

JUDICIAL INDEPENDENCE IN AFGHANISTAN:

LEGAL FRAMEWORK AND
PRACTICAL CHALLENGES

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Watching Brief



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Contents

Introduction.....	4
Executive Summary	5
Methodology	6
Key Findings	6
1. Recognition of Three Aspects of Judicial Independence in the Legislations	6
2. Judicial Independence in practice	7
3. Other Key Considerations	8
4. Conclusions and Recommendations	9

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Introduction

In a government with a separation of powers, independence is an indispensable feature of the judiciary. An independent judiciary gives credibility to political systems and is also the force behind reinforcing democracy and the rule of law.¹ Today, most democratic constitutions have incorporated the main elements of judicial independence.² Independence is now the trademark of judiciaries around the world.

Various international instruments, including the United Nations General Assembly resolutions, Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, have underscored the judiciary's independence.³ In addition, several internationally recognised documents have outlined the minimum requirements and guiding principles on judicial independence, focusing on three key aspects: institutional independence of the judiciary, individual independence of the judges and independence of judges from undue influence from inside the judiciary.

This watching brief briefly maps out the existing legal framework that ensures the independence of the judicial branch in Afghanistan and the reasons for the weak utilisation of this feature which puts the judiciary in an uneven position compared to the other two branches of government. Moreover, the watching brief presents a set of recommendations for the enhancement of judicial independence in the country.

1 "Commentary on the Bangalore Principles of Judicial Conduct" (United Nations Office on Drugs and Crime, September 2007), https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentary_on_the_Bangalore_principles_of_Judicial_Conduct.pdf. iv.

2 James Melton and Tom Ginsburg, "Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence," Coase-Sandor Institute for Law & Economics Working Paper, no. 612 (2014): 187-217. 188.

3 For a detailed list of regional instruments that focus on independence of judiciary, refer to pages 5-7 of the Report of the Special Rapporteur on the Independence of Judges and Lawyers (2019) at Diego García-Sayán, "Report of the Special Rapporteur on the Independence of Judges and Lawyers" (Geneva: United Nations Human Rights Council, April 29, 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/118/68/PDF/G1911868.pdf?OpenElement>.

Executive Summary

The history of judicial independence is short in Afghanistan. Occasionally, the individual independence of the judges, which is also acknowledged in Islamic traditions, has been respected; however, the judiciary's institutional independence was recognised only in 1964. Soon after, and with the exception of the 1987 Constitution that nominally recognised the judiciary as a separate branch, judicial independence was revoked by every regime that took power in the country. Absence of the rule of law resulted in a situation wherein judicial independence never became a serious consideration of governance. In time, the judiciary was even used to suppress the opposition and failed to protect citizens' human rights .

The 2004 Constitution tried to reverse this culture by offering protection to the judicial branch from outside influence. However, 16 years after the adoption of the Constitution, the judiciary remains a weak pillar of the current constitutional order.

The Constitution of 2004 addresses key aspects of independence of the judiciary, covering topics such as the appointment and removal of judges, security of tenure, suitable salaries for judges and the restriction of judges in selected activities. It also ensures participation of the Supreme Court in preparation of legislation in judicial affairs and preparation and implementation of the budget of the judiciary. Moreover, the Law on Organization and Jurisdiction of the Judiciary has added extra measures with the objective to enhance the independence of the courts and the judges. Building arguments only on the law, appropriate appointment and removal mechanisms, long-term tenure, recusal from cases with a potential conflict of interest, limitation on involvement in political and commercial activities and ensuring the judges receive appropriate salary and security can lead to individual independence of the judges, nearly all of which are embodied in the laws of Afghanistan. Additionally, all procedural laws have special measures to ensure the impartiality of the judges. Excluding some flaws such as the requirement of President's approval of the regular appointments of senior judges and appointment of the Head of the Supreme Court by the President, a comparison between Afghanistan's laws and international guidelines on judicial independence shows that the Afghan legal system has embedded the critical requirements for independence of the judiciary.

The main impediments to judicial independence are the practical application of the laws and the absence of a culture of independent institutions in the country, making many elements of judicial independence muted. For example, while the Constitution gives autonomy to the Supreme Court in preparation of its budget and related judicial legislations, in practice, the budgetary needs of the judiciary are ignored by the Ministry of Finance and the draft laws can be altered by the cabinet before they are shared with the National Assembly. In addition, a long history of dependent judiciaries has created a culture, both inside and outside the judiciary, that makes it difficult for the Supreme Court and other courts to act in full independence. The independence of the lower court judges from their supervisors is also critical since the provincial courts are heavily dependent on the Supreme Court and Directorate General of Administration of the Judiciary. The relationship between senior judges and the lower courts' judges are organised in a hierarchical manner, similar to executive offices. In the absence of clear assessment criteria or performance indicators, the proposal of appointments, transfers, promotions, disciplinary actions, rewards and the provision of security personnel and other privileges are all facilitated by the senior judges and departments of the Supreme Court, which creates the possibility of punishing the lower court judges. Such punishments can be meted out by transferring lower court judges to insecure provinces if they do not adhere to the orders of senior judges and central departments of the Supreme Court.

Methodology

The methods used for this paper are desk review and expert interviews with key informants. The desk review involved scholarly materials including analysing different constitutions, laws, books, journal articles, reports, decisions of official meetings and other sources relevant to judicial independence and constitutional law. Interviews were conducted with a range of individuals including judges, prosecutors, defense lawyers, academics, government officials, former members of the Independent Commission of Overseeing Implementation of the Constitution, members of watchdog agencies, members of parliament, and legal scholars.

Key Findings

1. Recognition of Three Aspects of Judicial Independence in the Legislations

1.1 Institutional independence

The Constitution recognises the judiciary as a separate branch of the state. It is illegal to remove any dispute from the judicial branch's jurisdiction except for the special trial of the President, the ministers, members of the Supreme Court and military courts.⁴ The Supreme Court also has some level of autonomy in budgetary and financial affairs. It prepares the budget of the judicial branch and submits it to the executive branch to be included in the national budget and has the authority to implement the budget. The administrative staff of the judiciary are civil servants; however, the Supreme Court has authority over their recruitment, dismissal and other aspects of human resources. Moreover, the judiciary has the authority to propose draft laws in the area of judicial affairs, through the executive branch, and the parliament.

1.2 Individual independence

The approval process of Supreme Court members that entails a proposal by the President and approval by the *Wolesi Jirga* is a democratic process. However, the appointment of the Head of the Supreme Court by the President does not serve the independence of the judicial branch. A non-extendable 10-year tenure, and the continuation of financial remuneration until death,⁵ are another key element to ensure independence of the Supreme Court members. To further ensure the Supreme Court's independence, only the *Wolesi Jirga* can initiate removal of Supreme Court members in case of committing felony or crimes pertaining to their duties.⁶ While it is fine that judges receive their judicial commission from the President, one major threat to the independence of judges is the impact of the President's approval of senior judges' appointments on a regular basis thereafter, an act that seems unconstitutional.

To ensure independence of judges, their decisions should always be based on legal sources.⁷ In addition, judges should recuse themselves from court proceedings if their impartiality can be questioned. Furthermore, while dissenting opinions are allowed, the reliance of members to the president of the bench for promotion and other privileges means dissents are rarely used. The recent increase in financial remuneration of the judges has a positive impact on decreasing corruption in the judiciary, which in return resulted in practising a higher level of independence by the judges.

4 "Constitution of Afghanistan," Official Gazette 818 § (2004). article 122.

5 Ibid. article 5.3.

6 Ibid. article 127.

7 "Law on Organization and Jurisdiction of Judiciary," Official Gazette 1109 § (2013). articles 12 and 13.

1.3 Independence of judges from their peers and supervisors

Dependence of lower court judges to senior judges and departments of the Supreme Court is the greatest challenge for their decision making independence. Unfortunately, the relationship between the lower court judges and senior judges of the judiciary and central departments of the Supreme Court is organized similar to the relationships in an executive branch, thus undermining the judges' independence. The performance evaluation process is also flawed and forces the lower courts' judges to adhere to those who have a role in their evaluation, promotion and transfer. In light of the deteriorating security situation in many provinces and districts, judges would accept outside influence to avoid being sent to insecure provinces.

2. Judicial Independence in practice

2.1 Executive branch and the judiciary

Direct influence and intervention in judicial affairs by the executive branch officials have occasionally occurred post-2004, though they have been generally in decline in recent years. For instance, the executive branch put pressure on the courts during the trials of individuals accused of gang rape in Paghman in 2014, as the President asked the Head of the Supreme Court to issue death sentences for the accused.⁸ There are also reports of local officials and governors intervening in judicial affairs.

It is the indirect influence of the executive branch over the financial and administrative needs and appointment of judges in the judiciary that have made an undeniable impact on the judiciary. Despite the Constitution's recognition of budgetary and financial autonomy to the judiciary, the judicial branch is treated similar to the budgetary units of the executive branch. To receive adequate financial resources, the Supreme Court leadership repeatedly appeals to the executive branch, a practice that can undermine the judicial branch's institutional independence. Another example is the lack of an appointment of the Director General of Administration of the judiciary for the last six years. This vacant position should have been proposed by the Supreme Court and approved by the President. The requirement of a presidential decree for foreign trips of the Head of the Supreme Court and a permit from the Head of Office of the President for foreign trips of the Supreme Court and senior judges outside the country is another serious concern.

The continuation of military courts under the leadership of the Ministry of Defense is another example of the courts that do not enjoy independence.

2.2 Legislature and the judiciary

The legislature has mostly respected the independence of the judiciary, though, in 2010, the *Wolesi Jirga* unconstitutionally and unsuccessfully initiated an impeachment process against members of the Supreme Court.

Several provisions in the ordinary legislations also weaken the independence of the judicial branch and the judges. These include the Law on Organization and Jurisdiction of the Judiciary which requires the judiciary's reporting to the Head of the executive branch, allows extension of tenure of judges and deviates from constitutional provisions by allowing the President to agree with the appointment and transfer of senior judges every three years. Moreover, the Law on Financial Affairs and Public Expenditures does not ensure the Supreme Court's budgetary and financial autonomy as foreseen in the Constitution. Besides, the Code of Ethical Conduct for Officials of the Three Branches requires judicial officials to appear in the *Wolesi Jirga* and refrain from speeches, gestures or actions that undermine the executive's independence.⁹ Furthermore, the Internal Rules of Procedure of the *Wolesi Jirga* introduces a procedure on questioning Supreme Court members by the *Wolesi Jirga*,¹⁰ which undermines the judiciary's independence and appears unconstitutional.

8 "Afghanistan: Gang Rape Trial Badly Flawed, Due Process Violations, Political Interference Undermine Justice," Human Rights Watch, 8 September 2014, <https://www.hrw.org/news/2014/09/08/afghanistan-gang-rape-trial-badly-flawed>.

9 "Code of Ethical Conduct for Officials of the Three Branches," Official Gazette § 1051 (2011). e of Ethical Conduct for Officials of the Three Branches. articles 21 and 25.

10 "Internal Rules of Procedures of Wolesi Jirga" (2017). articles 109-11.

3. Other Key Considerations

3.1 Judicial review undermining independence of the judiciary

The process of judicial review and constitutional interpretation is inconsistent in Afghanistan.¹¹ Article 121 of the Constitution authorises only the government and the courts to ask the Supreme Court for judicial review and constitutional interpretation. So far, only the executive branch has filed requests, and the Supreme Court has favored the executive branch in all cases except for one case in which it remained silent.¹² The courts have asked only abstract questions, known as *estihda*, on constitutional compatibility issues from the Supreme Court. As a result, it is presumed the judicial review process is politicised, and has undermined the judicial branch's independence in the eyes of the public.

3.2 Judicial independence versus accountability

A frequent concern raised about the judiciary in Afghanistan has been its lack of accountability and transparency,¹³ manifested in resistance to publish court decisions. A strong culture of secrecy in the judiciary¹⁴ contributes to a lowered public legitimacy. Accountability and transparency are not in conflict with independence.¹⁵ Despite the unacceptable ranking of Afghanistan in the world corruption index, the level of corruption has slightly dropped in the judiciary in recent years.¹⁶ The Office of Judicial Control and Surveillance, which has the authority to detect cases of corruption in the judiciary, has increased its efforts in recent years, leading to the prosecution of judges, court clerks and other staff involved in corruption.¹⁷ The more the judiciary is accountable, the public confidence in judiciary increases.

3.3 A Weak culture of independence

Afghanistan generally lacks a culture of independent institutions which is particularly true about the judicial institutions. The existence of dependent courts throughout the country's history is the key impediment to change this culture. The belief that the President, as *Uli al-amr* and Head of the State, has a presiding role over the judiciary, prevents decision-making against the executive branch. It seems that the value of the judicial branch's independence as an independent institution performing a vital role in the checks and balances of the state is not fully realised. The obligation to report to the executive branch and participation of senior members of the judicial branch in political activities, like the peace consultations or investigation committees, showcase the existence of this culture.

11 Shoaib Timory, "Judicial Review and Constitutional Interpretation in Afghanistan: A Case of Inconsistency," *Loyola of Los Angeles International and Comparative Law Review* 42, no. 2 (2019): 223-90.285.

12 After impeachment of seven ministers by Wolesi Jirga in 2016, the executive branch asked the Supreme Court to decide whether the decision was constitutional. The Supreme Court never announced a decision on that case.

13 Mohammad Musa Mahmoodi (former Secretary General of Afghanistan Independent Human Rights Commission), online pers. comm., 2 January 2020.

14 Yama Torabi (Head of Special Anti-corruption Secretariat at the Office of Chief of Staff of the President), online pers. comm., 5 February 2020.

15 Vicki C. Jackson, "Judicial Independence: Structure, Context, Attitude," in *Judicial Independence in Transition*, Edited by Anja Seibert-Folhr (New York; Heidelberg: Springer, 2012)., 61.

16 Compare the two 2014 and 2018 surveys by Integrity Watch Afghanistan at "Integrity Watch Afghanistan, "National Corruption Survey 2014" (Kabul, 2014), <https://iwaweb.org/wp-content/uploads/2016/12/NCS-2014-English.pdf>. 4." and Integrity Watch Afghanistan, "National Corruption Survey 2018" (Kabul, 2018), https://iwaweb.org/wp-content/uploads/2014/12/NCS_2018__English__WEB.pdf. 2.

17 Decisions of High Council of Rule of Law and Anti-corruption, 13 October 2019.

3.4 Absence of independence and its impact on human rights

Historically, the Afghan courts have failed to protect the citizens' human rights in two fronts: first, they were used to justify atrocities and human rights violations under some regimes before 2001. Second, they have failed to uphold and protect constitutionally recognised fundamental rights of individuals. Unlike democratic settings where the courts are the independent and trustable venues to uphold human rights, the courts in Afghanistan have been either reluctant or unfamiliar in their role to protect fundamental rights.

4. Conclusions and Recommendations

In line with international guidelines, the post-2004 legal framework has adopted unprecedented measures to ensure institutional independence of the judiciary, and the individual independence of judges. Unfortunately, some of the measures foreseen in the Afghanistan's laws are either flawed or have not been translated into practice, which has further contributed to the judiciary's dependency to the executive branch. The continuation of these practices has neutralised the constitutional mandate and authority of the judicial branch as an independent institution.

The hierarchical order in the judiciary is also a strong cause of influence by supervisors and senior judiciary officials over lower court judges. This is the hidden phenomenon in the judiciary that has resulted in applying a passive and conservative approach by the judges and changed the judiciary to an institution run by an executive approach. Thus, unless the internal arrangements over performance assessment, transfer and promotion of judges are revised, the judges may not exercise a positive form of independence.

The inability of institutions like the judiciary that are designed to perform independently is partly a result of a weak culture of independence in the country. Most judges are the product of a time when the judiciary was dependent on the executive branch, and the attitude of capitulation to executive officials' orders was the norm. Furthermore, the state officials and politicians have mostly failed to treat the judiciary as an independent branch of the state. This is evident in consideration of protocol arrangements to the Supreme Court members in official events or the attempt to impeach them by the parliament. Judicial independence needs a culture, which cannot be created by judges only. Each branch of the state, the legal community, politicians, media and the public must also contribute to creating this culture. The fear that an independent judiciary is uncontrollable and can apply Sharia Law unrestrictedly is not a legitimate concern. Judicial independence does not necessarily result in judicial activism; even if it does, Afghanistan's judiciary is obliged to rely on state laws as the primary source of its decision making. An independent judiciary in a government of "separation of powers" will undoubtedly advance the rule of law and play an essential role in accountable governance.

The following enlists key recommendations to enhance judicial independence.

General

- To ensure the judiciary's independence and prevent involvement of the judicial branch in political affairs, judicial review and constitutional interpretation both need urgent and long-term reforms. For the short term, as the Constitution requires, all three branches should work together on drafting a law that articulates how article 121 is applied. This can make a judicial review and constitutional interpretation more consistent. For the long run and through the constitutional amendment process, establishing a court to conduct a judicial review and constitutional interpretation and is accessible to a range of stakeholders and individuals could be the solution.
- Protocol arrangements for members of the judiciary as described in the laws should be respected. Ignoring the protocol undermines the credibility of the judicial branch.
- Law enforcement agencies with an obligation to enforce court decisions must share regular reports on enforcement of court decisions to the Rule of Law Council and officials that fail to enforce decisions should be indicted. The other measure is establishing a follow-up directorate in the judiciary, which can also indict those officials and persons who do not enforce court decisions.
- Legislations that undermine the judiciary's independence or make the judicial branch hierarchically subordinate to the executive branch should be amended urgently. These include the Law on Organization and Jurisdiction of the Judiciary, the Code of Ethical Conduct for Officials of the Three Branches, Internal Rules of the Wolesi Jirga and the Law on Financial Affairs and Public Expenditures. In addition, legislation should clearly define what constitutes "job-related crimes" and elaborate on the process of prosecution of Supreme Court members for crimes other than felonies or those unrelated to conduct of their duties. Moreover, a selective approach for extension of the tenure of judges after retirement should stop.

Judiciary

- To increase its credibility, the Supreme Court should take measures to increase accountability in the judicial branch, including publishing decisions of the courts and disciplinary actions against judges and other corrupt officials.
- An appointment council comprised of senior judges, parliament members, lawyers' associations, academia, relevant government agencies and civil society should be formed to make recommendations to the High Council of the Supreme Court on the appointment and transfer of judges. As article 132 of the Constitution requires, the President's role should be limited to awarding judicial commissions, dismissal of judges at the High Council of the Supreme Court's proposal and acceptance of resignations and retirement of judges.
- As a matter of principle and to ensure its independence and credibility, the Head and members of the Supreme Court should not take part in any political processes.
- The General Director of Administration of the Judiciary should be the figurehead of the judiciary in coordination and relationship with the other two branches. These include participation in Cabinet meetings, if participation is necessary, or in discussions of the Rule of Council and other committees.
- The Supreme Court should reform the judiciary's hierarchical order that makes the lower judges unreasonably dependent on their supervisors. Likewise, it should respect the fundamental rights of judges by developing guidelines for the use of social media or doing interviews with the media, letting them establish associations outside the judiciary and relaxing restrictions on the inclusion of judges in educational programmes.
- The inclusion of graduates of madrasas in the judicial branch should be stopped altogether. Stage programmes and on-the-job training should be seriously enhanced and include topics on independence of the judiciary, separation of powers, human rights, judicial review, due process and accountability of courts, among other key topics.

- The Supreme Court should stop the practice of arbitrary extension of tenure of judges after they are retired.
- The UN Special Rapporteur on the Independence of Judges and Lawyers can be invited to assess the judiciary and Attorney General Office and share their recommendations with the Supreme Court and the executive branch.
- The General Directorate of Administration of the judiciary needs serious strengthening. A comprehensive plan of reform should be developed that covers effective administration of the Case Management System, finance, procurement, planning, general administrative support, auditing, reporting and public relationships. The executive branch should prioritise funding this reform plan. Further, the position of General Director of Administration of the Judiciary should be filled as soon as possible.
- The process of assessment of judges needs reconsideration. To ensure unbiased assessment, clear criteria should be determined for the transfer and promotion of judges.
- The management of the courts in the Ministry of Defence should change. To ensure independence, similar to prosecution of members of the police and the Directorate of National Security, courts under the judiciary should adjudicate crimes committed by the members of the national army.
- The Supreme Court should design a grievance system managed by a specialised office in the judiciary. With this office in place, regular meetings of the Head of the Supreme Court with parliament members and other complainants can stop.

Executive

- The process of nomination of Supreme Court members should become a merely technical rather than a political process. For this purpose, it is recommended that the Supreme Court members' qualifications are elaborated in the ordinary laws and a selection committee comprising various stakeholders appointed to propose a shortlist of qualified nominees to the President so he can propose nominees to the Wolesi Jirga from that list.
- Provision of support to the judiciary should become a priority of the executive branch. A higher number of security personnel should be assigned for the protection of courts and judges. In addition, a specific percentage of the national budget should be allocated to the judiciary, which cannot be lowered by the Ministry of Finance or the Cabinet. If the judiciary asks for an increase, it should provide justifications. Furthermore, after undergoing the required administrative reforms, the judiciary should be given more autonomy in administrative and financial affairs.
- The decree that requires the President or his office to approve the judiciary members' trips should be amended only to require notification of trips of Supreme Court members.



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