



## The Capacities and Restorative Capabilities of the Law on Handling Juvenile Offenses in Afghanistan

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### **Abstract**

The prevention of crime, its control, and the response to offenders, as well as the protection of victims and society through a restorative approach, have long been a focus in the criminal justice systems of various countries. This approach emerged due to the inefficiency of repressive criminal systems, preventing the entry of offenders into the formal criminal justice process and avoiding the stigmatization of all offenders, especially children, who are more vulnerable. The Afghan legislator has acknowledged the benefits of restorative justice in several provisions. Article 21 of the Law on Handling Juvenile Offenses grants the prosecutor (Saranwal) limited authority, depending on the type of crime committed, to request the administrators of rehabilitation centers to invite the legal representative of the affected child for reconciliation. Suppose the crime committed by the child or juvenile is considered minor. In that case, the prosecutor has discretion to refer the case to the rehabilitation center administrators and request that they resolve the matter through a fully restorative process. In practice, the rehabilitation center officials invite the parents and families of the children for reconciliation. If both parties agree and the offending child's family compensates for the damages, the prosecutor retains the case file and releases the child. However, if the crime committed by the child or juvenile is classified as a misdemeanor or felony, the case is processed through the formal justice system. The law allows judges to consider certain elements of restorative justice when issuing verdicts. Articles 35 and 40 of this law reflect a strong potential for implementing restorative justice programs, including requiring apologies and compensation, key components of restorative justice. Additionally, measures such as referral to specialized social service institutions, issuing warnings, court deferrals, conditional suspension of sentences, house arrest, and handing over to parents or legal guardians are among the provisions closely aligned with restorative justice principles. This article, through an analytical review of the Law on Handling Juvenile Offenses, highlights the harms caused by involving children in the formal justice system. It argues that legislators should address existing limitations and adopt a fully restorative approach for all juvenile offenses at every stage of legal proceedings.

**Keywords:** *Restorative Justice; Juvenile Delinquents*—*Juvenile Delinquency Act*

## ***Introduction***

Restorative justice is an approach based on resolving offenses by involving the disputing parties and the local community, with this participation actively connected to legal institutions. (Marshall, Tony F, “RESTORATIVE JUSTICE: AN OVERVIEW” A report by the Home Office, Information & Publications Group, Research Development and Statistics Directorate, Room 201, 50 Queen Anne’s Gate, London SW1H 9AT, 1999. pdf.p). It is a form of justice concerning criminal matters based on reparation, meaning that in its implementation, efforts should be made to repair—either fully or symbolically—the effects and severity of the crime and the resulting harm and damages. (Gholami, Hossein, Restorative Justice, Samt, 2014)

Afghanistan, like other countries in the world, has long-standing signs and institutions of restorative justice for resolving disputes traditionally, consistent with the culture of society. These have existed among most of its people since ancient times and can be referred to as Jirga or Shura. Various interpretations of restorative justice have been expressed, including informal justice, interactive law, tribal law, customary justice, and the like. However, the most common and well-known term is "informal justice." In reality, the term "informal justice" encompasses all these mechanisms and programs.

This term includes Shura—referring to permanent local councils—and Jirga—a Pashto term denoting a larger assembly or gathering. (Coburn, Noah and Dempsey, John, “Informal Dispute Resolution in Afghanistan” op. cit. p:) Its members consist of influential individuals in the local community who convene to resolve emerging problems through dialogue and mediation. In some cases, if the dispute involves two or more members of the community, they also participate in the council, presenting their views and arguments as parties to the case. This method is used to resolve disputes, whether civil or criminal, and in most cases, it proves effective and beneficial.

Although these councils settle various crimes, even serious offenses considered the most severe in terms of gravity, they do not fully align with modern restorative justice principles. Instead, they operate by local customs and traditions. For this reason, the Afghan legislator has incorporated this method into legal texts to institutionalize it, grant it formal recognition, and standardize restorative justice programs in Afghanistan. This is explicitly stated in the Law on Handling Juvenile Offenses.

However, under this law, the prosecutor (Saranwal) and specialized juvenile courts can only invite parties to reconciliation in cases where the committed crime is minor (qabahat). This suggests that the legislator has initially taken a cautious approach, permitting only minor crimes to be addressed through restorative justice.

In this research, by identifying the existing restorative capacities within the Law on Handling Juvenile Offenses, the topic is examined in two stages: the pre-trial phase (i.e., the investigation stage) and the sentencing phase.

### ***1. Foundations and Capacities of Restorative Justice in Afghanistan***

The use of traditional and indigenous dispute resolution methods in many regions of Afghanistan with tribal and clan structures has deep roots and a long history. In Afghan local communities, when someone commits a crime, their family and relatives use social connections to engage community members in intervening to resolve the conflict, compelling both the victim and their family to enter into dialogue and reconciliation. Through this process, local councils and tribal elders encourage community members to prevent victims from taking retaliatory actions while also protecting them from filing complaints with formal criminal justice authorities.

On the other hand, victims and their families also expect the local community to help them obtain their rights. The expectation of disputing parties for community mediation and intervention is not limited

to minor claims and disputes; in more serious conflicts where there is fear of killing and bloodshed, it takes on new dimensions. Ethnic conflicts may lead to personal vendettas, the breakdown of social relations, and other harmful and irreversible consequences. This demonstrates the existing foundations, contexts, and the cooperative spirit among people and local communities for accepting and advancing restorative justice programs. (Sheikh Ahmadi, Abdul Basir. Master's Thesis in Criminal Law and Criminology. Islamic Azad University, Afghanistan Branch, 2015.)

Furthermore, restorative justice has roots in the cultures of various countries. In each nation, it has developed and matured according to that society's culture. From this perspective, it can be said that Afghanistan also has the necessary social and cultural foundations for institutionalizing this program. The success of any social phenomenon depends on its acceptance by society, which underscores the need for alignment with beliefs, expectations, values, and convictions. The legal system of any country, as part of the social sphere, emerges from its culture and values. Accordingly, scholars consider laws successful when they originate from within society and align with its dominant culture. (Asadi, Mohammad Reza. Restorative Justice as Social Justice in Islam and Christianity. Encyclopedia of Restorative Justice, Collection of Articles from the International Conference on Restorative Justice and Crime Prevention. Mizan, 2017)

## ***2. Restorative Capacities Available in the Juvenile Offenses Act***

The handling of juvenile offenses carries particular importance. Experts in children's rights, criminologists, and psychologists emphasize that, given the impressionable nature of children, their entry into the criminal justice system should be prevented as much as possible. This concept primarily relates to the use of traditional and classical penal alternatives by prosecution authorities when dealing with offenses committed against criminal laws. The effect of such methods is to remove the suspect from formal criminal judicial proceedings, which may occur at any stage of the process. Resorting to this method can be done informally through the exercise of administrative discretion during case processing or by implementing a formal program, such as utilizing police discretion or the prosecutor's decision (whether by police or prosecutors) to not initiate criminal prosecution, which can occur at any time before trial.

Regarding the diversion of children from the justice system, some propose a new approach to juvenile delinquency, suggesting that we should, to the greatest extent possible, avoid resorting to conventional criminal justice—even as practiced by juvenile courts—and instead turn to procedures and methods that have received significant attention in the United States. In Canada, there has been extensive discussion about diversion or de-judicialization, with the specific aim of avoiding formal criminal judicial processes. In the Law on Handling Juvenile Offenses, to prevent labeling and for the same reasons, it refers to offenses committed by minors as "violations" rather than crimes; the resolutions and rulings issued by courts are termed "decisions." This terminology carries legal and criminological implications: legally, the court issuing the decision can reconsider its rulings, whereas reconsidering judgments and resolutions requires a separate process. From a criminological perspective, labeling court opinions as "decisions" avoids creating feelings of shame and condemnation in the child and their family, thereby preventing the attachment of a criminal label. (Gholami, Hossein, Children in the Criminal Politics of Afghanistan, a memorial to the late Dr. Noor Baha.)

Given the personality of children and the negative impact of the formal criminal justice system on their development—as well as the limited rehabilitation and reintegration within the formal justice system—the Afghan legislature has sought to recognize restorative justice in Afghanistan. This aims to prevent children who have committed minor offenses, such as misdemeanors (qabahat), from entering the formal justice system and instead address the harm caused to victims and society through mediation and reconciliation. Additionally, this approach fosters better rehabilitation and reintegration of juvenile offenders while strengthening their sense of responsibility.

The Law on Handling Juvenile Offenses and Afghanistan's legislative-criminal policy regarding juvenile offenses lean toward avoiding the use of imprisonment and explicitly state this. Article 7 of the law stipulates: "Punishing a child, even for reform and rehabilitation, in a severe or degrading manner is not permissible." Article 8 states: "Detention shall be considered as a last resort for their reform and rehabilitation..." These provisions emphasize the de-prioritization of punishment and detention, meaning that non-penal methods in juvenile criminal policy take precedence. Thus, applying restorative processes to juvenile offenses aligns with this policy. In other words, the implied meaning of these provisions points to the intervention of Jirga (tribal councils), local communities, and family-based solutions.

The Law on Handling Juvenile Offenses has created opportunities for judges to use restorative processes, employing non-penal measures to prevent offenders from being sent to correctional facilities whenever possible. Interviews conducted on this matter indicate that encouraging the child's family members to seek the victim's satisfaction and compensation can lead to the child's release on bail and influence the trial's outcome.

Local community involvement in juvenile cases is more serious in rural areas because detention centers are usually located in urban centers. Families become deeply concerned about their children being taken far away, which motivates them to make every possible effort. As a result, they pressure local communities and village elders to use all available means to prevent the case from becoming formal or, at the very least, to avoid their child's detention. These concerns are understandable both for neighbors and local elders and for the victim's family. This situation creates an environment conducive to reconciliation and informal resolution. Interviews with prosecutors from the Kabul Juvenile Prosecutor's Office revealed that while juvenile offenses frequently occur in surrounding villages and rural areas, and authorities become aware of them, most of these cases are not formalized. If they are, local community members strive to prevent detention, as failure to do so would result in the child being transferred to Kabul, causing severe distress to the family and community.

Therefore, this law serves as a bridge between restorative justice and the formal criminal justice system. Prosecutors and courts can play a role by using criminal enforcement measures in juvenile delinquency cases while overseeing restorative processes where the local community is the decision-maker, ensuring that victims are compensated willingly. (Sheikh Ahmadi, Abdul Basir, Master's thesis in Criminal Law and Criminology, Islamic Azad University, Afghanistan Branch, 2015) The law also allows prosecutors to refer cases involving child or juvenile offenders to rehabilitation centers, where the parties are invited to discuss the matter.

### ***3. Possibility of Using Restorative Justice Programs Before Trial***

Restorative justice is a process in which the offender, the victim, and the community—or a facilitator—participate to advance this program. This collaboration forms an appropriate framework for restorative justice, where each party voluntarily fulfills its role without any threats or coercion from one side against the other.

This framework consists of interconnected elements that bring the parties together to achieve the goal of supporting the victim. The victim is given the opportunity to express all the suffering and difficulties inflicted upon them due to the crime, while also presenting their demands. Simultaneously, the offender—whose actions caused harm to the victim—takes responsibility. By listening to the victim's statements, they come to understand the pain and hardship they have caused another human being and become determined to help them and provide compensation.

After a crime occurs, there is a need for a mediator or facilitator to bring the parties (the offender and the victim) closer together. This is one of the key elements of restorative justice, as both the offender and the victim may initially reject direct interaction and harbor resentment toward one another. Therefore, a facilitator is necessary to encourage reconciliation and compromise.

Under Article 21 of Afghanistan's *Law on Handling Juvenile Offenses*, the administrators of juvenile rehabilitation centers play the role of facilitators. Section 1 of this article states:

"The prosecutor may invite the administrators of juvenile rehabilitation centers and specialized social service institutions to recommend and encourage the legal representatives of the child and the victim to reach a settlement, provided it does not contravene the law."

In some instances, this role is referred to as a social worker.

Once the case is referred to the social worker, the social worker first speaks with the offender to determine whether they are willing to take responsibility for their actions. (Khodadi, Abolghasem and Fatemeh Hosseini, Social Worker, Restorative Justice Implementation Axis in the Judiciary, Encyclopedia of Restorative Justice (Collection of Articles of the International Conference on Restorative Justice and Crime Prevention), Mizan, 2016) If the offender accepts responsibility, the family of the victimized child is invited, creating the opportunity for a face-to-face meeting—one of the key objectives of restorative justice.

### 3-1. Face to face encounter

A face-to-face meeting between the parties and their families is one of the essential elements in restorative justice programs, where stakeholders in restorative justice – the victim, the offender, and with the assistance of mediators, facilitators, family members, legal advisors, etc. – come together to narrate the incident. (Shiri, Abbas, Restorative Justice Process) This stage is critically important, as when the parties recount the event, many of the psychological knots and suspicions that arose from the crime are resolved.

Sometimes, the crime may have been accidental, and the offender may have had no malicious intent in committing the act. However, if they are punished through the formal justice system, it may lead to resentment and increase their likelihood of reoffending. Similarly, when the victim hears the account directly from the offender and understands their motives – realizing that there was no malicious intent – it often leads them toward forgiveness and reconciliation. This process can then achieve a desirable outcome.

For example, in a case described by Mr. John Braithwaite:

In a dispute involving a young man and an elderly gentleman, the mediation session began with an uneasy silence. Due to their differing perspectives, both parties struggled to express their thoughts and feelings. Only after the mediator asked the victim to describe and explain the incident did the young man realize how his actions had affected the victim. He came to fully understand that his prank had shocked and hurt the victim, who had already been feeling lonely that night. On the other hand, after hearing the offender's account, the victim realized that the young man had not intended to harm him but had been intoxicated. (3 Herz, Doot J., The Interference Between Perpetrator and Victim: The "D-Walk" Model in the German Colony, translated by Hassan Kashfi Esmailzadeh, Justice and Legal Journal, No. 42, Spring 2003)

The purpose of this element is to find a path toward reparation and healing the harm caused. The goal of restorative processes is restoration and rebuilding relationships, and this transformation often occurs sometime after the confrontation between the victim and the offender concludes. Thus, the pivotal role of this element in completing a restorative process becomes clear, as it is at this stage that we come closest to achieving the objectives of restorative justice.

From this stage onward, the process of repairing the relationship between the victim and the offender begins and, if mutual agreement is reached, can lead to compensation, healing, and reconciliation. (Shiri, Abbas, previous source) This is highly beneficial for improving the damaged relationship between the offender and the victim resulting from the crime.

### 3-2. Family conferences

Another element of restorative justice mentioned in the Law on Handling Juvenile Offenses is family group conferences. In these types of meetings, the families of both parties take active roles in resolving the issue through dialogue.

Family and group conferences expand the circle of primary participants by enabling direct participation of family members or other significant individuals connected to the parties. Since this model focuses on supporting offenders to accept responsibility and change their behavior, the offender's family and other relevant persons from the local community are considered particularly important. (Zahar, Howard, *The Little Book of Restorative Justice*, translated by Hossein Gholami, Majd Publications, 2004)

Group conferences are typically held in two forms: community group conferences and family group conferences. In community group conferences, criminal cases are sometimes diverted from the formal criminal justice system and referred to a process managed by the local community or institutions with government financial or non-financial support. In the "family group conference" process, groups of people connected to or affected by the offense gather to discuss related matters, with the key difference that the "family group conference" model is primarily used for children and adolescents. For example, in New Zealand, the birthplace of this program, family conferences were formalized through the "Children, Young Persons and Their Families Act." Similarly, in Belgium, the restorative process model of "family group conferences" is utilized. Under this model, when a criminal case is deemed suitable for referral to a restorative dialogue process after court evaluation, the facilitator of the "family group conference program" is authorized to refer the case. The facilitator contacts the involved parties (the offender and their supporters, the crime victim and their supporters, and the police officer). They first contact the offender to gather information about the offense and determine who the offender wishes to include as supporters in the conference process. The facilitator ensures the juvenile offender has accepted responsibility for their offense. They then contact the victim to ascertain their willingness to participate in the conference and identify who they will bring as supporters. If the victim chooses not to attend, the conference proceeds, and the victim may send a representative or submit their views in writing. During the conference, both offender and victim become aware of their rights and what they can or cannot accept.

At first glance, these conferences resemble the "victim-offender mediation" process in many ways but differ slightly. One key difference is that family group conferences involve more participants, expanding the circle of stakeholders. This process emphasizes supporting offenders to accept responsibility and change their behavior; accordingly, the offender's family and other local community members play significant roles in the process. (Sheikh Ahmadi, Abdul Basir, previous source)

### 4. *Restorative Justice Manifestations of the Juvenile Offenses Act at the Sentencing Stage*

At the initial stage, when a juvenile offender enters the criminal justice system, as previously mentioned, the legislator has authorized prosecutors to refer cases to administrators of rehabilitation centers. These administrators then invite the families of both parties to engage in reconciliation. This stage presents an excellent opportunity to utilize restorative justice mechanisms to prevent the juvenile offender from entering the formal justice system.

However, for various reasons - whether due to failure of parties to reach an agreement or the seriousness of the offense (more severe than misdemeanors) - the case may proceed to the next stage, which is the sentencing phase. Even at this stage, the law has incorporated elements of restorative justice that judges must consider when issuing their rulings.

The primary objectives of investigation, prosecution, preliminary inquiries, and adjudication of charges against juveniles in conflict with the law are education, rehabilitation, character reconstruction, and fostering their alignment with ethical-social values and religious principles. Corrective and

educational measures can be understood as responses aimed at moral reform through education in rehabilitation centers. (Shamloo, Baqer, *Juvenile Criminal Justice*, Jangal Publications, 2011) Therefore, when juvenile court judges, upon completing preliminary investigations and hearings, establish that an offense has been committed, they must render decisions by recognized standards and criteria of juvenile justice procedures. (Manaqibi, Mohammad Taqi, *Criminal Procedure of Children and Adolescents*, Journal of Legal Discourse, No. 10 and 11, 2006)

Generally, juvenile court decisions regarding offenders fall into two categories: penal measures and non-penal measures. Non-penal decisions should generally be prioritized, as sentencing individuals, particularly juveniles, to punishment should only be employed as a last resort in the most necessary cases. The juvenile court's recourse to non-penal decisions - those lacking punitive characteristics - is crucial, to the extent that such decisions take precedence over penal measures. These non-penal decisions come in various forms, as referenced in Articles 35 and 40 of the Law on Handling Juvenile Offenses (Gholami, Hossein. Previous source), which include:

#### **4-1. Mandatory community service**

Community service, or work for the benefit of society, which initially entered the penal domain under the name of penal labor, is an enforcement measure employed as an alternative to short-term imprisonment. Due to reasons such as the criminogenic nature of prisons, the transformation of occasional offenders into habitual ones, and the imposition of heavy costs on the national economy, alternatives like community service were adopted as solutions to avoid the negative consequences of such imprisonment and to give convicts another opportunity to make amends for their wrongdoing.

These superior characteristics have led legal systems to gradually show interest in accepting community service as an effective enforcement measure. (Habibzadeh, Mohammad Jafar and Mohsen Sharifi, *Restorative Justice Approach to Criminal Enforcement Guarantees for Legal Entities* (Encyclopedia of Restorative Justice (Collected Papers of the International Conference on Restorative Justice and Crime Prevention), May 2017)

Article 40 of the Juvenile Offenses Law includes mandating juveniles to perform community service as one of the rulings the court may issue.

Paragraph 2 of this article also explicitly mentions referring juveniles to specialized social service institutions.

#### **4-2. Handing over children to parents**

One of the objectives of restorative justice is the rehabilitation and reintegration of offenders into society. Therefore, when a crime is committed, courts should issue decisions appropriate to the juvenile offender's circumstances that will facilitate their rehabilitation.

The family environment plays a crucial role in shaping children's behavioral systems and personalities. It is within this environment that children develop and their behavioral characteristics are formed. Consequently, numerous international instruments such as the International Covenant on Economic, Social, and Cultural Rights recognize the family as the natural and fundamental unit of society. (Niazpour, Amir Hassan, *Iranian Criminal Justice Responses to Juvenile Delinquency*, Quarterly Journal of Crime Prevention Studies, No. 4, 2010)

On the other hand, imprisonment - or more accurately, deprivation of liberty penalties, which represent the most common punishment in countries' penal systems - faces significant criticisms. This issue becomes particularly important for juvenile offenders, as individuals at different stages of development require parental care, affection, and support. Separating them from their family environment, school, and play spaces equates to disrupting their behavioral and personality development.

(Mehra, Nasrin, *Criminal Justice for Children and Adolescents*, Mezan Publishing House, 2011) The best option for their care remains their parents. Paragraph 7 of Article 40 states:

"Handing over to one of the parents or a person with guardianship rights. The juvenile court or competent authority, after summoning the parents and legal guardians and explaining the causes of the offense, shall make them aware of their negligence and failure in guiding and raising the child. It shall emphasize the necessity of care in education, fostering mutual understanding and strengthening bonds of affection within the family environment, and shall obtain a commitment from the guardians or legal custodians regarding proper supervision and good conduct of the child." (Abachi, Maryam, *Criminal Law of Children in United Nations Documents*, Majd, 2009)

Additionally, other measures include issuing warnings to make the child aware of the consequences of repeating offenses, such as deprivation of liberty in rehabilitation centers.

### **4-3. Adjournment of trial**

One of the most prominent restorative approaches at the pre-sentencing stage is the deferral of judgment. This legal mechanism, known in the Common Law system as the Anglo-American model, was first introduced in 1870 in Boston, USA, for young offenders under the term "probation" or trial period.

The deferral of judgment allows the court to postpone imposing a sentence for a specific period, during which the offender's behavior can be evaluated before final judgment is rendered. Paragraph 4 of Article 40 indicates that trial deferral means not prosecuting the juvenile while warning them that if they reoffend, both the previous and new offenses will be adjudicated. This deferral aligns with judicial diversion policies aimed at reducing referrals to formal criminal proceedings, particularly for juveniles, and preventing their harmful consequences. (Noushin Pad, Elahe and Abolfat Khaleghi, *Investigating the restorative justice approach in the stages of trial and execution of the sentence in the Islamic Penal Code*)

According to Paragraph 3 of Article 40, the maximum deferral period is three years for felony offenses and one year for misdemeanors. In any case, the juvenile court will refer the child to a specialized institution for observation and treatment. The deferral process serves as an opportunity for rehabilitation while maintaining judicial oversight, embodying the restorative principle of giving offenders a chance to reform before facing formal punishment. (Gholami, Hossein, previous source)

## **Conclusion**

Afghanistan possesses appropriate customary and cultural foundations for implementing restorative justice programs. As is evident, this approach is currently used for resolving various disputes and conflicts by the prevailing local culture. When a concept is rooted in a society's culture, the necessary groundwork for its development and maturation already exists.

The Law on Handling Juvenile Offenses in Afghanistan permits juvenile justice officials, in certain cases, to resolve crimes or violations committed by children or adolescents using restorative justice methods. However, this is conditional upon the offense being classified as a misdemeanor (*qabahat*), in which case the parties may be invited to reconciliation. If the families of both the victim and offender reach an agreement and provide compensation for damages, the case is removed from the formal justice system. If the parties fail to reach an agreement at this stage, or if the offense constitutes a more serious crime (*janayat*), the matter is referred to juvenile court for adjudication.

Even at this judicial stage, juvenile court judges are required to consider restorative mechanisms when examining cases. This demonstrates the significant opportunities and capacities for utilizing restorative justice in addressing juvenile offenses and protecting children's rights.



It would be preferable for the aforementioned law to incorporate provisions allowing all offenses committed by children and adolescents to be resolved through restorative justice at any stage of proceedings, provided the parties consent, given the superior outcomes of restorative justice in case resolution. The law should more broadly recognize and institutionalize family and local community conferences as formal dispute resolution mechanisms. This expansion would better align legal procedures with Afghanistan's established cultural practices of restorative conflict resolution while strengthening protections for juvenile offenders. The existing legal framework demonstrates promising restorative capacities that could be further developed through legislative amendments emphasizing culturally-appropriate, community-based solutions throughout all stages of juvenile proceedings.

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