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Judicial Independence in Afghanistan

**A Study of the Legal System
in Light of International Standards,
Islamic Principles and the Afghan
Legal Tradition**



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Preface

This study critically analyses the legal system of Afghanistan and examines the extent of independence acquired by the Afghan judiciary both from institutional and individual perspectives. The main research problem concerns judicial independence and its enforcing mechanisms incorporated and applied in the legal system of Afghanistan. The primary incentive for conducting this study has been the absence of an in-depth legal research on different aspects of the legal system of Afghanistan. This study therefore intends to fill that gap and evaluate the specific legal measures and mechanisms and their application regarding judicial independence in accordance with the international standards, Islamic principles and Afghan legal tradition as recommended by the 2001 Bonn Agreement that laid the legal and administrative foundation of the post-Taliban judicial institutions. In a global legal context, it draws attention towards the intersection of Islamic law and international law with regard to independence of judges and courts, and affirms the harmony between both systems in a paradigm of rule of law, human rights and democratic values.

The findings of this study not only acknowledge the unprecedented achievements in rebuilding the judicial institutions and normalisation of the vast areas of judicial matters in the aftermath of the civil war, and the establishment of an independent judiciary under the 2004 Constitution of Afghanistan; they also demonstrate that the subsequent legal formulations and their application violate the separation of power and the principle of non-interference as the primary drivers of judicial independence. The judiciary is regulated in a manner that is under the influence of the executive branch, in particular the president of Afghanistan. Moreover, the lack of transparent and participatory practices in appointing the justices has often violated the clear provisions of the Constitution of Afghanistan. The conducted case studies reveal that the president has often delayed or prolonged the appointment of the justices and thus violating international standards, e.g. International Covenant on Civil and Political Rights (ICCPR) and Islamic principles of judicial independence with which Afghanistan should comply.

The functions of the judiciary as protected by international standards and the discretionary power of judges that has been guaranteed by Islamic principles have often been subject to the president's interference as well as disrespect and pressure from the legislative organ. For instance, from an institutional point of view, this study argues that the executive branch often imposes pressure on the judiciary during the preparation of the judicial budget. The main reasons for such discrepancies are the absence of any regulations on the extent of executive consultation with the judiciary during the making of the budget and the lack of a fixed amount of the national budget allocated to the judiciary.

Appointment, transfer, promotion and removal of judges from office as the main procedures that impact the independence of every single judge are administered by the chief justice of the Supreme Court and the president of Afghanistan. While judges receive appointments until they reach the age of retirement, there are a number of flaws in Afghanistan's legal system that prevent their tenure from being truly secure. In the current legal system, prior consent of the judges and necessity are the actual requirements for transferring judges from one court to another. Yet, the

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system has no rules that define the concept of necessity or give judges the chance to appeal transfers that go against their will. The procedure for removal of the judges is not sufficiently protective of the independence of the judges or guarantees of fair and public trials, conditioned with the right to an independent review. The status quo goes against the supposed immunity of judges, not only in criminal matters, but also with regard to civil charges brought against them.

There is a significant gap between the laws and their application. In spite of existing laws, in reality, judges face many challenges to their physical and financial integrity, which further threatens their independence. Judges suffer from a lack of impartiality in practice. They often do not apply national laws in the cases at hand and lack of knowledge of the legal system.

In addition, the current system provides measures for judicial accountability, where the Supreme Court unilaterally administers oversight and implements disciplinary measures. The disciplinary measures undermine judges' independence due to the lack of the right to appeal or review of any disciplinary decisions rendered by the Supreme Court. The study finally confirms the research hypothesis that a number of legal rules for guaranteeing judicial independence are inefficient, unclear and absent from the legal system of Afghanistan and do not respect the minimum international standards and Islamic principles. To remedy the above shortcomings, a number of recommendations are made.

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Introduction

I. Background

A competent and independent judiciary is essential for upholding the rule of law and separation of power as fundamental principles of democratic societies; it is particularly pivotal for the protection of the fundamental rights of citizens and for a just adjudication of disputes between persons including the state. Building such an independent judiciary has been a central debate not only in a national legal context, but also at an international level.

Afghanistan, however, has witnessed the collapse of its legal and administrative structures due to the last three decades of war and conflict. In particular, the judicial branch, which had emerged in the late 19th century and had been developed over a prolonged period of time, suffered the most. The civil war that lasted from 1992 to 2001 completely destroyed the judicial system. It resulted in the loss of judicial infrastructures, official records, legal resources, and more importantly, the death, imprisonment and immigration of hundreds of qualified judges and judicial officials to other countries.¹ Particularly during the Taliban regime, the situation greatly deteriorated, resulting in the imposition of arbitrary rules that were inconsistent with the national legal tradition, Islamic norms and international judicial standards.²

Judges also faced great physical and financial insecurity. In 2001, judges of the Primary Courts were earning an average salary of 60 USD per month.³ In 2002, judges from Kabul and Mazar-e-Sharif did not receive salaries at all. It is unknown whether the situations in the other parts of the country resembled that of Kabul and Mazar-e-Sharif.⁴ In addition, legal qualifications were not respected as a legitimate criterion for the appointment of judges. Some field research indicated

- 1 Carol Wang, *Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability*, 55 HARVARD LAW JOURNAL, p. 217 (2014); Phillip Tahmindjis, *The Rule of Law, Democracy and the Legal Profession in the Afghan Context: Challenges and Opportunities*, International Bar Association's Human Rights Thematic Paper, p. 3; Aruni Jayakody, *The State of Electoral Dispute Mechanisms in Afghanistan. The State of Electoral Dispute Mechanisms in Afghanistan*, at <http://areu.org.af/Uploads/EditionPdfs/1420E%20The%20state%20of%20electoral%20dispute%20mechanisms%20in%20Afghanistan.pdf>; Ali Wardak, *Building a Post-War Justice System in Afghanistan*, 41 CRIME LAW AND SOCIAL CHANGE, pp. 319–328 (2004); Amnesty International, *Afghanistan: Re-establishing the Rule of Law*, at <https://www.amnesty.org/en/documents/asa11/021/2003/en/>.
- 2 J. Alexander Thier, *Reestablishing the judicial system in Afghanistan*, p. 5 (2011), at http://fsi.stanford.edu/sites/default/files/Reestablishing_the_Judiciary_in_Afghanistan.pdf; 135; David Nauta, *The Judicial Reform Process in the Peace Support Operation in Afghanistan*, p. 7 (2008) (Peace Operation Training Institute); Matteo Tondini, *The Role of Italy in Rebuilding the Judicial System in Afghanistan*, 45 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE, p. 81 (2006).
- 3 International Crisis Group (ICG), *Reforming Afghanistan's Broken Judiciary*, Asia Report, No. 195, p. 24 (2010); Marie L. Greenman, *Curbing Corruption in Afghanistan's Courts*, 26 GEORGETOWN JOURNAL OF LEGAL ETHICS, p. 704, (2013).
- 4 The International Commission of Jurists conducted a two-phase research project: (1) They collected and analysed the existing laws; (2) they conducted interviews with the judges, which led to the above statement. See Martin Lau, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, p. 16 (2002).

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that most of the judges did not even understand basic legal concepts and were not interested in receiving judicial training.⁵

Even before the period of the Taliban, there had been neither practical experience nor a will to support an independent judiciary.⁶ The judicial organ had been seen as an extension of the executive branch, whereas according to the international instruments such as the International Covenant on Civil and Political Rights (ICCPR) to which Afghanistan is a party, everyone has the right to be tried fairly and publicly by an independent and impartial tribunal that is established by law.⁷

In 2001, the US military invasion in response to the 9/11 terrorist attacks ended the Taliban regime that was harbouring *Al-Qaida* in Afghanistan. In December of the same year, Germany hosted the UN talks on Afghanistan within the framework of the Bonn Conference. The outcome document of the Bonn Conference, the *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions* (hereinafter the Bonn Agreement), laid the legal and administrative foundation of the post-Taliban judicial institutions. On December 6, 2001, the UN Security Council endorsed the Bonn Agreement by Resolution No. 1383/200. Indeed, the Resolution stepped beyond a mere validation of the Bonn Agreement and called upon all Afghan groups to implement its provisions in full. Article 2 (2) of the Bonn Agreement provides that:

The judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration. The Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.

Article 2 (2) recognises a number of national and international norms as the conditions for building the legal system, and in particular an independent judiciary. These norms include international standards, the Islamic principles, the rule of law and the Afghan legal tradition. In May 2002, President Hamid Karzai issued a decree and established a Judicial Commission to implement the above provision. The Commission was mandated to conduct educational programmes, reform the laws and appoint judges.⁸ After three months, the president dissolved this institution and replaced it with the Judicial Reform Commission (JRC) with minor changes made to the formation and authority of the JRC compared to its predecessor.

According to Decree No. 153 issued in November 2002, the new commission was assigned to study the reform of the judicial affairs in Afghanistan and propose appropriate solutions. In par-

5 Kara Jensen, *Obstacles to Accessing the State Justice System in Rural Afghanistan*, 18 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, p. 948, (2011).

6 Wang, HARVARD LAW JOURNAL, (2014); Amy Senier, *Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law*, p. 1, at <http://fletcher.tufts.edu/~media/Fletcher/Microsites/al%20Nakhlah/archives/2006/senier.pdf>.

7 See Chapter One for specific references to the international standards on judicial independence.

8 *Farmon Raes Jamhor Dar Rabeta Ba Wazaef Wa Salahait Hai Kumussion Qazaae* [Draft Presidential Decree on Power and Functions of the Judicial Commission], arts. 2, 3 & 5 (Office of the President ed. June 2002).

ticular, it was tasked with providing a comprehensive plan for the reform of the judiciary in close coordination with the Supreme Court, the Ministry of Justice and other relevant institutions to play an important role in the recruitment of judges, rebuilding courthouses, training judges and strengthening the research and teaching capacity of the faculties of law and *Sharia*.⁹

In 2004, a new constitution (Constitution) was adopted, which established an independent judiciary, administered by the Supreme Court of Afghanistan. Even though the judicial system has been rebuilt from scratch since 2004,¹⁰ there have been claims that the judiciary suffers from the lack of independence due to the weak legal framework, which in turn causes problems with applying the laws that guarantee the independence of the judicial organ. This issue is addressed in the section below.

II. Problem Statement

In the post-Taliban era, the judiciary has experienced large-scale development. The Constitution established an independent judiciary comprising of a Supreme Court, the Appeal Courts and the Primary Courts with specific jurisdictions and authorities.¹¹ Notwithstanding, judicial independence is still far from a familiar notion among the judges and other state institutions. The judiciary still carries an organisational culture with it that is not familiar with the concept of independence.¹² In other words, in spite of the success in different aspects of the judiciary in the aftermath of the Taliban, one nonetheless cannot rigorously claim its independence and integrity.

The problem arising from the absence of a fully independent judiciary can be mapped within the legal system of Afghanistan. There are observable flaws within the constitutional framework, existing laws and institutional design as well as historical capacity of the judiciary.¹³ Indeed, the legal mechanisms that guarantee judicial independence are either absent or inefficient for proper implementation. For instance, even though there is a strict mechanism for the appointment of the Supreme Court justices, in reality the appointees have not met the requirements set out in the Constitution.¹⁴ Chief Justice Shinwari (2001–2006) often appointed judges for political and ideological reasons.¹⁵

9 Presidential Decree on Formation of the Judicial Reform Commission and its Duties, No. 153, arts. 2, 3, 4, 5 & 6 (November 2, 2002).

10 Compared to 2001, in 2004 the number of judges and judicial officials had increased enormously. According to the 2011 Afghanistan Independent Human Rights Commission's report, the judiciary assigns 4,390 judges and judicial officials. Among them, 1,505 are judges with 120 women judges. However, 777 posts are vacant. Afghanistan Independent Human Rights Commission (AIHRC), Report on the Activities of the Judicial System in Afghanistan, p. 14 (2011).

11 *Qanun Asasi Jamhori Islami Afghanistan* [The Constitution of the Islamic Republic of Afghanistan], art. 116 (2004).

12 Farid Hamidi & Aruni Jayakody, Separation of Power under the Afghan Constitution: A Case Study p. 20 (Tom Shaw and Kelsey Jensen ed. Afghanistan Research and Evaluation Unit (AREU, 1507E), 2015).

13 *Id.*, p. 2.

14 *Id.*, p. 17.

15 Katherine McCullough, *Out with the Old and in with the New: The Long Struggle for Judicial Reform in Afghanistan*, 19 GEORGETOWN JOURNAL OF LEGAL ETHICS, p. 837 (2006).

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This is not the only problem that compromises the independence of the judiciary. External interference remains another central challenge that is often caused by political fractions, warlords and armed groups.¹⁶ The Supreme Court, which leads the judiciary of Afghanistan, has often reported that different external actors have violated its independence.¹⁷ Such interference highlights the lack of thorough legal protection and the existence of ambiguities in the Constitution as well as gaps in the laws, which have paralysed the judiciary and prevent it from protecting the fundamental rights of the citizens.

In addition to threats, intimidation and financial pressure from outside, there is a struggle to overcome bias and unethical behaviour within the institution itself. In 2008, Astri Suhrke and Kaja Borchgrevink conducted a study on justice sector reform, *Negotiating Justice Sector Reform in Afghanistan*. They wrote that, given the statutory independence of the judiciary, due to the lack of efficient mechanisms, the Supreme Court has acted in a way that questioned its independence and violated the citizens' basic human rights.¹⁸

To overcome bias and unethical behaviour within the judiciary, judicial education and accountability have to be strengthened. With regard to judicial education, the actors have failed to establish an efficient system. By 2007, most of the judges did not have the opportunity to learn about the universal concepts of judicial independence, fair and public trial, and the rule of law, as compared to education on the *Sharia*, jurisdictional competence, judicial method and standards of proof.¹⁹ In the same year, according to the records of the Supreme Court, there were a total number of 1,415 judges in the whole judiciary. Among them, only 11.6% had a university education and only 3% were women.²⁰ With such a limited capacity, it is not easy to increase the integrity and independence of the judiciary.²¹

Moreover, the Afghan judicial system struggles with the lack of accountability, which in turn affects its independence.²² The reason for no reconciliation in Afghanistan may be grounded in the fact that there is no accountability, public confidence or reliability within the judiciary. In particular, measures for the enforcement of judicial accountability, such as judicial inspection, public complaints mechanisms and disciplinary proceedings, are either ineffective or not implemented at all.²³ Such a deficit often causes a loss of public confidence in the judicial institutions. No improvements in any other fields will be accomplished in the absence of a responsive judiciary,

16 Id, pp. 842–843.

17 M. Cherif Bassiouni & Daniel Rothenberg, *An Assessment of Justice Sector and Rule of Law Reforming Afghanistan and the Need for a Comprehensive Plan* [London Conference on Afghanistan, 2007], p. 27 (2007).

18 Astri Suhrke & Kaja Borchgrevink, *Negotiating Justice Sector Reform in Afghanistan*, 51 *CRIME, LAW AND SOCIAL CHANGE*, p. 221 (2009).

19 Livingston Armytage, *Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War*, 67 *ZÄÖRV*, p. 19 (2007).

20 United Nations Development Programme (UNDP), *National Human Development Report*, p. 71 (UNDP Afghanistan: Islamic Republic of Afghanistan, 2007).

21 Afghanistan Independent Human Rights Commission, *Observation Report of the Situations and Actions of the Courts and Judicial System in Afghanistan* (2011).

22 Ghizaal Haress, *Judicial Review in Afghanistan: A Flawed Practice* (Afghanistan Research and Evaluation Unit [AREU], August 2017).

23 Armytage, *ZÄÖRV*, p. 198 (2007).

and there is little hope for upholding the rule of law and human rights without an impeachable and independent judiciary.²⁴ To overcome these problems, there must be a transparent system of oversight that entails disciplinary measures to curb the unlawful acts of judges.

The literature on judicial independence in the post-Taliban era is virtually non-existent, limited to an abstract level or is only accessible to limited number of readers due to language or other constraints, especially from a legal point of view.²⁵ For example, in 2007, the Afghanistan Human Development Report listed four important areas to be improved within the judicial system:

- 1) judicial appointment based on merit;
- 2) clear terms and conditions of the service of the judges;
- 3) accountability and disciplinary measures, and efficient procedures for the implementation of such measures; and
- 4) transparency in judicial functions.²⁶

The abovementioned study itself did not provide any details or analysis of these measures. This is also true for a number of other studies that suggest the establishment of proper guidelines and effective legal mechanisms for the development of a culture of independence.²⁷ Another study that, for instance, implicitly reflects on judicial independence, is a piece of research conducted by the Afghanistan Research and Evaluation Unit (AREU) in 2015. However, it touches upon the issue on an abstract level by engaging in an analysis of the notion of separation of power as a central theme of the research. There is also a short Article by Abdul Karim Azer on the independence of the judiciary, published in the *'Mujalaha Adalat'* (justice journal).²⁸ This study discusses the independence of judges only in the context of decision-making under Afghan laws. It excludes discussions on the shortcomings and strengths of both the individual and institutional aspects of independence. Indeed, it suffers from a lack of analysis, academic ethics and methodological accuracy. The Article itself is also published in the Dari language and unavailable to an English-speaking environment.

Moreover, the existing limited studies do not contain key information or analyses about the legal system of Afghanistan regarding judicial independence. A study titled *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan*, which was pre-

24 Ashley Tellis & Luis Peral [Co. ed.], *Afghanistan 2011–2012 and Beyond: From Support Operations to Sustainable Peace*, p. 4 (2011).

25 There is another Article by Martin Lau, *The Independence of Judges Under Islamic Law, International Law, and the New Afghan Constitution*, published in 2004 in 64 *ZaöRv*. This Article talks about the independence of judges under international law and Islamic law. Nevertheless, it does not draw any normative analyses on the existing mechanisms as aimed for in the study at hand. Likewise, no explanation is offered of the accountability mechanisms drawn from the Afghan legal system, as the Article claims. Such a descriptive approach does not enable the reader to understand the shortcomings and strengths of the system.

26 United Nations Development Programme (UNDP), *National Human Development Report*, p. 62 (2007).

27 Jayakody, *Separation of Power under the Afghan Constitution: A Case Study*, pp. 21 & 36 2015; M. Cherif Bassiouni & Daniel Rothenberg, *An Assessment of Justice Sector and Rule of Law Reforming Afghanistan and the Need for a Comprehensive Plan*, p. 5, 2007.

28 Abdul Karim Azer, *Chegonagi Istiqlal Qazee Dar Nezam Hoqoqi Afghanistan* [Judicial Independence in Afghanistan in Legal System of Afghanistan], *ADALAT*, pp. 132–136 (2015).