lot in comparison to Taliban era, nevertheless, it needs continues funding and international donations, legal support and human resource development.

Chapter Seven of the Draft Law illustrates the equal right to access to the education and Chapter Four discusses access to health, including vaccination and to healthcare. Although there are huge challenges due to various factors like insecurity, narcotics and years of war, the new law has provided the provisions for equal access to education and health care. In mid to long term the legal provisions could be the stepping stones that oblige the government to comply with these legal provisions. This way the government also will be obligated to protect and uphold these two principle rights of children and work towards implementing more effective policies to better preserve these rights.

There are a number of other important aspects of the draft Child Protection Law. Those areas are beyond the capacity of this commentary to discuss but its major aspects can be summarized as following: the prohibition of recruiting children in the military activities covered in Chapter 12,
the criminal offences victimizing children covered in chapter 13 of the draft law, and protecting children from prostitution, sexual relationship, and prohibition of pornography that is a particular issue in many places in Afghanistan, and those are covered in Chapter 14 of the draft law.