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JUDICIAL INDEPENDENCE IN AFGHANISTAN:

LEGAL FRAMEWORK AND
PRACTICAL CHALLENGES

Shoaib Timory
February 2021



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Evaluation Unit

Afghanistan Research and Evaluation Unit

Issues paper

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Shoaib Timory
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Shoaib Timory

February 2021

Foreword

The Afghanistan Research and Evaluation Unit (AREU) is honored to present its esteemed audience with a meticulous research paper- Judicial Independence in Afghanistan: Legal Framework and Practical Challenges. The paper outlines the present legal framework that aims to ensure the independence of the judicial branch in Afghanistan and the reasons why the judiciary has not yet achieved this objective.

This paper is based on the findings of desk reviews of relevant legal documents, including the constitution, legislative documents, court decisions, academic writings and interviews with key informants including judges, defense attorneys, prosecutors, government officials, and former members of the Independent Commission of Overseeing Implementation of the Constitution, members of civil society, parliament members and legal scholars. Moreover, by referring to several international documents such as the United Nations (UN) General Assembly Resolutions, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, the paper has emphasized on the independence of judiciary.

The paper refers to minimum requirements and guiding principles of judicial independence that focus on three key aspects such as institutional independence of the judiciary, individual independence of the judges, and the independence of judges from undue influence from inside the judiciary. The paper argues that one cannot ignore a trade-off between institutional independence of the judiciary and individual independence of judges; however, a judiciary cannot enjoy a reasonable level of independence if all three aspects are not given balanced attention.

In Afghanistan, the independence of the judiciary as a branch of the state was recognized only in the Constitution of 1964 and Constitution of 1987 before the current constitution mapped out a range of measures necessary to keep the judiciary and the judges independent. For example, the Constitution requires “political inputs” from both the executive and the parliament in appointing members of the Supreme Court, though for ordinary judges, the President signs on their appointments. In addition, the Supreme Court prepares and manages its own budget and has the authority over recruitment of administrative staff in the courts. The laws also prohibit exclusion of disputes from the jurisdiction of the judicial branch. Provision of a suitable salary, finality of decisions, security of tenure and the restriction of judges from membership in political parties or other occupations are other measures in place to ensure impartiality of the judge and independence of the judiciary.

The paper points out that despite these measures, some of the provisions set out in the Constitution as well as ordinary legislation that should have protected the independence of the judiciary and the judges are unfortunately flawed and have not been able to transform the judiciary into a credible institution able to conduct its duties with independence. As a result, the judiciary is still dependent on the executive branch for budget, finance, appointments and transfer of judges and administrative affairs. Consequently, the judiciary has repeatedly sided with the executive branch in cases of political importance. This is mainly due to flaws in article 121 of the Constitution, which have made the practice of judicial review inconsistent, politicized, and a sign of the dependence of the Supreme Court on the executive branch. Besides, the reporting obligation of the Head of Supreme Court to the President and his engagement in political discussions are perceived as evidence for a close association of the judiciary with the executive branch.

I would like to thank the author of this paper for his painstaking work, and acknowledge the anonymous peer reviewers for their highly important contribution to further enriching the content of the paper and not the least AREU's core funding partner- the Swedish International Development Assistance (SIDA)- for their continuous support at this challenging juncture. They have enabled us to keep up with carrying on research and studies like this. I am confident this paper will be a significant contribution and a great reliable source for policy makers and all those who are involved in the judiciary system, reforms and governance.

Sincerely,



Dr Orzala Nemat,

AREU Director

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Glossary

Diwan	A division of a court
Estihda	Request for guidance on a legal issue from the Supreme Court
Fatwa	A non-binding legal ruling that is given by the mufti, a qualified Muslim scholar, as an answer to enquiries by someone on a certain legal issue
Hadith	Record of the traditions, sayings or silent approval of Prophet Muhammad (PBUH), revered and received as a major source of religious law and moral guidance after the authority of the Qurʾān
Huqooq Department	Entity that deals with civil disputes in Afghan Ministry of Justice
Ijtihad	The process of Muslim jurists making a legal decision by independent interpretation of the Qurʾan, the Sunna and other relevant sources of Sharia
Imam	Title of worship leader in the mosque
Jihad	Holly War
Jirga	Assembly
Madhhab	School of thought within Islamic jurisprudence
Madrasa	Religious school
Mahakem Mazalem	Courts of grievances (for prosecution of senior officials)
Meshrano Jirga	House of Elders of Afghan National Assembly
Mufti	Person who gives fatwa
Majahiddin	Holly war fighters (referred to Afghan fighters against Soviet Union)
Panchat Courts	Commercial courts in Afghanistan with a mixed composition of Muslim, Hindu and Jewish judges in the second half of 19th and early decades of 20th century
Tamiz Court	Supreme Court
Uli al-Amr	The Muslim ruler
Wolesi Jirga	House of representatives of Afghan National Assembly

Acronyms

AFN	Afghani (official currency of Afghanistan)
AUAF	American University of Afghanistan
COVID-19	2019 novel coronavirus
LL.M	Magister Legum or Master of Laws
PBUH	Peace Be Upon Him
SY	Shamsi Year (Islamic Hijri calendar) that started in 622 AD
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNDP	United Nations Development Programme
USD	United States Dollar

Executive Summary

In a government with a separation of powers, independence is an indispensable feature of the judiciary. Various international instruments, including the United Nations (UN) General Assembly resolutions, Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, have underscored the independence of judiciary. 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. One cannot ignore a trade-off between institutional independence of the judiciary and individual independence of judges; however, a judiciary cannot enjoy a reasonable level of independence if all three aspects are not given a balanced attention.

Independence of the judiciary, as a branch of the State in Afghanistan, was recognised only in the Constitution of 1964 and the Constitution of 1987 before the current Constitution mapped out a range of measures necessary to keep the judiciary and judges independent. For example, the Constitution requires “political inputs” from both the executive and the parliament in appointment of members of the Supreme Court, though, for ordinary judges, the President signs off on their appointments. In addition, the Supreme Court prepares and manages its own budget and has the authority over recruitment of administrative staff of the courts. The laws also prohibit exclusion of disputes from the jurisdiction of the judicial branch. Provision of a suitable salary, finality of decisions, security of tenure and restriction of judges from membership in political parties or other occupations are other measures in place to ensure impartiality and independence of the judiciary.

Despite these measures, some of the constitutional and provisions of ordinary legislations that should have protected the independence of the judiciary and the judges are unfortunately flawed and have not been able to transform the judiciary into a credible institution able to conduct its duties with independence. As a result, the judiciary is still dependent on the executive branch on budgetary, financial and administrative affairs, along with appointment and transfer of judges, and it has repeatedly sided with the executive in cases of political importance. This is mainly due to flaws in article 121 of the Constitution that have made the practice of judicial review inconsistent, politicised and a sign of dependence of the Supreme Court to the executive branch. Besides, the reporting obligation of the Head of the Supreme Court to the President and his engagement in political discussions are perceived as a close association of the judiciary with the executive branch. Despite these flaws, the judiciary has seen considerable progress in different areas including partial success in decreasing corruption and increasing the recruitment of younger and more qualified judges in recent years. The Supreme Court has also tried to ensure impartiality of judges in court proceedings by introducing limitations on engagement in certain activities and introducing a code of conduct. However, some of these limitations have been extreme and undermined the fundamental rights of the judges.

The objective of this paper is to map out the existing legal framework that ensures the independence of the judicial branch in Afghanistan and the reasons why it has not been able to best use this feature and act as an essential pillar of power in Afghanistan. To achieve this goal, the paper relies on desk review of all relevant legal documents, including the Constitution, legislative documents, court decisions, academic writings and interviews with key informants including judges, defence attorneys, prosecutors, government officials, former members of the Independent Commission of Overseeing Implementation of the Constitution, members of civil society, parliament members and legal scholars.

To consolidate itself as an independent institution, the judiciary should establish an effective system of self-governance and be unconservative in defending its integrity. In addition, it is important that all actors, whether political or non-political, contribute to creating a culture of judicial independence. For such a culture to blossom, time is required, but it also needs the honest effort of judges, government officials, politicians, legislators, civil society, media and the public. More than anyone else, it is important that judges acknowledge their independence and pioneer exercising it.

The following are key recommendations to enhance judicial independence in the country. Full recommendations are enlisted in part four of this paper:

- Legislations that undermine independence of the judiciary or make the judicial branch hierarchically subordinate to the executive branch should be amended urgently. They include the Law on Organization and Jurisdiction of the Judiciary, the Code of Ethical Conduct for Officials of the Three Branches, Internal Rules of *Wolesi Jirga* and the Law on Financial Affairs and Public Expenditures.
- An appointment council comprising senior judges, members of the parliament, lawyers' associations, academia, representatives of relevant government agencies and civil society should be established to make recommendations on appointment and transfer of judges to the High Council of the Supreme Court. In line with constitutional provisions, the role of the President should be limited to awarding judicial commissions, dismissal of judges at the proposal of High Council of Supreme Court and acceptance of resignations and retirements of judges. Moreover, a selection committee should compile a list of qualified candidates for membership in the Supreme Court for the President to pick up his nominees from the list to the *Wolesi Jirga*.
- The process of assessment of judges needs serious reconsideration. To ensure an unbiased assessment process, clear criteria should be determined in the Law on Organization and Jurisdiction of the Judiciary for transfer and promotion of judges.
- Judicial review and constitutional interpretation both need to be reformed. For the short term, a law that articulates how article 121 is applied can make judicial review and constitutional interpretation more consistent. However, for the long run as part of constitutional amendments, establishing a court to conduct judicial review and constitutional interpretation, and providing a range of stakeholders and individuals access to it, is the solution.
- 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. The Supreme Court should also introduce mechanisms to regulate the affairs of the Directorate of Judicial Control and Surveillance and the Directorate of Inspection to prevent monopoly and misuse of authority in those two directorates.

- 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 the cabinet meetings, if an agenda needs inputs from judiciary, or meetings of Rule of Council and other committees.
- Inclusion of graduates of *madrasas* in the judicial stage should be stopped altogether. Stage programme and on-the-job trainings should be seriously enhanced and should include topics on the independence of the judiciary, separation of powers, human rights, judicial review, due process and accountability of courts, among other key topics.
- The United Nations (UN) Special Rapporteur on the Independence of Judges and Lawyers can be invited to assess the judiciary and Attorney General Office and share his recommendations with the Supreme Court and the other two branches.
- 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. Further, the Supreme Court should propose qualified nominees with strong management experience for the position of General Director of Administration of Judiciary to be appointed by the President as soon as possible.
- At the proposal of the Supreme Court, the executive and legislative branches should in principle agree on assigning a fixed percentage of the national budget to the judiciary without the possibility to decrease that budget annually. If the judiciary requires more money, it should provide its justifications for consideration in the budget process.
- The courts under the umbrella of the judicial branch should have jurisdiction over all cases, including adjudication of crimes committed by members of the National Army.
- The Supreme Court should reform the hierarchical order in the judiciary that makes the lower judges unreasonably dependent on their supervisors. Likewise, it should respect the fundamental rights of judges by developing guidelines for use of social media or making interviews by judges, letting them establish associations outside judiciary and relaxing restrictions on inclusion of judges in educational programmes.

Introduction

The separation of powers has a meaningful existence only if the judicial branch enjoys independence. An independent judiciary gives credibility to political systems and is also the force behind reinforcing democracy and the rule of law.¹ Today, most world constitutions have incorporated the main elements of judicial independence, a trend that is the result of the wave of democratisation in the 1980s² and the birth of various new states in the 1990s. Independence is now the trademark of judiciaries around the world.

Judicial independence is a multi-dimensional phenomenon with no concise definition. Institutional independence of the judicial branch and individual independence of the judges are the two main aspects of judicial independence.³ A third aspect that concerns protection of judges from their peers and supervisors inside the judiciary is also important.⁴ Despite its critical value, judicial independence does not mean the courts are unaccountable. While independence is the essential characteristic of the judicial branch, it is equally important that judges and courts be accountable for their performance and decisions. The necessity to hold court sessions publicly, make court decisions based on law and publish them and charge judges with disciplinary actions in case of violating the rules are examples to ensure the judges are accountable besides being independent in their decision making

The main topic of this research paper is articulation of the existent legal framework for protection of the Afghan judicial branch and the judges against outside influence. Basically, the flaws in constitutional design and the legislative framework that have contributed to an impaired judicial branch are analysed in depth. In addition, and perhaps more importantly, the aim of this paper is to examine the challenges and impediments that have directly affected the judicial branch in acting as a true independent branch of the state. The study of these two aspects provides us a better picture of how “separation of powers” has panned out under the current constitutional order and whether the judiciary has accomplished its expected role of making the other two branches accountable and protecting the fundamental rights of individuals.

Signalling its importance, various international and regional legal instruments endorse the independence of the judiciary.⁵ In 1985, the General Assembly of the UN endorsed a resolution that outlines the basic principles of judicial independence.⁶ The Bangalore Principles of Judicial Conduct and its commentary,⁷ which are globally recognised and used as a guideline for national legislation on judicial conduct, along with a number of other documents adopted by regional institutions, including the recommendations of Council of Europe and the Beijing Statement of the Principles of the Judicial Independence, have also defined and mapped out the scope of judicial independence.⁸ Despite extensive recognition of judicial independence in the national legislations and international instruments, the incursion on courts and judges have been frequent, which resulted in courts

- 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/Commentry_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 Shimon Shetreet, “Judicial Independence: New Conceptual Dimensions and Contemporary Challenges,” in *Judicial Independence: The Contemporary Debate* (Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985), 590-681. 590.
- 4 Ibid.
- 5 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>.
- 6 “Basic Principles on the Independence of the Judiciary, Endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985” (New York, United Nations, 1985).
- 7 García-Sayán, “Report of the Special Rapporteur on the Independence of Judges and Lawyers.” 4.
- 8 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) as cited in the previous reference.

failing to exercise independence.⁹ While the executive branch is usually blamed for intrusion on the independence of the judicial branch and the judges, legislators and even senior judges can exert a high level of influence over the judges in the lower courts.

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, institutional independence of the judiciary 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. 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, largely dependent to the executive branch, that has failed to act as the guardian of fundamental rights of the citizens like many of its counterparts in constitutional democracies around the world.

This paper determines that it is both the legal framework and flawed practices that have resulted in the declining role of the judicial branch and the resulting implications for the future of separation of powers in Afghanistan. In addition, the on-going efforts to start the peace negotiations and political agreements may end up in amending the Constitution. This paper outlines key recommendations for enrichment of judicial independence for consideration in a potential constitutional amendment process.

The paper examines different aspects of judicial independence in Afghanistan. Part one gives an overview of judicial independence, its elements and key aspects. Part two briefly examines the evolution of judicial independence in Afghanistan before 2004. Recognition and application of judicial independence under the current Constitution will be examined in part three. Based on the analysis in the initial three parts, part four offers a set of recommendations and way forward for enhancement of judicial independence in Afghanistan.

Research Methodology

The methods used for this paper are desk review and expert interviews with key informants. The desk review was conducted through 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. Because of the sensitivities and restrictions for making interviews, the judges who shared their experience requested for anonymity. Due to outbreak of COVID-19, I had to leave my trip to Afghanistan incomplete and conduct interviews using online methods.

The paper is a theoretical study of judicial independence and its applicability around the world. The evolution of judicial independence in the history of Afghanistan and the applicability and practice of judicial independence under the Constitution of 2004 are an empirical study. The unavailability of published court decisions makes an in-depth analysis of how individual judges decide cases more difficult. Once the judiciary starts publishing court decisions, more research is needed to examine the influence of outside factors on judicial decision-making processes.

⁹ Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges." 606.

PART ONE: JUDICIAL INDEPENDENCE IN A NUTSHELL

1. What Constitutes “Judicial Independence?”

Judicial independence is a complex and contested subject,¹⁰ and there is not a unified definition of it. The following definitions elaborate the meaning of judicial independence:

*Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law.*¹¹

*[Judicial independence] refers to the insulation of the judiciary from the influence of other political institutions, interest groups, and the public.*¹²

While the above definitions shed light on different aspects of judicial independence, the following can offer a more comprehensive definition: judicial independence is a principle based on which the judges can make decisions without undue influence from other actors, including their peers and supervisors, and the judiciary as an institution is protected against pressures of political actors. Constitutions and legislations usually outline a “package”¹³ to ensure independence of the judiciary. Prominent scholars have pointed to three common aspects:¹⁴ institutional independence of the judiciary, individual independence of judges and independence of the judges from influence exerted from inside the judiciary.

Judges may not be able to make independent decisions if they are not protected against outside influence. Therefore, as a branch of the state, the judiciary should possess a separate personality and not be influenced by the other two branches. However, institutional independence of the judiciary is not an end, but a means to protect the impartiality of the judges,¹⁵ an important prerequisite for the rule of law. There are certain aspects like non-intervention in the affairs of the judiciary, authority of the judiciary to prepare its own budget, appointment of administrative staff and determination of the jurisdiction of the courts that are necessary for the independence of the judiciary as an institution.¹⁶ On the other hand, the judicial branch does not control financial resources; it does not have an executive force and does not have the power to enforce its decisions. As a result, unless the other two branches abstain from intrusion in the judicial affairs and willingly provide support to it, the judiciary cannot function, let alone perform independently. An institutionally independent judiciary plays a critical role in the constitutional order and the process of “checks and balances”. Judges can ensure that no one, including executive officials and members of the legislature, is above the law. They can also ensure superiority of the Constitution by conducting judicial review. A dependent judiciary, in contrast, abets exploitation of power and weakens the rule of law. In these circumstances, the judiciary is usually used to rubber-stamp unlawful decisions of the executive branch.

10 Melton and Ginsburg, “Does De Jure Judicial Independence Really Matter?,” 190.

11 Robert L. Bayman, “Judicial Independence: A Cornerstone of Democracy Which Must Be Defended,” *American College of Trial Lawyers*, 2006, https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/actl_judicial_independence_a_cornerstone_of_democracy.pdf?sfvrsn=4. 1.

12 G. Allan Tarr, “Judicial Independence and State Judiciaries,” in *Judicial Independence: Essays, Bibliography, and Discussion Guide* (Chicago: American Bar Association, Division for Public Education, 1999). 8.

13 Vicki C. Jackson, “Judicial Independence: Structure, Context, Attitude,” in *Judicial Independence in Transition*, Edited by Anja Seibert-Folhr (New York; Heidelberg: Springer, 2012). 27.

14 Shetreet, “Judicial Independence,” 598-99.

15 Shimon Shetreet and Christopher Forsyth, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Leiden, Boston: Brill | Nijhoff, 2011). 3.

16 Shetreet, “Judicial Independence,” 599.

Judges are the public face of any judicial system whose binding decisions make a great impact on the lives of the citizens.¹⁷ Justice can be perceived as fair only if the judge that declares justice is independent and unbiased. For a judge to be independent, it is important that he is appointed through a fair process, cannot be removed without credible reasons, his remuneration cannot be diminished, his tenure is adequately long and there are measures in place that ensures his impartiality and requires him to make decisions based on law.¹⁸ This is called individual independence.

Moreover, judges should also be protected from undue influence of their own supervisors and senior officials in the judiciary.¹⁹ Because promotion and transfer of judges is usually managed by their superiors, the hierarchy in the judicial branch can have a chilling impact on their independence.²⁰ Internal structure and regulatory arrangements in the judiciary have an undeniable role on the independence of lower court judges. As an organisation, there is always some level of hierarchy in the judiciary; however, this should be limited to administrative matters and should not impact how judges decide a dispute.²¹ The judges that work in judiciaries with a higher level of hierarchy are increasingly exposed to pressures from their supervisors, while in judiciaries with non-hierarchical models of judicial organisation, as is the case in many common law countries, judges may decide cases more freely.

2. Islam and Independence of the Judge and the Judiciary

In the early years of Islam, the Prophet Mohammad (PBUH) personally resolved disputes, though the Prophet also assigned his companions to resolve disputes.²² The first caliph considered judgement as an inherent part of his tasks.²³ During the tenure of the second caliph, expansion of territory exposed the Islamic Caliphate to new cultures and traditions and the governors struggled in parallel management of executive and judicial tasks. As a result, the caliph delegated judges to have the exclusive job of making judicial decisions.²⁴ As such, judgement was perceived as a religious duty, because judges were considered as representatives of the *Uli-al-Amr* (the Muslim caliph or ruler).²⁵ Though this perception might negate the social and formal aspects of judicial decision making, it still exists in Muslim countries, including Afghanistan. Assignment of judges to decide cases highlighted the beginning of separation of judicial tasks from executive tasks, though judges were still considered as delegates of the caliph.

17 “Corruption Prevention: Members of Parliament, Judges and Prosecutors - Conclusions and Trends,” Evaluation Report (Group of States Against Corruption, October 2017), <https://rm.coe.int/corruption-prevention-members-of-parliament-judges-and-prosecutors-con/16807638e7>. 17.

18 Shimon Shetreet, “Judicial Independence: New Conceptual Dimensions and Contemporary Challenges.” 598.

19 Ibid. 599.

20 Ibid. 641.

21 Ibid. 642.

22 Ali bin Abi Talib and Moaz bin Jabal were assigned as judges for example.

23 Martin Lau, “The Independence of Judges Under Islamic Law, International Law and the New Afghan Constitution,” *Max-Planck-Institut Für Ausländisches Öffentliches Recht Und Völkerrecht*, no. 64 (2004): 917-27. 920.

24 Hazratgul Hessami, *Tarikh Qaza dar Afghanistan (History of Judiciary in Afghanistan)*, vol. 1, 2 vols. (Kabul: Saeed Publishing, 2009). 17-18; Nadirsyah Hosen, “Checks and Balances Mechanism in Islamic Constitutionalism: A Critical Reflection,” *Journal of Islamic Studies and Culture* 7, no. 2 (December 2019): 26-38. 36.

25 Lau, “The Independence of Judges under Islamic Law,” 921.

There are two views on independence of judges in the early stages of the Islamic era. The dominant view asserts that Islam did not support judicial independence since it empowered the head of the state to control the judiciary.²⁶ Under this view, the caliph or *Uli al-Amr* appointed judges as his representatives, which also meant the judiciary was part of the executive branch, even though judges were considered impartial in their decision making.²⁷ Likewise, the head of the Islamic state could appoint the judges; however, dismissal of the judge could not take place by him except if it was based on community interests.²⁸ Further, since courts could be influenced by the governors, separate administrative courts (*Mahakem Mazalem*) were established which had the authority to receive complaints against the governors and other high-ranking officials.²⁹ Nevertheless, these courts were not independent of the Caliph, but could exert effective check on the governors and other powerful officials.³⁰ Therefore, the first opinion does not categorically reject the independence of judges. Instead, it limits the role of governors in removing judges, so once a judge is appointed, he is empowered to make judgements freely.

The opposite opinion is that Islam recognises judicial independence since the concept of *Ijtihad* requires a high level of independence of the judges in conducting personal reasoning.³¹ A common criticism of this view is that not all judges in the early governments of the Islamic era were *mujtahid*; however, a number of Muslim theorists, including Muhammad Idris al-Shafi'i, Abd al-Wahab Khallaf and Abu Hasan al-Mawardi, emphasised that many judges were practicing *Ijtihad*.³² *Ijtihad* requires personal reasoning and demonstrates independence in decision making.³³ After *Umayyads*, *Madhhabs* (Islamic schools of thought) were established during the *Abbasid* dynasty due to the need for reasoning and issuance of new rulings of Islamic Law. Few *Abbasid* rulers provided more space for judicial independence. Harun Al-Rashid, for example, fully authorised Chief Justice Abu Yusuf in judicial affairs.³⁴ Some Islamic scholars report that the recommendations of the Chief Justice were sought before judicial appointments were made by Harun Al-Rashid.³⁵ There were also reports of judgements made by Abu Yusuf that did not favour Al-Rashid.³⁶ This has been a turning point, since the chief justice was not only delegated the judicial authorities of the caliph; rather, he was authorised as a state office to decide disputes on his own, without seeking advice or instruction from the caliph.³⁷ It was a great step toward institutional independence of the judicial power at the time. The example of Abu Yusuf could be simply an exception, though one cannot ignore the signs of independence exercised by the judges at the early stages of Islamic government and can be used to support the notion that independence of the judges had been an acceptable principle at the time.

26 Mohammad Hashim Kamali, "Appellate Review and Judicial Independence in Islamic Law," in *Islam and Public Law: Classical and Temporary Studies*, Chibli Mallat, Ed. (Boston: Graham and Trotman Press, 1993), 50-83. 50; Ata ur Rehman, Dr. Mazlan Ibrahim, and Dr. Ibrahim Abu Bakar, "The Concept of Independence of Judiciary in Islam," *International Journal of Business and Social Science* 4, no. 2 (February 2013). 68.

27 Ata ur Rehman, Dr. Mazlan Ibrahim, and Dr. Ibrahim Abu Bakar, "The Concept of Independence of Judiciary in Islam," *International Journal of Business and Social Science* 4, no. 2 (February 2013). 68.

28 Mohammad Hashim Kamali, "Appellate Review and Judicial Independence in Islamic Law," 60.

29 Sarwar Danish, *Huqoq Edari Afghanistan (The Administrative Law of Afghanistan)* (Kabul: Ibn Sina Higher Education Institute Publications, 2013), 56.

30 Nadirsyah Hosen, "Checks and Balances Mechanism in Islamic Constitutionalism: A Critical Reflection," *Journal of Islamic Studies and Culture* 7, no. 2 (December 2019): 26-38. 36

31 Kamali, "Appellate Review and Judicial Independence in Islamic Law," 50.

32 Nadirsyah Hosen, "Checks and Balances Mechanism in Islamic Constitutionalism: A Critical Reflection." 36.

33 Kamali, "Appellate Review and Judicial Independence in Islamic Law," 50.

34 Ibid. 55.

35 Ibid.

36 Lotfurahman Saeed (Professor at Sharia Law Faculty of Kabul University and former member of Afghanistan Independent Commission of Oversight on Implementation of the Constitution), online pers. comm., 25 January 2020.

37 Kamali, "Appellate Review and Judicial Independence in Islamic Law," 55.

These positive developments that illustrate respect for judicial independence during the *Umayyad* and *Abbasid* dynasties were not consistent and reports of misuse by the executive officials have been frequent.³⁸ For instance, a number of prominent scholars rejected serving as senior judges because they feared they may not be able to decide cases independently.³⁹ Taking into account these examples, it can be concluded that Muslim judges practiced individual independence in their decision making; however, the legal foundation for institutional independence of the judiciary, as a separate entity, has not been strong, as we see in the modern judiciaries. As a result, contemporary constitutions in several Muslim countries opted for a constitutional design modelled on principles of separation of powers.

The notion that judges are designated by and responsible to *Uli al-Amr* had tremendous impact on their independence and the establishment of the judiciary as an independent entity in Afghanistan. Historically, Afghan judges, most with religious or *Sharia* law background, believed they were making judgements on behalf of *Uli al-Amr*. Even today, the majority of judges are graduates of *Sharia* Law schools or religious *madrasas* (schools).⁴⁰ The Constitution of 2004 also reflects this notion by assigning extensive powers in appointment of members of the judiciary to the President. Relying on this notion, the Law on Organization and Jurisdiction of the Judiciary, drafted by the Supreme Court, has expanded the role of the President and the executive branch in the judiciary beyond the limits of the Constitution. Two examples that the Constitution does not authorise are the authority of President to appoint senior judges (after awarding judicial commission) and the requirement of the Head of the Supreme Court to report to the President. It seems the judiciary obliges itself to continue the old tradition of being attached to the head of the state. According to a senior official of the Supreme Court, the judges consider their job as succession to the Prophet and are appointed by the most senior judge, the President.⁴¹ This perception contradicts the modern definition of judicial independence and separation of powers since judges should be immune from outside influence and be obedient to the law only. An incorrect application of *Sharia*-based notions in Afghanistan has obstructed creation of a culture of independence and is a key cause for weakening the judiciary.

3. Recognition of Judicial Independence in International Instruments

The international community attaches particular importance to independence of the courts and the judges. Protection of fundamental rights of individuals remains a key objective of judicial independence.⁴² Several international human rights instruments reflect the rational relationship between judicial independence and human rights protection. The following are the key international instruments that are solely dedicated to judicial independence or have embedded text on it:

Universal Declaration of Human Rights: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁴³

38 Ibid. 56.

39 Nadirsyah Hosen, “Checks and Balances Mechanism in Islamic Constitutionalism: A Critical Reflection.” 37.

40 Lutforahman Saeed, “The Role of *Sharia* in the Afghan Courts’ Decisions: A Study of Criminal Cases after the 2004 Constitution” (University of Erlangen, 2019). 106.

41 Abdullah Attayee (Director of Judicial Education at the Supreme Court of Afghanistan) pers. comm., 25 January 2020.

42 Linda Camp Keith, “Judicial Independence and Human Rights Protection Around the World,” *Judicature* 85 (February 2002): 194-200. 194.

43 UN General Assembly, “Universal Declaration of Human Rights,” (217 [III] A) § (1948), <http://www.un.org/en/universal-declaration-human-rights/>. article 19.

International Covenant on Civil and Political Rights: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁴⁴

The Basic Principles on the Independence of the Judiciary: The Basic Principles on the Independence of the Judiciary, adopted by the General Assembly in 1958,⁴⁵ outline key values required for independence of the judiciary. Though these principles do not have a mandatory force, they make an acceptable module used by countries as guiding principles.

The Bangalore Principles of Judicial Conduct: These principles outline all aspects of judicial conduct and have a special emphasis on judicial independence. The Bangalore Principles are based on six values: independence, impartiality, personal integrity, propriety, equality, and competence and diligence.⁴⁶ These principles are accepted and recognised globally by many international forums and found their way to national legislations.⁴⁷

Appointment of Special Rapporteur on the Independence of Judges and Lawyers: In 1994, the UN Commission on Human Rights appointed a special rapporteur to inquire into reports of attacks on judges and the judiciary and provide recommendations on how to enhance judicial independence.⁴⁸ The Human Rights Council has also extended the mandate of the special rapporteur since then.⁴⁹ The office of the special rapporteur also provides technical support to the requesting judiciaries.⁵⁰ The mechanism used by the special rapporteur is a practical tool to ensure independence of judges and lawyers.

Regional human rights instruments, such as the European Convention on Human Rights⁵¹ and the American Convention,⁵² also embed text on independence of the judicial branch.

44 “International Covenant on Civil and Political Rights,” 999 UNTS § (n.d.). Article 14, paragraph 1.

45 “Basic Principles on the Independence of the Judiciary, Endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.”

46 The Bangalore Principles of Judicial Conduct.

47 “Commentary on the Bangalore Principles of Judicial Conduct.” iv.

48 “Special Rapporteur on the Independence of Judges and Lawyers,” *Office of the High Commissioner for Human Rights*, accessed April 3, 2019, <https://www.ohchr.org/en/issues/judiciary/pages/idpindex.aspx>.

49 “Extension by the Human Rights Council of All Mandates, Mechanisms, Functions and Responsibilities of the Commission on Human Rights” (Human Rights Council Resolution 2006/102, 30 June 2006), <http://ap.ohchr.org/documents/E/HRC/decisions/A-HRC-DEC-1-102.doc>.

50 Stefano Sensi (Legal Expert in Office of Special Rapporteur on the Independence of Judges and Lawyers) pers. comm., 6 February 2020.

51 “European Convention on Human Rights” (1950), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>. article 6, para. 1.

52 “American Convention on Human Rights” (1969), <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>. article 8, para. 1.

PART TWO: A BRIEF HISTORY OF JUDICIAL INDEPENDENCE IN AFGHANISTAN

Despite qualified individual independence of judges in resolving criminal and civil cases after emergence of Islam, Afghanistan is a late comer in establishing the judiciary as a separate branch of the state. The first Constitution of Afghanistan emerged in 1923; however, it was not until the second half of the 20th century that the judiciary became a recognised branch of the state. In this part of the paper, a brief overview of how the Afghan judiciary exercised independence is examined.

1. Courts before the Establishment of Modern State Institutions in Afghanistan

After its establishment in 1747, the State Afghanistan did not have a separate institution as the judiciary; however, judges were assigned by the kings and the governors to resolve disputes. Though each judge enjoyed enormous independence and power, the king and other senior officials could intervene and issue the final decision.⁵³ The first significant step in the consolidation of the courts happened in the 1880s, during which an appeals court was established for the first time.

As part of the unification and centralisation plans of Amir Abdul Rahman Khan, two important developments took place: the establishment of state courts along with Sharia courts, and the introduction of *Assas-ol-Quzzat* (fundamentals for judges), which regulated the judicial affairs and was also used as the code of conduct of judges.⁵⁴ Abdul Rahman Khan also allowed Hindus and Jews to sit in the *Panchat* courts⁵⁵ to ensure commercial courts were perceived as independent; thus, non-Muslim merchants got encouragement for investment and helped his consolidation project. However, during the rule of Abdul Rahman Khan and his successor Habibullah Khan, Amir and some royal family members had the final say over decisions of the court,⁵⁶ with individuals able to appeal court decisions to Amir.⁵⁷ For Amir Abdul Rahman Khan, courts were only a tool to expand the state apparatus to the provinces and consolidate a central power in the country, a tool that was to a great extent successful. Under his leadership, every institution had to report to the Amir, which left no room for independent institutions.

53 Mountstuart Elphinstone, *Account of the Kingdom of Cabul and Its Dependencies in Persia and India* (1842). 246.

54 Kristina Alekseyeva et al., *An Introduction to the Laws of Afghanistan*. 74.

55 Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden: Brill Academic Pub, 1997), 220.

56 Louise Dupree, *Afghanistan*, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1980). 441-42.

57 Alekseyeva et al., *An Introduction to the Laws of Afghanistan*, 74.

2. Judiciary under the First Constitutions of Afghanistan

Following declaration of independence in 1919, there was a high hope that a government based on the concept of “separation of powers” with distinct executive, legislative and judicial branches would emerge. However, the first constitution of Afghanistan did not foresee establishment of the judiciary and legislature as separate branches.

The other relevant point was prohibition of the establishment of special courts outside state courts.⁵⁸ As a sign of dependence to the executive power, the Minister of Justice had the lead in *Tamiz* (Supreme) Court, which had a chair and four members with the authority to review cases from the appeal courts.⁵⁹ The King had the power to appoint the Chief Justice, the judges and *Muftis*,⁶⁰ while appointment committees in the provinces had the authority of appointing judges in the provincial courts.⁶¹ Despite legal protections for courts against outside influence, Amanullah Khan personally issued a verdict for execution of *Mullah Lang*, the leader of a popular anti-government rebellion.⁶² Though flawed, the first steps were critical in restricting the unlimited individual independence of the judges and to make them accountable for their decisions. This was revolutionary at the time since the state was breaking the monopoly of the religious and local elite over dispute resolution mechanisms. The first call for amending the Constitution in Afghanistan regarded an increase in the independence of judges in the religious courts.⁶³ The demand for amending the Constitution showed the emergence of a competition between *Sharia* Law and state laws that is still continuing in Afghanistan.

On judicial affairs, the Constitution of 1931 abolished the four-tier court system that had been introduced under the first Constitution of Afghanistan and reinstated the *Sharia* courts.⁶⁴ The role of religious leaders also increased and *Hanafi* jurisprudence became the main source of law. The Constitution of 1931 preserved the text of the 1923 Constitution on non-interference in judicial affairs; however, it recognised the possibility of appeal to the Prime Minister and the King if the parties to a case were not content with the decision of the courts.⁶⁵ Absence of a separate judicial branch was a big blow to the post-independence era in Afghanistan. Taking into consideration these flaws, the 1964 Loya Jirga recognised the judiciary as a separate branch of the state, which paved the way for a complete overhaul of the judicial system.

58 Constitution of Afghanistan, 1923. article 54.

59 Judge Shah Ali Asghar Shahrstani, *Sair Tarikhi Mohakem Jazayee Dar Afghanistan “Historic Evolution of Criminal Courts in Afghanistan”* (Kabul: Nebraska Educational Press, 2007), 38.

60 Mufti derives the ruling on a point of Islamic law that is brought before the judge. The judge then issues the verdict using the ruling introduced by Mufti.

61 Shahrstani, *Sair Tarikhi*, 44.

62 Mohammad Ashraf Rasouli, *Morori Bar: Qawanin Asasi Afghanistan “An Overview of: Constitutions of Afghanistan,”* 2nd ed. (Kabul: Saeed Publishing, 2013), 78.

63 Dupree, *Afghanistan*, 463.

64 “Constitution of Afghanistan” (1931). article 87.

65 Ibid. article 24.

3. Constitution of 1964: Birth of an Independent Judiciary

A basic legal framework of governance emerged between 1919 and 1964; however, it had never met the standards of a government of separation of powers. In 1964, with the introduction of the new constitution, the best opportunity to fix this problem emerged. Introduction of an independent judiciary that performs its duties side by side with the executive and legislative branches⁶⁶ and the establishing the two-house legislative branch were meant to amend the power of the executive branch and constituted a major step toward a representative government and separation of powers.

The new Constitution prescribed the Supreme Court as the highest court of the country,⁶⁷ and established other courts at the provincial and district levels. Members of the Supreme Court and all judges were appointed by the King.⁶⁸ The Supreme Court was responsible for transfer, promotion, questioning and proposal of retirement of the judges.⁶⁹ However, the King still had the authority of appointment of the head and members of appellate courts and heads of primary courts.⁷⁰ In cases of a judge committing a crime, the Supreme Court could propose removal of the judge to the King.⁷¹ This article of the Constitution used a general language that could be used for removal of judges for committing any crimes, whether big or small. In addition, to ensure the Supreme Court's independence, a cumbersome and complex process (which was never triggered) was introduced for removal of its members.⁷² The Supreme Court had a role in preparation of its budget⁷³ and recruitment of its administrative staff;⁷⁴ however, it did not have the capacity to self-govern, and, therefore, remained institutionally dependent on the executive branch.

The Constitution also imposed specific restrictions on judges, such as a prohibition against taking on certain occupations or membership in political parties, that were aimed to enhance their impartiality.⁷⁵ The term of Supreme Court members was 10 years; however, the King could extend the tenure of each judge.⁷⁶ Members whose term was not extended were entitled to financial remuneration for the rest of their life.⁷⁷ The extendable term was a factor for undermining independence of the Supreme Court members who were prone to accepting outside influence in exchange for extension of their term.

In spite of the legal gaps, there were signs the new judiciary was functioning well and the judges exercised their independence more freely than before. For example, when the Queen called a Supreme Court member, Samar Gul, to change a death sentence, the Supreme Court member declined and recommended talking with the King since he could constitutionally accept or reject death penalties.⁷⁸ Nonetheless, one thing that did not change immediately was the attitude that had considered the judiciary as an attachment of the executive branch.⁷⁹ As a new branch of the state, the judiciary took important steps in establishing itself as a trusted department. However, advancement and independent performance required more time, which did not occur since the Constitution was nullified by the new regime.

66 "Constitution of Afghanistan" (1964). article 97.

67 Ibid. article 98.

68 Ibid. article 9.

69 Ibid. article 99.

70 Afghanistan Law of the Jurisdiction and Judicial Organization of the Kingdom, 1967. articles 37 and 45.

71 Constitution of Afghanistan, 1964, article 99.

72 Ibid. article 106.

73 Ibid. article 107.

74 Ibid.

75 Ibid. article 105.

76 Ibid. article 106.

77 Ibid. article 105.

78 Saeed, pers. comm., 25 January 2020.

79 Hessami, *Tarikh Qaza dar Afghanistan (History of Judiciary in Afghanistan)*, 181-82.

4. Military Coup and Fall-down of Judicial Independence

Presidential Decree No. 3 of the first republic, devoted to the judicial affairs, scrapped the independence of the judicial organ and put management of the judiciary in the executive branch. The powers that had been foreseen for the King were transferred to the President.⁸⁰ The most dramatic shift occurred in relation to the powers of the Chief Justice, which were all assigned to the Minister of Justice,⁸¹ who was also working as Attorney General and was heading a judicial forum of his ministry that replaced the Council of the Supreme Court. Unfortunately, the decisions made after declaration of the republic dashed the progress achieved in the judicial branch under the 1964 Constitution. The judiciary, which had been the real winner under the constitutional reforms of 1960s, had to take several steps backward.

The new Constitution introduced in 1976 deprived the judiciary of its independence. The Constitution did not use the word “independence” when it mentioned the judiciary as a pillar of the state.⁸² Unlike previous constitutions that prohibited removal of any dispute from jurisdiction of the judicial branch, the 1974 Constitution made the “conditions of war” as an exception.⁸³ The Constitution also lowered qualifications for the Supreme Court members⁸⁴ and relaxed the procedure for removal and trial of members when they were accused of crimes pertaining to their job.⁸⁵ The tenure of Supreme Court members was reduced to 5 years, which could be extended for another 5 years by the President,⁸⁶ a move that is characteristic of a dependent judiciary.⁸⁷ Overall, the Constitution introduced a government in which the President was the central figure, with all other agencies dependent. The judiciary was, unfortunately, a big victim in this process. In practice, the articles of the Constitution about the Supreme Court never got implemented because the Constitution was nullified after a leftist military coup in April 1978.

5. Courts as Mechanisms of Suppression during Communist Regime

Despite abolishment of the 1976 Constitution, executive decrees of the communist administration kept the same arrangements that had undermined the judiciary in the previous constitution. The Judicial High Council replaced the Supreme Court and was held responsible to the leadership of the state⁸⁸ by submitting periodic reports of the courts to the Revolutionary Council.⁸⁹ Furthermore, the communist regime also established military courts that had jurisdiction not only over cases that involved the military personnel, but also over all crimes against the revolution, national security or public interests.⁹⁰ The Basic Principles of Democratic Republic of Afghanistan outlined the same arrangements and asked the Supreme Court to report its activities to the Revolutionary Council.⁹¹ The Constitution, however, said the judges are individually independent in their decisions and should

80 “Afghanistan’s Presidential Decree No. 3,” Official Gazette No. 245 § (1973). paragraph 2.

81 Ibid. paragraph 5.

82 “Constitution of Afghanistan,” Official Gazette 360 § (1976). article 96.

83 Ibid. article 98.

84 Ibid. article 107.

85 Ibid. article 111.

86 Ibid. article 107.

87 Shetreet, “Judicial Independence,” 624.

88 “Decree No. 3 of the Democratic Revolutionary Council of Afghanistan,” Official Gazette No. 398 § (1978). article 2.1. The Revolutionary Council consisted of leaders of the leftist parties, Khalq and Parcham and a number of military officers who led the military coup.

89 Ibid. article 2.3.

90 Ibid. article 8.2.

91 “Basic Principles of Democratic Republic of Afghanistan,” Official Gazette No. § (1980). article 55.

follow the laws only.⁹² Like many other totalitarian regimes that lacked independent judiciaries,⁹³ the courts in Afghanistan unfortunately failed to protect the fundamental rights of the citizens during this period and were even used to suppress the opposition.

Departing from the tradition of judicial dependence and in a move to signal a shift toward a more acceptable system of governance, the Constitution of 1987 introduced a number of democratic measures including recognition of independence of the judiciary and re-establishment of Supreme Court.⁹⁴ Nevertheless, the appointment process of members of the Supreme Court did not change much. The President had the authority to appoint members of the Supreme Court for 6 years.⁹⁵ It was in the 1987 Constitution that the President was mentioned as head of the state, and, in that role, he had power in the judicial and legislative branches.⁹⁶ The President had authority for awarding judicial commission, appointment, removal, retirement and promotion of judges.⁹⁷ Despite recognition of some aspects of judicial independence in the 1987 Constitution, in practice, change did not occur. Overall, the judges did not have independence during the communist administrations.⁹⁸ Some categorically ruled out the existence of judicial independence or due process.⁹⁹ The few steps taken to recognise judicial independence were too little and too late. Trust in the judiciary was lost many years back due to summary executions, unfair court processes and harsh sentences.

Though many judges had political affiliations with the ruling party,¹⁰⁰ judges during the communist regime were tolerating a lot of pressure and threats from the executive and military officials. Many judges who did not believe in the leftist values were killed or disappeared.¹⁰¹ This situation was harsh during administration of Amin and Karmal, and less during Taraki and Najibullah.¹⁰² The courts had an active role in justifying these violations, or at least they did not play their role as the guardian of the rule of law and fundamental rights of the citizens to prevent atrocities. This is partly due to judges being obliged to apply the laws even if they are in contradiction with human rights values.

6. Judicial Independence During the Civil War and the Administration of Taliban

The government of the *mujahiddin* was marred by internal conflicts that left the country in disintegration. Based on the division of state institutions among *mujahiddin* factions, the Supreme Court was given to the faction of Mohammad Nabi, who stuffed the courts with unqualified individuals.¹⁰³ During this period, anarchy ruled the country and the courts did not have normal operations. Though the previous constitution was presumably nullified, the structure of the judiciary based on the Law on Organization and Jurisdiction of the Judiciary remained in place.¹⁰⁴ Absence of justice was a feature of this period, and one of the reasons for emergence of the Taliban.

92 Ibid. article 56.

93 Shetreet, "Judicial Independence," 595-96.

94 "Constitution of Afghanistan" (1987). article 109.

95 Ibid. article 110.

96 Ibid. article 71.

97 Ibid. article 75.6.

98 Judge in Kabul Primary Court (anonymity requested), online pers. comm., 1 December 2019.

99 Saeed, pers. comm., 25 January 2020.

100 Ghizaal Haress (Assistant Professor of Law at American University of Afghanistan and former member of Afghanistan Independent Commission of Oversight on Implementation of the Constitution), pers. comm., 11 November 2019.

101 Saeed, pers. comm., 25 January 2020.

102 Ibid.

103 Ibid.

104 Mohammad Ashraf Rasouli, *Tahlil Wa Naqd Qanoon Asasi Afghanistan "Analysis and Critic of the Afghan Constitution"*, 3rd ed., vol. 2, 2 vols. (Kabul: Saeed Publishing, 2014), 254.

For the Taliban, judgements had to be conducted based on Hanafi jurisprudence, which could justify recruitment of hundreds of *madrasa* graduates in the courts. In 1998, when the Taliban conducted exams to hire new participants in the judicial stage, only graduates of *madrasas* were hired.¹⁰⁵ Though courts existed in areas controlled by the Taliban, the judicial branch was not independent of the Taliban leadership.¹⁰⁶ In political and important cases, Mullah Omar, the Taliban leader, had intervened and dictated the decisions.¹⁰⁷ Due process, the rule of law and the independence of judges were outlandish concepts under the Taliban. With no parliament and elected government, the emergence of an independent judicial branch never came close to reality.

7. Recognition of Judicial Independence in the Bonn Conference

The Bonn Agreement in 2001 recognised the independence of the judicial branch and foresaw establishment of a Supreme Court and other courts during the interim government.¹⁰⁸ Accordingly, the chapter on the judiciary in the 1964 Constitution was reinstated with few changes and modifications. Political interference had been a frequent phenomenon during the interim and transitional governments and the courts were not performing independently or coherently.¹⁰⁹ Hamid Karzai appointed Fazl Hadi Shinwari, a *madrasa* graduate, as the Chief Justice. Chief Justice Shinwari appointed several *madrasa* graduates and unqualified individuals as judges across Afghanistan.¹¹⁰ Filling the judiciary with his allies who did not have proper legal education did not help with professionalising the judicial branch. In addition, corruption became a visible characteristic of the judicial organ under his leadership.¹¹¹ Shinwari reportedly acted independently of the executive branch, though he has not been following rule of law, another reason why President Karzai limited the tenure of the next Chief Justice to only 4 years.¹¹² Unfortunately, the legacy of Shinwari haunted the judicial branch for several years, since many of his appointed judges were not capable of understanding and serving an independent and accountable judiciary. With judges serving up to retirement age, the consequences of those appointments have been drastic.

105 Saeed, pers. comm., 25 January 2020.

106 Primary court judge in Kabul (anonymity requested), pers. comm., 1 December 2019.

107 Ibid.

108 “Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions” (United Nations, December 5, 2001), <http://www.un.org/News/dh/latest/afghan/afghan-agree.htm>. article 2.2.

109 Martin Lau, “The Independence of Judges Under Islamic Law, International Law and the New Afghan Constitution,” *Max-Planck-Institut Für Ausländisches Öffentliches Recht Und Völkerrecht*, no. 64 (2004): 917-27. 926.

110 International Crisis Group, “Reforming Afghanistan’s Broken Judiciary” (Kabul/Brussels: International Crisis Group, November 2010)., 2; “A Guide to Property Law in Afghanistan” (Norwegian Refugees Council, 2011), <https://www.nrc.no/globalassets/pdf/reports/a-guide-to-property-law-in-afghanistan.pdf>. 21.

111 Carlotta Gall, “Afghan Parliament Rejects Chief Justice Nominee,” *The New York Times*, May 28, 2006, <https://www.nytimes.com/2006/05/28/world/asia/28kabul.html>.

112 Haress, pers. comm., 17 October 2019.

PART THREE: JUDICIAL INDEPENDENCE UNDER CONSTITUTION OF 2004

The Constitution of 2004 cultivated a separation of government powers under which all three branches can check each other to a varying degree. Nevertheless, the Constitution designates tremendous powers to the President, who is the figurehead of the state and exercises a number of powers in the legislative and judicial branches. It is no surprise that the executive has been the dominant branch post-2004, as it has been throughout much of history. Though the legislature has not met expectations, it has created its own moments. The presence of several jihad leaders and ethnic elites changed the *Wolesi Jirga* into a strong forum that was not easy to challenge or overcome. As such, on several occasions, like the case of *Spanta*, or a vote of confidence or impeachment of government senior officials and challenging government proposed laws, the *Wolesi Jirga* confronted the executive and judicial branches. The judicial branch, on the other hand, has acted passively and is seen as less influential among the state branches. As the independent and non-political branch, the judiciary has enhanced its structures and procedures post-2001; however, it still needs to win more ground to establish itself in the power structure in Afghanistan.

In this part of the paper, institutional independence of the judicial branch, individual independence of the judges and independence of judges from their supervisors in Afghanistan will be discussed. In addition, a few cross-cutting topics such as impact of judicial review, human rights and accountability on judicial independence and vice versa will be examined. The objective is to understand the legal framework, but also the practical application of judicial independence in Afghanistan. A brief introduction of the judicial system of Afghanistan and its actors precedes that discussion.

1. An Overall Introduction of the Judicial System in Afghanistan

The current judicial system has preserved most characteristics of the system introduced by the 1964 Constitution. The courts are the main actors of the judicial system, and the police, prosecution offices, Ministry of Justice and General Directorate of Prisons are involved in the adjudication process of disputes and enforcement of court decisions. Only the courts are part of the judiciary; all other institutions are part of the executive branch. The police detect crimes and arrest suspects. Prosecution offices investigate the accused and bring cases against them in the court. The Ministry of Justice is engaged in preparation of dossiers and enforcement of court decisions in civil disputes; it also supervises the centres where juveniles guilty of crimes or delinquency are kept. Moreover, the Directorate of Government Cases of the Ministry of Justice represents the government in the courts. Furthermore, the General Directorate of Prisons, a newly established office, runs the prisons.

The judiciary consists of three tiers of courts: the primary courts, the appellate courts and the Supreme Court.¹¹³ In addition to military courts, special courts can be established for prosecution of the President, ministers and members of the Supreme Court.¹¹⁴ The Supreme Court can also form specialised courts at the primary and appellate levels. Each district and provincial centre has primary courts. District primary courts have at least three judges, while, in exceptional cases, this could be reduced to only one member.¹¹⁵ Jurisdiction of district primary courts is general and covers all civil, criminal and family-related disputes on the first instance.¹¹⁶ However, some cases that are complex or relate to specialised courts are not adjudicated in the district courts.¹¹⁷ Generally, the provincial centres have four primary courts: (1) city primary court, (2) commercial primary court, (3) family

113 "Constitution of Afghanistan," Official Gazette 818 § (2004). article 116.

114 Ibid. articles 69, 78, 122 and 127.

115 "Law on Organization and Jurisdiction of Judiciary," Official Gazette 1109 § (2013). Article 69.

116 Ibid. article 67.

117 Judge in Kabul Primary Court (anonymity requested) pers. comm., 1 December 2019

affairs primary court, and (4) juvenile primary court.¹¹⁸ The city primary court is the largest among these courts and is divided into a number of *diwans* (divisions).¹¹⁹ In primary courts, the accused and prosecutors in criminal cases, and disputants in civil and commercial cases appear before the court with the evidence and defence of their claims. Though the laws have tried to limit the time each case takes, civil and commercial disputes in particular take a long time, which is one of the main factors that force the disputants to look for alternatives such as a compromise or referral to local *jirga* (council) for a quicker reconciliation.

At the provincial level, there is one Appellate Court¹²⁰ that hears all eligible disputes from the primary courts of the provincial capital and the districts.¹²¹ Each provincial appellate court has several subject matter *diwans*.¹²² The parties to a case can defend their claims before the bench as they did before the primary court. As a *de novo* trial, the appellate court can approve or amend the decision of the primary court. It can also strike down the primary court decisions and send the case back to the primary court for repeat of the court procedures.¹²³ Though the expectation is that disputes get resolved either at the primary court or appellate courts, the majority of cases end up in the Supreme Court's docks.

The Supreme Court leads the judiciary and has nine members. The President nominates the Head¹²⁴ and members of the Supreme Court and *Wolesi Jirga* members are constitutionally mandated to give a vote of confirmation.¹²⁵ The Supreme Court has nine *diwans* each led by a Supreme Court member, except for Head of Supreme Court who does not lead a *diwan*: (1) general criminal *diwan*, (2) public rights *diwan*, (3) public security *diwan*, (4) commercial *diwan*, (5) *diwan* of military personnel,¹²⁶ (6) *diwan* of civil rights and personal affairs, (7) *diwan* of elimination of violence against women, (8) *diwan* of crimes against internal and external security, and (9) *diwan* of juvenile.¹²⁷ The Supreme Court makes four types of decisions: (1) decisions on cases from the Appeal Courts, which it reviews for their compliance with the law;¹²⁸ (2) decisions pertaining to article 121 of the Constitution that fall under the judicial review mandate;¹²⁹ (3) decisions on issues such as change of court, extradition, proposing appointments and disciplinary actions; and (4) decisions pertaining to administrative needs of the judicial organ.¹³⁰ In the Afghan legal system, the Supreme Court enjoys extensive powers, with those over judges' personal affairs having made its members very influential. The role of the Head of the Supreme Court is critical since the laws assign several administrative authorities to that position. It is due to the dominant role of the Supreme Court that the independence of the judges inside the judiciary becomes critical.

118 Law on Organization and Jurisdiction of Judiciary. article 61.

119 Ibid. article 62.

120 Ibid. article 52.

121 Ibid. article 54.

122 Ibid. article 53.

123 Ibid. article 54.

124 The Constitution does not use the phrase "Chief Justice," which is a common title used to refer to the Head of the Supreme Court. Following the text of the Constitution, this paper also uses the title "Head of the Supreme Court".

125 Constitution of Afghanistan, 2004. article 117.

126 Law on Jurisdiction and Organization of the Judiciary. article 42.1.

127 The Law on Organization and Jurisdiction of the Judiciary mentions five *diwans*, while the number of *diwans* has raised to nine under new revisions.

128 Law on Jurisdiction and Organization of the Judiciary. article 4.12.

129 Constitution of Afghanistan, 2004. article 121.

130 Law on Jurisdiction and Organization of the Judiciary. article 32.

2. Independence of the Judiciary Post-2004

The Constitution of 2004 recognises the judiciary as an independent branch of the state.¹³¹ Though the mere existence of constitutional provisions does not necessarily guarantee independence of the courts, it signals the importance of judicial independence in the constitutional order and guarantees higher assurances because the text of constitutions cannot be amended as easily as ordinary legislation. Therefore, the text of many world constitutions explicitly recognises independence of the courts.¹³² 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 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 judiciary budget. Moreover, the Law on Organization and Jurisdiction of the Judiciary has added extra measures with the objective to enhance independence of the courts and the judges. Among other topics, this law regulates admission to judicial cadres, appointment procedures, transfer of judges, on-the-job training, and the principle of impartiality. Additionally, all procedural laws, namely Civil Procedures Law, Criminal Procedures Law and Commercial Procedures Law, have special measures to ensure impartiality of the judges.

A comparison between Afghanistan laws and international guidelines on judicial independence shows that the Afghan legal system has embedded the key requirements for independence of the judiciary. However, there are measures in place that negatively impact judicial independence. These include the necessity of the signature of the President on regular appointments of senior judges proposed by the Head of the Supreme Court, appointment of the Head of the Supreme Court by the President, approval of judiciary-related draft laws by the Cabinet before they go to the parliament and determination of the budget of judiciary, as part of proposed national budget, by the executive branch, among others. Furthermore, article 127 of the Constitution on the removal of Supreme Court members fails to define the crimes that allow the parliament to try and impeach the members of Supreme Court. The following sections examine how institutional, individual and intra-judiciary independence is recognised by the legal system in Afghanistan and how each aspect fares in practice.

2.1. Institutional independence: a shallow design or failure in practice?

The Constitution and the laws recognise many factors that contribute to institutional independence of the judiciary; however, compared to individual independence of the judges, they are flawed. For example, the Constitution gives power to the judiciary to prepare its budget; however, it must be submitted to the executive branch to be finalised, and, as part of the national budget, submitted it to parliament. In effect, the Supreme Court's contribution in preparing its budget is negligible because the actual authority to adjust the draft budget rests with the cabinet. The following sub-sections examine the legal framework and practical aspects of institutional independence of the judiciary in Afghanistan.

2.1.1. Non-interference by the executive branch

The Constitution of 2004 establishes a strong executive branch by assigning tremendous powers to the President which include powers related to the judicial branch. Though the Constitution does not have any language that disapproves intervention of executive officials in the judicial affairs, the spirit and structure of the Constitution do not provide such a possibility. In addition to nominating Supreme Court members, the President confers judicial commissions on all newly appointed judges. He also conducts subsequent appointment of senior judges, though this power originates from ordinary legislation rather than the Constitution. In addition, the executive branch has direct involvement in provision of budgets, administrative support, security and appointment of administrative staff in the judiciary. Under these conditions, the judiciary does not have enough space to manoeuvre and

¹³¹ Constitution of Afghanistan, 2004. article 116.

¹³² Jackson, "Judicial Independence: Structure, Context, Attitude," 40.

thus can be seen as dependent to the executive branch.¹³³ The dominant role of the executive branch in the judiciary is the continuation of a historic reality that has always been reflected in the legal instruments and in practice. The tradition in Sharia that gave authority to the head of executive branch in the judiciary has been influential as well.

There are two different opinions on the role of the President as the head of state. The first opinion considers the President as the highest authority of the state that exercises power in all three branches. Therefore, the legislative and judicial branches should report to him. Based on this interpretation, the Head of the Supreme Court reports on “judicial and administrative affairs” of the judiciary to the President.¹³⁴ Senior members of judiciary seem to have the same understanding. For example, Abdul Salam Azimi, the former Head of Supreme Court writes, “the Supreme Court is responsible to the President and has an obligation to report to him.”¹³⁵ Reporting of the Supreme Court in the meetings of the High Council of Rule of Law and Anti-corruption (Rule of Law Council) and adoption of the Judicial and Legal Reform Program by the executive branch that assigns specific tasks to the Supreme Court are in line with this understanding. According to a senior official of Supreme Court, the President, as the highest judge, delegates the judicial power to the judges by awarding them judicial commissions, and their reporting ensures the President is aware of the implementation of rule of law.¹³⁶ Beside the written instructions, verbal instructions of the President to the Supreme Court, Attorney General’s Office and other offices are communicated only by the National Security Advisor, Chief of Staff and Director General of Administrative Office of the President.¹³⁷ The head of the Anti-corruption Secretariat in the Presidential Palace, who coordinates anti-corruption efforts in all three branches, supports this view, but adds that President Ghani has utmost respect for the Head of the Supreme Court and the executive branch has arranged its relationship with the judiciary in a way to avoid undermining its independence.¹³⁸ President Ghani himself repeatedly insisted on independence of the courts and warned the executive agencies on intervention in the courts’ affairs.¹³⁹ The basis for this opinion is the assignment of authorities to the President in the judiciary by the Constitution. It is worth mentioning that the legislative branch does not provide reports to the President.¹⁴⁰ Therefore, while the Constitution assigns the President authorities in both the legislative and judicial branches, it is only the judiciary that feels obliged to report to the President. Reports of the Supreme Court to the President and the Rule of Law Council have been substantive in nature.

Under the second opinion, it is argued that the Constitution of 2004 is based on clear lines between branches of the state; each branch has a special role and none of the branches is subordinate to the other. Based on this opinion, the “State of Islamic Republic of Afghanistan,” as mentioned in article 60 of the Constitution, is a special name used for the country of Afghanistan.¹⁴¹ While the President is considered the head of the state, this designation does not mean the other two branches should report to the President or be subordinate to him. Afghanistan has a system in which the President is the ceremonial head of state, unlike parliamentary regimes in which a separate authority, like a king, undertakes roles such as nominating justices, opening of the parliamentary sessions or accepting credentials of foreign ambassadors. Some also argue that the parliamentary oversight

133 International Crisis Group, “Reforming Afghanistan’s Broken Judiciary,” i.

134 Law on Organization and Jurisdiction of Judiciary. article 40.

135 *Collection of Supreme Court Circulars, Decisions, and Guidelines for 1385-89 (2006-10)* (Kabul: Supreme Court of Islamic Republic of Afghanistan, 2011), 333.

136 Abdullah Attayee, pers. comm., 4 May 2020.

137 “Official Letter No. 336 from Office of Chief of Staff to State Agencies on Instructions of the President,” May 23, 2020.

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

139 Decisions of High Council of Rule of Law and Anti-corruption, 10 September 2016, 2 October 2016, 2 May 2018. https://aop.gov.af/dr/page_list/80.

140 Abdul Moqtader Naseri (Secretary General of Meshrano Jirga) online pers. comm., 2 May 2020.

141 Haress, pers. comm., 17 October 2019.

over the President and the fact the President cannot remove judges directly justify this opinion.¹⁴² Obviously under this opinion, some of the practices applied by the executive in the judiciary so far are not considered as appropriate. This opinion is close to practice of democratic countries where the principle of separation of powers is observed and the judiciary conducts strong checks on the other two branches.

The Code of Ethical Conduct for Officials of the Three Branches has set standards of behaviour among state officials. The Code asks executive officials to refrain from any speech, gesture or movement that undermines the independence of the judiciary, the value of judicial proceedings and the prestige, respect and immunity of judges.¹⁴³ In addition, executive officials are prohibited from any action that intervenes in judicial affairs or puts pressure on the judges or judicial officials and cannot intervene in disputes of judicial nature.¹⁴⁴ Some of the provisions used in this law reinforce the argument that the laws in Afghanistan have provided an acceptable framework for an independent judiciary. Nevertheless, in the absence of a culture of independence, the laws have not resulted in practical independence of the judiciary.

Senior officials in the Supreme Court admit there had been pressure from executive officials on the courts, something that has gradually slowed in recent years.¹⁴⁵ A good example is the decision of the primary and appellate courts in the Anti-corruption Justice Center to acquit a former deputy minister in a corruption-related case.¹⁴⁶ Despite perceptions that the executive branch wanted a sentence against the former official, the courts did not follow suit. Though the role of the executive branch to help the judiciary has been largely positive, there are also practices that can be interpreted as the executive branch confronting the judiciary. The following examples elaborate how these confrontations undermined judicial independence.

Establishment of Special Electoral Complaints Court: Not content with the results of the 2010 parliamentary election, President Karzai pressured the Supreme Court to establish the Special Electoral Complaints Court, with the objective to change the election results.¹⁴⁷ The judiciary unfortunately bowed to the pressure and accepted demands of the executive branch, though at the end, decisions of the Court were disregarded.

Case of Paghman: At midnight on 23 August 2014, seven armed men, intending to rob the passengers, stopped two cars in Paghman and raped four women, one of whom was pregnant.¹⁴⁸ The crime triggered public anger and a demand for immediate action. Following announcements from the Presidential Palace that the President wanted the death penalty for the accused,¹⁴⁹ the trial began. In addition, in a meeting with women activists before the trial, President Karzai was quoted as saying: “I request the honorable Chief Justice to give them the death sentence.”¹⁵⁰ His office had announced that the President would not delay signing a death sentence,¹⁵¹ and he actually signed the

142 Haress, pers. comm., 17 October 2019.

143 “Code of Ethical Conduct for Officials of the Three Branches,” Official Gazette § 1051 (2011). Article 10.

144 Ibid. articles 12 and 13.

145 Attayee, pers. comm., 18 February 2020.

146 “Afghanistan’s Fight Against Corruption: Crucial for Peace and Prosperity” (Kabul: United Nations Assistance Mission in Afghanistan, June 2020), https://unama.unmissions.org/sites/default/files/afghanistans_fight_against_corruption_crucial_for_peace_and_prosperity_english.pdf. 59.

147 Ghizaal Haress, *Adjudicating Election Disputes: Afghanistan and the Perils of Unconstitutionalism* (Kabul: Afghanistan Research and Evaluation Unit, 2014), 21.

148 “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>.

149 Ibid.

150 Ibid.

151 Ahmad Shah Ghanizada, “Karzai to Immediately Sign Death Penalty of Kabul Rape Convicts: Faizi,” *Khaama Press*, 2 September 2020, <https://www.khaama.com/karzai-to-immediately-sign-death-penalty-of-kabul-rape-convicts-faizi-6621/>.

death penalty in his last days in office after the Supreme Court confirmed the sentence for five of the accused barely a month after the trial in the primary court.¹⁵² The case raised serious concerns over a fair trial as a result of political influence in the process. Amnesty International criticised the decision as an “affront to justice” and the United Nations’ High Commissioner for Human Rights announced “grave concerns” over the announced death penalties.¹⁵³ The rushed trial did not provide sufficient time for the lawyers of the accused to prepare for the court sessions. In addition, pre-emption by the President had already had its effects on the decision of the Court. The case of Paghman exemplifies the influence of the executive branch at the highest level, but also the obedience of the courts to such influences.

Intervention by local officials: In 2007, the Chairman of Provincial Council of Kandahar, brother of President Karzai, directly intervened in the local court affairs by inviting the Head of the Appellate Court, the accused, his attorney and the victim to his house where he asked for an end to the criminal case by replacing an imprisonment term with a monetary fine of AFN5,000.¹⁵⁴ As a result, the court issued the requested sentence and both parties agreed with it.

In another case in 2017, the former Governor of Kandahar had intervened in the work of the provincial courts by warning the judges and ignoring the required protocols for the Head of the Kandahar Appellate Court in the formal events.¹⁵⁵ The move prompted criticism from the Supreme Court, which sent a letter to the President in this regard. The President ordered his administrative office to warn the Kandahar governor and ask him to respect the independence of the courts.

Executive local officials have also checked the attendance of the judges and asked the provincial courts to report to them, which also prompted criticism from the Supreme Court.¹⁵⁶ On other occasions, courts were publicly criticised by the local officials.¹⁵⁷ There are also several politically motivated cases that will be discussed as part of the discussions on impact of judicial review on independence of the courts. The less vigorous approach of the Supreme Court to finalise court proceedings against the former ministers has also raised eyebrows on the willingness of the judiciary to take actions against executive officials.¹⁵⁸ Where the Supreme Court responded, it took a soft response and demanded the executive branch to take action against executive officials who had been ignored mostly. The occurrence of such attacks on the judiciary and hesitation of courts to give a proper response have only discredited the judiciary.

Furthermore, the executive branch is managing the military courts that prosecute members of the National Army for committing crimes related to their duties. This practice does not provide grounds for independence of the military courts since they are managed by personnel of the Ministry of Defense. The Law on Organization and Jurisdiction of the Judiciary foresees prosecution of personnel of Ministry of Defense in the courts managed by judiciary, similar to the prosecution of police;¹⁵⁹ however, this has not been implemented for the members of the National Army yet. Generally, the

152 “Afghan Executions: Five Hanged for Paghman Gang-Rape,” *BBC News*, 8 October 2014, <https://www.bbc.com/news/world-asia-29537738>.

153 Ibid.

154 Wahid Halimyar (Director of Cabinet Affairs in Administrative Office of President and former attorney), online pers. comm., 6 December 2019.

155 The author was serving as Deputy Director in the Administrative Office of the President at the time and communicated instructions of the President with the relevant authorities.

156 *Collection of Circulars of Supreme Court of Islamic Republic of Afghanistan from SY 1394 to 1397 (2015 - 2018)* (Kabul: Supreme Court of Islamic Republic of Afghanistan, 2019), 95-96.

157 “Jalasa Shurai Aali Stara Mahkama Dayer Shod (The Meeting of High Council of the Supreme Court Held).” See also, *Collection of Supreme Court Circulars, Decisions, and Guidelines for 1389-93 (2010-14)*, 2nd ed. (Kabul: Supreme Court of Islamic Republic of Afghanistan, 2016), 382-83.

158 Sakhi Frozish (former rule of law officer in United Nations Assistance Mission for Afghanistan), online pers. comm., 27 February 2020.

159 Law on Organization and Jurisdiction of Judiciary. article 77.

military courts that sit outside the judiciary are not considered independent because the judges are following the rules of command of the military and are responsible to their military supervisors.¹⁶⁰ Because judges who are sitting in the courts of the Ministry of Defence are personnel of that ministry and not the judiciary, discussion of judicial independence does not apply to them. In short, military courts in the Ministry of Defence are not independent.

Undue delays in the introduction of nominees of the Supreme Court to the *Wolesi Jirga* are another example of the executive branch's unconstructive approach toward the judiciary. President Karzai, for example, kept some members of the Supreme Court as "acting members" for as long as 5 years since he was afraid of potential rejection of his candidates by the *Wolesi Jirga*.¹⁶¹ In contrast to Karzai, President Ghani took a different stance when seats in the Supreme Court were vacant. He did not appoint anyone as an acting member, and the seats remained vacant. Delays in the introduction of nominees for the Supreme Court in 2019 and 2020 were partially due to the presidential election, though this created perceptions that an independent judiciary is not a priority for the government.¹⁶² Keeping "acting members" while their tenure had finished was an unconstitutional act that seriously undermined the independence of the Supreme Court. Further, decisions of the Supreme Court do not hold high credibility if the bench is not complete.

To promote the rule of law and fight against corruption, the National Unity Government established the Rule of Law Council in which the Head of the Supreme Court serves as a member. The other members are the Vice Presidents, the Attorney General, Head of Independent Commission of Oversight on Implementation of the Constitution, Chairman of Independent Human Rights Commission, Minister of Justice, Ombudsperson, a number of executive officials and representatives of civil society and selected ambassadors based in Kabul. The meeting is presided by the President; however, in his absence, the 2nd Vice President leads the sessions. The Rule of Law Council provides a great opportunity for the Head of the Supreme Court to raise challenges to the judiciary and seek support of the President and agencies of the executive branch, which he has used quite frequently.¹⁶³ Despite the attention the judiciary attracts from the Rule of Law Council, participation of the Head of the Supreme Court in a forum that is composed of officials of the executive branch and civil society members creates a perception that the judiciary is not independent of the executive branch. Coordination and solving administrative and financial problems of the judiciary, which can find a solution in the Rule of Law Council, are short-term gains that are not worth risking the public image of the judicial branch.

Reporting to the Rule of Law Council on implementation of the Judicial and Legal Reform Program is another point of concern.¹⁶⁴ In addition, the Rule of Law Council discusses many agenda points that may not be relevant to the judiciary, or makes decisions that need adherence of the judiciary. The United Nations Assistance Mission in Afghanistan (UNAMA) report on the fight against corruption refers to this aspect using this language: "The High Council strives to balance respect for judicial and institutional independence with the need to hold these institutions accountable for meeting reform goals."¹⁶⁵ In addition, the law asks the Head of the Supreme Court to report on judicial and administrative activities to the President. While it is still questionable why the head of the judiciary should report to the head of the executive on judicial activities, which should be protected under

160 Shetreet, "Judicial Independence," 597.

161 Ehsan Qaane, Salima Ahmadi, and Thomas Ruttig, "Filling NUG Vacancies: Parliament to Vote on Interior Minister and Attorney General," *Afghanistan Analysis Network*, April 8, 2016, <https://www.afghanistan-analysts.org/en/reports/political-landscape/filling-nug-vacancies-parliament-to-vote-on-interior-minister-and-attorney-general/>.

162 Naheed Farid (member of parliament), online pers. comm., 15 April 2020.

163 For more information, look the decisions of the meetings of High Council of Rule of Law and Anti-corruption available at https://aop.gov.af/dr/page_list/80.

164 Haress, pers. comm., 17 October 2019; Mohammad Musa Mahmoodi (former Secretary General of Afghanistan Independent Human Rights Commission), online pers. comm., 2 January 2020; Saeed, pers. comm., 25 January 2020.

165 "Afghanistan's Fight against Corruption: From Strategies to Implementation" (United Nations Assistance Mission in Afghanistan, May 2018), https://unama.unmissions.org/sites/default/files/afghanistans_fight_against_corruption_from_strategies_to_implementation-14_may_2018.pdf. 12.

the concept of judicial independence, the other question is whether the Head of the Supreme Court should provide reports to the Rule of Law Council, which consists of many actors. To notify the head of the state from the overall state of the judiciary, the Head of the Supreme Court could dispatch informative reports on issues of administration, finance, security, etc., and not on the substance of judicial processes or decisions, to the President. The participation of the Director General of Administration of the Judiciary in these types of fora is another suitable alternative.

Inviting Supreme Court members in political consultations or selection committees is also out of line with guidelines on independence of the judiciary. Participation in political discussions may harm the perception that the judiciary must not be engaged in political matters. Even for symbolic purposes, it is important for the judiciary not to engage in such activities, similar to the US, where the justices of the US Supreme Court rarely visit the White House or are involved with Presidents after their appointment.¹⁶⁶ Though international principles on judicial independence do not ban participation of judges in commissions and activities related to the rule of law, they are strict in disallowing participation in activities that undermine the perceived impartiality and political neutrality of a judge.¹⁶⁷ It is still important that the judiciary keeps a constructive relationship with the other two branches. The new draft Law on Organization and Jurisdiction of the Judiciary allows the participation of Director General of Administration in cabinet meetings if participation of a representative of the judiciary was necessary for explaining related agenda points or legislations.¹⁶⁸ To avoid undermining the independence of the judiciary, the Director General of Administration of the Judiciary should take a more active role in coordination with the other two branches.

Despite constitutional measures and executive orders that warn executive officials against intervening in judicial affairs, intrusion of executive officials has continued and the judiciary has not been able to overcome its dependency on the executive branch. This is partly due to the lack of a culture of respect for independent institutions. To reverse the status quo, not only the legislative documents need amendment, but also the administrative procedures should accommodate the needs and independent status of the judiciary.

2.1.2. Non-interference by the legislative branch

By design, there is less chance of legislative body interference in judicial affairs since the probability of encounter between the two branches is low. Both houses of the National Assembly are involved in the legislation process and thus can alter the authorities and jurisdiction of courts. Besides, the *Wolesi Jirga* is authorised to approve nominations for the Supreme Court or remove them. Moreover, it has an undeniable role in the approval of the budget of the judicial branch. The following sub-sections examine these aspects:

166 “Presidential Involvement in the Supreme Court,” *Constitutionfacts.Com*, accessed 2 May 2020, <https://www.constitutionfacts.com/us-supreme-court/presidential-involvement/>.

167 The Bangalore Principles of Judicial Conduct. value 4.11.3.

168 Draft Law on Jurisdiction and Organization of the Judiciary (approved by cabinet in 2018 and submitted to the National Assembly). article 34.

Legislation

The Constitution has blocked any attempts to remove cases from jurisdiction of the judiciary. Article 122 reads “No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority. This provision shall not prevent formation of special courts stipulated in Articles sixty nine, seventy eight, and one hundred twenty seven of this Constitution, as well as cases related to military courts. The organization and authority of these courts shall be regulated by law.”¹⁶⁹ In recent years, the legislature, particularly the *Wolesi Jirga*, has attempted to change selected laws with the aim to restrict the judicial branch and extend its control over judiciary. For example, in the aftermath of the *Spanta* case in 2007, in which the Supreme Court announced the impeachment of the Minister of Foreign Affairs to be unconstitutional, the parliament tried, rather unsuccessfully, to assign the authority of interpretation of the Constitution to the Independent Commission of Oversight on Implementation of the Constitution.

There are also other legislations that partly undermine the independence of judiciary. For example, the Code of Ethical Conduct for Officials of the Three Branches, one of the few laws drafted by the *Wolesi Jirga*,¹⁷⁰ requires judicial officials to appear in the *Wolesi Jirga* and refrain from speeches, gestures or actions that undermine the independence of the executive branch,¹⁷¹ while the essence of having an independent judiciary is to control the illegal actions and decisions of the other two branches. The judiciary’s decisions cannot be subject to such limitations. Moreover, the Internal Rules of Procedure of the *Wolesi Jirga*, which regulates the internal affairs of the *Wolesi Jirga* but is consequential on the other two branches as well, has similar terms that undermine the independence of the judiciary. In the chapter titled “Oversight on the Judiciary” a procedure is introduced on how the *Wolesi Jirga* can question members of the Supreme Court.¹⁷² The measures foreseen in the Rules predominantly undermine judicial branch independence and appear unconstitutional. As part of the mechanisms of checks and balances, the parliament has the opportunity to check the judiciary; however, those instances are limited and specifically mentioned in the Constitution. Confirming and voting to remove members of the Supreme Court in case of committing crimes, approval of legislation related to the judicial branch and approval of the national budget, that incorporates budget of the judiciary, are the only instances the parliament can exercise checks on the judiciary. Question and answer sessions with the members of the Supreme Court overstretches parliamentary power and ignores the basic aspects of independence of the judiciary.

Approval and Removal of Supreme Court Members

A vote of confidence in the members of the Supreme Court is the strongest leverage the *Wolesi Jirga* has in relation to the judicial branch. It has so far rejected several nominations between 2006 and 2019. The *Wolesi Jirga* has not removed or attempted to remove members of the Supreme Court using the mechanism prescribed by the Constitution. However, it has impeached members of the Supreme Court after they agreed with President Karzai to establish the Special Court for Adjudication of Electoral Complaints in 2010.¹⁷³ The *Wolesi Jirga* reacted to decision of the Supreme Court by impeaching the Head and five members.¹⁷⁴ Interestingly, the term of three members out of the six impeached had finished months before and they were kept in their positions as acting members of

169 Constitution of Afghanistan, 2004. article 122. The special courts that are made exception by this article are for trial of the President, trial of ministers and trial of members of the Supreme Court.

170 Abdul Majid Ghanizada (Director General of Institute of Legislation in Ministry of Justice), online pers. comm., 11 July 2020.

171 Code of Ethical Conduct for Officials of the Three Branches. articles 21 and 25.

172 “Internal Rules of Procedures of Wolesi Jirga” (2017). articles 109-11.

173 Haress, *Adjudicating Election Disputes*, 21.

174 Scott Worden, “A Guide to Afghan Impeachment,” *Foreign Policy*, 15 July 2011, <https://foreignpolicy.com/2011/07/15/a-guide-to-afghan-impeachment/>.

the Supreme Court. A rather political decision with no legal basis,¹⁷⁵ this was the legislative branch's most severe attack on the judiciary. Nevertheless, the Supreme Court rejected the vote, arguing that members cannot be impeached.¹⁷⁶ Though members of the Supreme Court cannot be impeached like ministers, the Constitution allows for their removal if they are accused of committing a felony or other job-related crimes.

Approval of Budget

Altering the budget of the judiciary or failing to provide sufficient funds to the courts are considered indirect attacks on the independence of the judiciary.¹⁷⁷ Based on the Constitution, the budget is either accepted or rejected as a package,¹⁷⁸ so there is no chance for the *Wolesi Jirga* to alter the budget of the judiciary only; however, it can request revisions in the budget. The Ministry of Finance reports that comments of the *Wolesi Jirga* generally have not included decreases in the budget of the judiciary.¹⁷⁹ A member of parliament also confirmed this and demonstrated it as a sign that the *Wolesi Jirga* sees the judiciary as independent.¹⁸⁰ In reality, however, the *Wolesi Jirga* has been more interested in keeping development projects that could be used by members of parliament during their next election campaign. Since the budget of judiciary could not serve that purpose, there has been little interest in discussing it.

2.1.3. Financial independence

The judicial branch generally receives a small portion of the budget and even judiciaries with higher levels of independence are still struggling with their financial needs.¹⁸¹ Countries follow different budgetary methods for funding activities of the judiciary. For example, the courts in France do not have a separate budget; rather, their budget is part of the executive budget.¹⁸² This is generally the case with countries with a high level of involvement of the executive branch in the administrative affairs in the judiciary. Elsewhere, a number of high courts have taken control of their budget and created autonomy in administrative affairs.¹⁸³ In countries like the US that follow a coordination model between branches, the judiciary submits its budget directly to the legislature.¹⁸⁴ Giving full control of budgetary and administrative affairs of the judiciary to the executive agencies undermines the requirement of checks and balances.¹⁸⁵ Therefore, countries around the world try to either give autonomy to the judiciary in the preparation and spending of its own budget, or establish multi-sector councils that are involved in judicial appointments and in preparation of courts' budgets.

Despite special arrangements for preparation of budget and financial expenditures recognised in the Constitution, the judiciary of Afghanistan is still extremely dependent on the executive branch for financial allocations. The Supreme Court can only prepare its budget in consultation with the government, which shall be submitted to the National Assembly as part of the national budget.¹⁸⁶ This is no different from the other budgetary units such as ministries; exceptional measures do not

175 Farid, pers. comm., 15 April 2020.

176 Farid Hamidi and Aruni Jayakody, *Separation of Powers under the Afghan Constitution: A Case Study* (Kabul: Afghanistan Research and Evaluation Unit, 2015), 32.

177 Shetreet, "Judicial Independence," 607.

178 Constitution of Afghanistan, 2004. article 97.

179 Sayed Masoud Hashimi (Director of Budget Reform Policy in Ministry of Finance), pers. comm., 14 April 2020.

180 Farid, pers. comm., 15 April 2020.

181 David M. Ebel, "Judicial Independence," *Denver University Law Review* 88, no. 2 (2011): 313-24. 320.

182 F. Grivart de Kerstrat, "France," 65.

183 Jackson, "Judicial Independence: Structure, Context, Attitude," 58.

184 Shetreet, "Judicial Independence," 646.

185 Jackson, "Judicial Independence: Structure, Context, Attitude," 57.

186 Constitution of Afghanistan, 2004. article 125.

exist for the judiciary.¹⁸⁷ The judiciary must prepare a budget based on the ceiling given to it by the Ministry of Finance and should participate in the budget hearing meetings the same way as the ministries.¹⁸⁸ There are also reports that the Ministry of Finance exerts pressure on the judiciary to adjust its budget.¹⁸⁹ Financial constraints pushed the Head of the Supreme Court to complain in the Rule of Law Council, a concern also raised by watchdog agencies.¹⁹⁰ Representatives of the Supreme Court also claimed article 125 of the Constitution that gives special status to the Supreme Court for spending its budget, has never materialised.¹⁹¹ The Ministry of Finance, however, argues the budget for the judiciary is determined based on available resources, which is not adequate to fulfil all its needs.¹⁹² Financial dependence on the executive branch is a serious concern that jeopardises judicial branch independence. While it is true that all state entities are under budgetary austerities, the judicial branch seems to suffer a disproportionate financial pressure such that it has failed to complete some key parts of its reform plans.

Despite President Ghani's instructions to the Ministry of Finance to consider the financial needs of the judiciary, things have not changed in practice and complaints on this subject have persisted.¹⁹³ These concerns signify that financial allocation to the judicial branch needs serious revision and relevant officials in the Ministry of Finance need to treat requests in a way that does not undermine independence of the judiciary. Allocation of a certain percentage of the national budget to the judicial branch is a model that is trending in the world.¹⁹⁴ Afghanistan can also apply this model, which gives more flexibility and discretion to the judiciary in performing its duties.

On the other hand, the Constitution authorises the Supreme Court to implement its budget.¹⁹⁵ This means the Supreme Court should have more authority in financial spending compared to the executive offices. However, representatives of the Supreme Court claim this constitutional provision has not been implemented.¹⁹⁶ The Ministry of Finance also acknowledged that the same control mechanisms applied in executive branch are used in the judiciary.¹⁹⁷

2.1.4. Involvement in preparation of judiciary-related legislation

A unique characteristic of the constitutional order in Afghanistan is that all three branches of the state can propose legislation. In the area of judicial affairs, the Supreme Court can propose draft legislation, through the executive branch, to the National Assembly.¹⁹⁸ Since the laws are finalised at the cabinet and the National Assembly has full authority to approve, revise or reject the draft laws, proposals by the Supreme Court can become academic at times. In practice, the government has tried to engage the Supreme Court representatives in the process of drafting legislation as much as possible. For example, during finalisation of the Draft Law on Organization and Jurisdiction of Judiciary in 2018, it was discussed in the Rule of Law Council before it was finalised in a special meeting in the presence of the Head of the Supreme Court under leadership of the President. The

187 Hashimi, pers. comm., 14 April 2020.

188 Mohammad Naser Timory (Head of Communication in Integrity Watch Afghanistan), online pers. comm., 30 November 2019.

189 Aruni Jayakody, "Separation of Powers in Afghanistan: Theory and Practice." 2.

190 Decisions of High Council of Rule of Law and Anti-corruption, 27 December 2017, 2 May 2018, 13 October 2019, 28 November 2019; Judge in Kabul Primary Court (anonymity requested) pers. comm., 1 December 2019; Timory, pers. comm., 30 November 2019; Torabi, pers. comm., 5 February 2020.

191 Decisions of High Council of Rule of Law and Anti-corruption, 27 January 2020.

192 Hashimi, pers. comm., 14 April 2020.

193 Decisions of High Council of Rule of Law and Anti-corruption, 13 October 2019 and 27 January 2020.

194 Shetreet, "Judicial Independence," 646.

195 Constitution of Afghanistan, 2004. article 125.

196 Decisions of High Council of Rule of Law and Anti-corruption, 27 January 2020.

197 Hashimi, pers. comm., 14 April 2020.

198 Constitution of Afghanistan, 2004. article 95.

Supreme Court also introduces its members in the Legislative Committee of the Cabinet when laws related to the judiciary are discussed and finalised before their submission to the Cabinet. In addition, the High Council of the Supreme Court is authorised to pass regulations, charters and guidelines in the area of judicial affairs,¹⁹⁹ which are published in the official gazette of the Ministry of Justice, along with other legislations. These legislative documents are exclusively adopted by the Supreme Court and there is no involvement of the other two branches. Overall, the engagement of the judiciary in preparation of legislative documents concerning it is satisfactory.

2.1.5. Administrative affairs of the judiciary

On administrative matters, the Supreme Court is very much dependent on the executive branch.²⁰⁰ This can be seen in appointment of administrative staff, provision of security, and the requirement to get permission to conduct foreign trips for high-ranking officials of the judiciary, among others. Though the administrative staff of the judiciary are considered civil servants, their appointment, removal, retirement, promotion, rewards and punishment would be managed by the Supreme Court.²⁰¹ This created a point of contention between the executive branch and the judiciary in recent years, which was resolved by signing a memorandum of understanding between the Supreme Court and the Independent Administrative Reform and Civil Service Commission. As a result, the Commission provides support to the Supreme Court in the area of human resources and recruitment and the General Directorate of Administration of the Judiciary conducts the actual hiring.²⁰² Based on law, the President approves appointments of administrative staff proposed by the High Council of the Supreme Court for the top three grades of civil service ranks.²⁰³ The appointment for the lower positions takes place after approval of the Head of the Supreme Court. The recent arrangements in recruitment have recognised the autonomy of the judiciary and seem to be critical for professionalising the administrative cadre in the judicial branch.

To manage its administrative affairs, the General Directorate of Administration of the Judiciary is established within the judiciary. This Directorate is constitutionally mandated to help the courts with the judicial and administrative affairs and conduct necessary reforms in the judicial branch.²⁰⁴ However, many administrative procedures, such as procurement rules, are still dependent on the executive branch and there are reports of applying bureaucratic pressure on the judiciary.²⁰⁵ The Directorate has an undeniable role in implementing reforms and changing the judiciary to a functioning and credible institution. Despite importance of this office, the position of Director General has been vacant for many years and is led by acting directors from within the judicial branch.

There are few other administrative items that might harm independence of the judicial branch. For instance, the 310 district courts, which constitutes the majority of all district courts, do not have separate buildings and are using space provided to them by the offices of the district governor or the district police.²⁰⁶ In addition, members of the Supreme Court and senior judges need to have a presidential decree that allows their travel abroad. For foreign trips of the Head of the Supreme Court, the President usually assigns an amount to be expensed at his discretion. In addition, the

199 Law on Organization and Jurisdiction of Judiciary. article 31.

200 Mohammad Haroon Rahimi (Assistant Professor Law in American University of Afghanistan), online pers. comm., 11 February 2020.

201 Constitution of Afghanistan, 2004. article 124.

202 “Memorandum of Understanding between Directorate General of Administration of Judiciary and Afghanistan Administrative Reform and Civil Service Commission for Reform of Civil Service Positions,” May 2018, <https://iarasc.gov.af/fa/%d8%aa%d9%81%d8%a7%d9%87%d9%85%e2%80%8c%d9%86%d8%a7%d9%85%d9%87%e2%80%8c%d9%87%d8%a7/>.

203 Civil service jobs are divided into 10 grades in Afghanistan and the President approves appointments for grade 2 and above. The only exception in the judiciary is that the President approves appointments for grade 1 and above.

204 Constitution of Afghanistan, 2004. article 132.

205 Decisions of High Council of Rule of Law and Anti-corruption, 2 May 2018.

206 Decisions of High Council of Rule of Law and Anti-corruption, 27 January 2020.

Supreme Court has sent requests for travel of its former members when they used their political passports,²⁰⁷ something that seems unnecessary. The need to get permission for foreign trips is a legacy from the government of President Karzai.²⁰⁸ A new decree issued in March 2020 authorised the Director General of the Administrative Office of the President to sign off on travel requests of senior state officials including the Head and members of the Supreme Court; however, the decree was replaced with another one in July 2020 that asked for the President's signature on travel requests of Vice Presidents, the Head of the Supreme Court, speakers of the two houses of the National Assembly, the ministers, the Attorney General and the heads of independent commissions and agencies and left the remaining travel requests to the Director General of Administrative Office of the President.²⁰⁹ This is a serious measure that impacts the members of the Supreme Court who are higher in ranking than the Director General of the Administrative Office of the President. Instead of asking for permission, it could be more appropriate that the Head of the Supreme Court only notifies the President of members' travel, and signs off on travel requests of senior judges.

2.1.6. Enforcing decisions of the courts

Unimplemented decisions create a perception that decisions of the courts do not make a difference. The laws in Afghanistan require the executive officials to enforce judicial decisions, their interpretation of laws or any other similar decision.²¹⁰ Nevertheless, there are reports that indicate weak implementation of court decisions. In a meeting of the Rule of Law Council in August 2018, the Head of the Supreme Court reported that around 7,000 judicial decisions of courts have not been enforced.²¹¹ Even some government agencies do not implement court decisions if the decision is not in favour of the government.²¹² Reports of UNAMA also point out the same concern.²¹³ Afghanistan does not have a strong legal framework to ensure enforcement of courts' decisions. Only recently has the Penal Code foreseen punishments for those who fail to implement decisions of courts.²¹⁴ Lack of implementation of court decisions weakens the judiciary and undermines it in the eyes of the public.

In general, most elements required for institutional independence of the judiciary in Afghanistan are recognised by either the Constitution or other laws. However, application of these elements has not ended in independence of the judicial branch. The main reason behind this failure is how these elements are operationalised in practice. An absence of a culture of respect for the independence of institutions prevents constitutional articles from being implemented. To overcome this challenge, the leadership in the executive branch should issue guidelines to members of the executive branch on how to interact with the judicial branch and also pass specific measures that ensures autonomy of judiciary in budgetary, financial and administrative matters. Legalising and enhancement of the courts' use of contempt power also seems necessary.

207 Attayee, pers. comm., 4 May 2020.

208 Saeed, pers. comm., 25 January 2020.

209 "Presidential Decree No. 575" (2020).

210 Code of Ethical Conduct for Officials of the Three Branches. article 9.

211 Decisions of High Council of Rule of Law and Anti-corruption, 25 August 2018.

212 Zabihullah Kalim (Director General of Government Cases), online pers. comm., 18 November 2019.

213 "Afghanistan's Fight Against Corruption: Crucial for Peace and Prosperity." 12.

214 "Afghanistan Penal Code," Official Gazette 1260 § (2017). Article 407 and additions to article 461 published in Official Gazette 1260 on 21 October 2018.

2.2. Individual independence of the Afghan judges

The Constitution and the laws in Afghanistan have strict rulings to ensure the judges, as the individuals that declare justice, have independence when they make judicial decisions. As discussed in the first part of this paper, building arguments only on law, appropriate appointment and removal mechanism, long-term tenure, recusal from cases with potential conflict of interest, limitation on involvement in political and commercial activities and ensuring the judge receives appropriate salary and security can lead to individual independence of the judges. The laws in Afghanistan have embodied nearly all these requirements. However, as it was seen in institutional arrangements, in practice, many of these aspects are flawed and not adhered to.

2.2.1. Making decisions based on law

Courts in Afghanistan are obliged to build their decision on legal sources.²¹⁵ Each court is making its decision independent of other courts or authorities; the decision of the court should be based on its satisfaction of the evidence presented to it. In addition, courts must consider equality of the parties to the case and be impartial in their treatment of the clients of the court.²¹⁶ Letting only the law determine who wins and who loses a dispute is the main element that ensures impartiality of a judge and confidence in the judicial institution.

An interesting aspect that struck me during interviews was preferential treatment of prosecutors and government representatives in the courts. A former defence attorney said many judges do not take the defence lawyers seriously and sometimes decide in their absence; however, they do not have the same treatments with prosecutors who represent the state.²¹⁷ There are also signs of a similar behaviour in recent cases that the state organisations have been a party to. The Directorate of Government Cases of the Ministry of Justice defends the government in those cases. The courts have overruled many decisions that had disfavoured the government. In SY 1397 for example, the courts decided 157 cases in favour and six cases against the state.²¹⁸ In addition, from 22 December 2017 to 14 October 2019, a total of 15 cases that had been decided against the state were submitted for re-evaluation to the Supreme Court, 12 of which were nullified and sent back to lower courts for a repeat of legal proceedings.²¹⁹ Though corruption could be the main cause for the loss of the government in the courts, it is still questionable how this many cases are overturned. Dependence of the judiciary in appointment and receiving administrative and financial support to the executive branch could justify this attitude. In addition, in the absence of a strong culture of respect for citizens' rights, deciding against the government can be perceived as betrayal of the state and thus undesired.

Beside pressure from the executive and legislative branches, judges can come under public scrutiny and criticism. Under any circumstances, it is crucial for the judges to follow the principles of rule of law and be unbiased and unharmed of the public perceptions. As a state chief justice in the US has written "Courts are not established to follow opinion polls or to try to discern the will of the people at any given time but rather are to uphold the law."²²⁰ There have been instances in Afghanistan that courts seemingly followed the public opinions. The case of gang rape in Paghman that was mentioned earlier is an example of the influence the public incurred on the courts.

²¹⁵ Law on Organization and Jurisdiction of Judiciary. articles 12 and 13.

²¹⁶ Ibid. article 19.

²¹⁷ Sayed Ashraf Muzafari (legal expert in Asian Foundation Kabul Office and former defense attorney), pers. comm., 14 March 2020.

²¹⁸ Farid Ahmad Najibi (Director of Government Cases in Kabul) online pers. comm., 9 February 2020.

²¹⁹ Ibid.

²²⁰ *The Missouri Bar* 62, No. 2, March-April 2006.

2.2.2. Appointment, removal and tenure

Like many other civil law countries,²²¹ Afghanistan has adopted a career model in hiring and removing ordinary judges, but a political model for selection of members of its highest court. Many civil countries such as France, Italy and Germany are increasingly using judicial councils for appointment of ordinary judges, while Afghanistan seems to follow a model similar to that of Japan in which the executive branch has strong involvement in appointments in the judiciary. In addition, the tenure of the Supreme Court members is fixed, while ordinary judges continue serving until they retire or are removed from their job as a result of disciplinary measures. In this section, the paper first elaborates the process of appointment, removal and tenure of the Supreme Court members, and then of the ordinary judges.

Supreme Court members:

The Supreme Court has nine members who are nominated by the President and confirmed by the *Wolesi Jirga*.²²² From the members, the President selects the Head of the Supreme Court. This mechanism had triggered discussions in the Constitutional Loya Jirga with the views that selection by the President will impact independence of the judiciary.²²³ Though the Loya Jirga accepted the current mechanism, there are still concerns whether it is the best method to select the Head of the Supreme Court.²²⁴ An alternative was allowing the Supreme Court to select its own Head, especially since the Head of the Supreme Court possess immense administrative authority over the entire judiciary. The following are the qualifications the members of the Supreme Court should possess.

1. Having completed 40 years of age

While completion of 40 years of age is the minimum requirement, there is not a ceiling set as the maximum age. Though tenure of the Supreme Court members is not for life, neither is there a retirement age. In practice, few Supreme Court members were over 65, the retirement age, when they were nominated to the *Wolesi Jirga*, and a handful other members were over 65 when they completed their tenure. Only once did the *Wolesi Jirga* reject a nomination due to the high age of the nominee.²²⁵ Appointment of individuals who are close to retirement age increases the possibility of independent performance, since they do not need to look for other jobs after completion of their tenure, and that tenure cannot be extended.

2. Having Afghan nationality

The Constitution has not restricted the members of the Supreme Court to only Afghan nationality. However, the *Wolesi Jirga* rejected three nominees for Supreme Court membership due to having dual nationality in 2006.²²⁶

3. Having higher education in legal studies or Islamic jurisprudence in addition to having expertise and adequate experience in the judicial system of Afghanistan

For the Supreme Court, a bachelor's degree in law or Islamic jurisprudence is required. It also means the graduates of *madrasas* who can become judges do not qualify for Supreme Court membership. In addition to the educational requirement, the Constitution also requires adequate expertise and

221 Sujit Choudhry and Richard Stacey, "International Standards for the Independence of the Judiciary," *The Center for Constitutional Transitions at NYU Law & Democracy Reporting International Briefing Papers*, January 2013. 6.

222 Constitution of Afghanistan, 2004. article 117.

223 Ahmad Ali Alizada Sadeqi, *Mowzigeriha, Chalesh-Ha Wa Tafahomat Dar Loya Jirga (Positions, Challenges and Compromises in Loya Jirga)*. 247-48.

224 Saifullah Popal (Director of Prosecution Office of Balkh), online pers. comm., 25 December 2019; Najibi, pers. comm., 9 February 2020.

225 Carlotta Gall, "Afghan Parliament Rejects Chief Justice Nominee."

226 Ibid.

experience in the judicial system of Afghanistan. “Adequate expertise and experience” is subject to interpretation, since those terms are not defined in any legal document.

The other complication of this requirement is the definition of the “judicial system of Afghanistan”. The word “judicial” has conventionally referred to the judicial branch, which consists of the courts. However, the other interpretation is that the “judicial system” does not refer only to the judiciary, but also to other institutions relevant to the work of the courts. These include prosecution offices, the Ministry of Justice and other institutions that deal with legal subjects. It is under the latter interpretation that a number of candidates, including the current Head of the Supreme Court and a few other members, have been introduced to parliament for endorsement. The *Wolesi Jirga* has accepted this interpretation by giving a vote of confidence to the nominees that had no prior occupation in the judiciary. Though textual interpretation might restrict membership to those who worked in the courts, a pragmatic interpretation avails more candidates for Supreme Court membership.

4. Having a good character and good reputation

This is another undefined condition that does not have any criteria in the laws or in the social norms. It seems the drafters of the Constitution wanted to deter unpopular nominations.

5. Have not been convicted of crimes against humanity, felony or deprivation of civil rights

From the list of serious crimes, only crimes against humanity is mentioned. However, the definition of felony also covers all other types of serious crimes. According to the Penal Code, a felony is punished with long-term imprisonment, grade one or grade two life imprisonment or death penalty.²²⁷ In addition, the nominees should not have been legally deprived of their civil rights such as being barred from working in public office or prohibition of running for elected positions. Given the involvement of many individuals in serious atrocities in Afghanistan in recent decades, this is a condition to ensure individuals with a criminal background do not serve in the highest court of the country.

6. Shall not be a member of political parties during his tenure

Following the tradition of many countries, members of the Supreme Court cannot be part of political parties during their term of office. This also means prior membership in political parties does not deprive the individual from becoming a Supreme Court member.²²⁸ Some countries allow membership of judges in the political parties; however, they impose limitations on how judges interact in the party.²²⁹ Political parties are not strong in Afghanistan and people generally do not favour them²³⁰ because of involvement of a number of political parties in the civil war. Thus, this limitation seems to originate from this fear and the need to ensure the public sees the judiciary as independent.

Selection of the Supreme Court members is a desirable approach that involves two elected branches of the state. Proposal of nominees by the executive and approval by the legislature together provide the “political input” and establish a possible structure of checks and balances.²³¹ A balanced composition at the highest court of the judiciary is helpful in enhancing independence and creating a credible institution. Though it is natural that the nominating power prefers candidates that share common values and interests with him, as has been evident in post-2004 nominations, there have been also efforts to make consultations before nominations are finalised. President Karzai and President Ghani have conducted informal consultations with the Head of the Supreme Court, political parties and persons of political influence in identifying qualified nominees; however, there is not a defined process of consultation in place. Part of these efforts was designed to make a Supreme Court that

227 Afghanistan Penal Code. article 31.

228 Rasouli, *Tahlil Wa Naqd Qanoon*, 263.

229 Grivart de Kerstrat, “France.” 71.

230 “Afghanistan in 2006: A Survey of the Afghan People” (Kabul: The Asia Foundation, 2006), <https://asiafoundation.org/resources/pdfs/AGsurvey06.pdf>. 3 and 29.

231 Jackson, “Judicial Independence: Structure, Context, Attitude,” 73.

represents the main ethnicities in Afghanistan and to have members expert in different fields of law. As a result, there has been representation of all main ethnicities in the Supreme Court since 2005 and one member from the Shia religious minority. Such considerations are believed to bring stability and confidence to the judicial branch.²³² Countries such as Canada, Belgium, Brazil and Uganda have special attention to fair reflection of the society in judicial appointments.²³³ Unfortunately, no woman has ever served as a member of the Supreme Court so far. Though President Ghani nominated a female for the Supreme Court, she was rejected by the *Wolesi Jirga* by a few votes. While emphasis on ethnic balance undermines a merit-based appointment process, the importance of this aspect in creating a public perception toward independence of the Supreme Court, particularly in divided societies, cannot be overruled.

Fear of presidential domination of the selection process has caused proposals for establishing a selection committee that forwards nominees to the President.²³⁴ Afghanistan is not unfamiliar with selection committees comprising members from different agencies and even civil society organisations who have prepared a shortlist of qualified candidates for various commissions. The President selects the nominees from that shortlist. This partly proved to be a successful process since individuals who did not have political affiliations were also selected. To ensure independence of the process and that proposal of nominees is based on their knowledge and experience of the judicial system of Afghanistan, establishment of a judicial appointment council is critical.

Except for the initial appointments that took place in 2005, each Supreme Court member serves for a 10-year non-renewable term. This is an important protection the objective of which is to ensure members of the Supreme Court do not finish their term at the same time as the President and will not be influenced by him.²³⁵ Studies also certify that limited tenures, provided they are non-renewable, increase independence of judges.²³⁶ Despite constitutional elaboration on limitation of terms, President Karzai extended the tenure of the former Head of the Supreme Court, Abdul Salam Azimi, and few other Supreme Court members for more than 3 years.²³⁷ A tenure of 10 years is relatively short; however, payment of financial remuneration for the rest of life and the fact that majority of nominees are near or over retirement age, make it an appropriate condition.

Once endorsed as a member of the Supreme Court, no one can remove the members except in case of “commitment of crime related to job performance or committing a felony”.²³⁸ The Constitution does not define “crimes related to job performance”. The Penal Code only criminalises entrance into a profitable transaction by an Supreme Court member, but prescribes only payment of the equivalent amount of the transaction value to the state as the punishment.²³⁹ The other crimes that are related to conduct of duty and are punishable if committed by an employee of public service, which includes judges,²⁴⁰ are bribery, embezzlement, misuse of authority, illegal increase in assets and membership and working for the interest of political parties during term of office.²⁴¹ The legislative documents are not clear on the process of prosecution of Supreme Court members for committing crimes that do not fall under article 127 of the Constitution. The Law on Organization and Jurisdiction of Special

232 Sima Samar (State Minister on Human Rights), pers. comm., 27 February 2020.

233 Shetreet, “Judicial Independence,” 634.

234 A judge in Kabul Primary Court (anonymity requested) on 1 December 2019 and Mohammad Naser Timory (Head of Communication in Integrity Watch Afghanistan) on 30 November 2019 pointed out that this a suitable mechanism to ensure merit-based nominations.

235 Rasouli, *Tahlil Wa Naqd Qanoon*, 258.

236 Melton and Ginsburg, “Does De Jure Judicial Independence Really Matter?,” 195.

237 Jayakody, “Separation of Powers in Afghanistan,” 2.

238 Constitution of Afghanistan, 2004. article 127.

239 Afghanistan Penal Code. article 403.

240 Ibid. article 4 (3).

241 Ibid. articles 370-421.

Courts adds to the confusion because it uses the word “crime” when it discusses the jurisdiction of the Special Court for members of the Supreme Court; however, it only explains the procedure that involves the *Wolesi Jirga*, a procedure that is used for prosecution of felonies or crime related to job performance.²⁴² Obviously, for crimes that are not categorised as a felony or crimes unrelated to conduct of the job, it would be unusual to put a member of the Supreme Court on trial in an ordinary court. Therefore, the best venue would be the Special Court for members of the Supreme Court with a special arrangement that does not encompass removal by the *Wolesi Jirga*, but still the trial could take place in that court.

The procedure of removal is rather complicated, which was necessary due to the social credibility and the huge responsibility of the Supreme Court.²⁴³ First, more than one-third of members of the *Wolesi Jirga* are required to demand the trial of a member of the Supreme Court. If this demand is approved by a two-thirds majority of all members, the accused member is unseated and referred to a special court that will be organised for this purpose.²⁴⁴ The investigation team consists of three members: one member each from the *Wolesi Jirga* and *Mishrano Jirga* who have previously worked on legal and judicial affairs selected by their respective house, one member of Supreme Court selected by members of the Supreme Court, and the Attorney General.²⁴⁵ The Attorney General has the task of bringing charges against the accused member of the Supreme Court²⁴⁶ before the Special Court that consists of two members each from houses of the parliament, who are legal expert with previous adequate experience of working in the area of legal and judicial affairs, and two members of the Supreme Court selected by the High Council.²⁴⁷ Decisions made by the Special Court are final.²⁴⁸ So far, no charges have been brought against members of the Supreme Court using the above procedure. However, the *Wolesi Jirga* has impeached members of the Supreme Court in 2010 in a move that seemed unconstitutional. The complex procedure to remove members of the Supreme Court seems to be appropriate to prevent attacks on the judiciary and ensure members do not fear for political consequences of their decisions.

Appointment, tenure and removal of ordinary judges

According to Afghan legislation, a judge is defined as “a person who possesses judicial commission and decides disputes based on law.”²⁴⁹ At the proposal of the Supreme Court, judges are awarded judicial commission by the President.²⁵⁰ Unless there is a concern, the President usually signs on proposals of the Supreme Court.²⁵¹ A senior official of the Supreme Court argues that conferring of judicial commissions by the President originates from the *Sharia* concept that the head of the state is *Uli-al-amr* and judges are designees of him to undergo judicial authorities on his behalf.²⁵² During interviews, this view was repeatedly mentioned, but there were also arguments that provision of a judicial commission does not make the President superior or unaccountable to the judiciary.²⁵³ Besides, the head of the state had a historic role in appointing senior officials and the judges and this can be accounted in continuation of that role.

242 “Law on Organization and Jurisdiction of Special Courts,” Official Gazette 1130 § (2014). articles 4 and 5.

243 Rasouli, *Tahlil Wa Naqd Qanoon*, 279.

244 Constitution of Afghanistan, 2004. article 127.

245 “Law on Organization and Jurisdiction of Special Courts,” Official Gazette 1130 § (2014). article 5.2.

246 Ibid. article 10.

247 Ibid. article 11.2.

248 Ibid. article 17.

249 Law on Jurisdiction and Organization of the Judiciary. article 4.16.

250 Constitution of Afghanistan, 2004. article 132.

251 Attayee, pers. comm., 4 May 2020.

252 Ibid.

253 Judge in Herat Primary Court (anonymity requested) online pers. comm., 10 February 2020.

The Law on Organization and Jurisdiction of the Judiciary requires the following qualifications to receive a judicial commission and appointment: (1) having nationality of Afghanistan for at least 10 years; (2) not having been convicted of a felony or intentional misdemeanour by an authorised court; (3) having a bachelor's degree or a higher degree in Islamic Jurisprudence or law or a diploma from official religious colleges and schools or their equivalencies; (4) not having infectious diseases or disabilities that stops the individual or performing duties; (5) completion of 25 years of age when receiving judicial commission; and (6) successful completion of the judicial stage.²⁵⁴ A new Draft Law on Organization and Jurisdiction of the Judiciary does not allow graduates of *madrasas* to be appointed judges anymore; instead, it paves the way for lawyers, prosecutors, judicial clerks or similar duty holders to be included in the judicial stage and receive judicial commission.²⁵⁵ If approved by the National Assembly, it can initiate an important element for the professionalisation of the judicial cadre. The presence of graduates of *madrasas* as judges has been a key impediment toward modernising the judiciary in Afghanistan, since the presence of less-qualified judges undermines the independence of the courts. In essence, there is not a need to hire graduates of *madrasas* as judges. The legal system of Afghanistan is basically a state system with the Islamic jurisprudence only as a gap-filler. In addition, in *madrasas*, the trainees are not receiving an acceptable level of legal education; therefore, hiring judges from graduates of *madrasas* is not a necessity anymore.

The Constitution requires a presidential decree for awarding a judicial commission, retirement, acceptance of resignation and dismissal of the judges.²⁵⁶ In effect, these are the situations when an individual gets into the judiciary or gets out of it. The Constitution leaves the other aspects of personnel affairs to the Supreme Court. Article 132 of the Constitution reads: "Appointment, transfer, promotion, punishment and proposal for retirement of judges, carried out according to provisions of the laws, shall be within the authority of the Supreme Court." The current Law on Organization and Jurisdiction of the Judiciary requires appointment of all judges at the adoption of the High Council of the Judiciary after which the appointment proposal for senior positions is sent by the Head of the Supreme Court to the President for approval.²⁵⁷ The list is usually prepared by a committee consisting of a few members of the Supreme Court, Director General of Administration and Director of Human Resources for consideration of the High Council of the Supreme Court.

The above process is similar to the appointment of high-ranking officials in the executive branch. However, the constitutionality of the process is questionable since the Constitution does not require approval of the President for subsequent appointment (after the judicial commission is awarded by the President) of judges. Besides, the Supreme Court has previously ruled that adding conditions by ordinary legislation when they do not appear in the Constitution is unconstitutional.²⁵⁸ In addition, this puts an unnecessary burden on the President and questions the appropriateness of the whole system because judges would look for a favourable appointment by the President every 3 years. At least one interviewee of this paper made references to senior judges who made judgements in favour of the executive branch with the hope they be selected for Supreme Court membership; however, after they were not picked up by the President, they started to decide cases against the executive branch to show their unhappiness.²⁵⁹ It could be also argued that article 64 of the Constitution gives the authority to the President to appoint senior officials; however, this argument is not justified since article 132 is clear on role of the Supreme Court in conducting subsequent appointment of all judges, which had been orchestrated to ensure independence of judges during their tenure.

254 Law on Jurisdiction and Organization of the Judiciary. article 81.

255 Draft Law on Jurisdiction and Organization of the Judiciary (approved by cabinet in 2018 and submitted to the National Assembly). article 53.

256 Constitution of Afghanistan, 2004. article 64.

257 Law on Organization and Jurisdiction of Judiciary. article 83.

258 "Decision No. 20 of the High Council of Supreme Court Regarding Lack of Compliance of Article 5(1) and Article 8 of the Law on Diplomatic and Consular Employees with the Constitution of Islamic Republic of Afghanistan," Published in Official Gazette no. 1114, 2013.

259 Timory, pers. comm., 30 November 2019. This was also agreed with another interviewee who had close knowledge of the subject. The interviewee asked for anonymity because he is not authorized to talk about this matter.

There are also reports that judges who were nominated for senior positions in the judiciary were interviewed by the President at the beginning of the National Unity Government; however, this practice has stopped.²⁶⁰ The decision to make interviews could have been taken because of widespread corruption in the judicial branch and the intention to appoint the right judges. Nevertheless, this was a move that could undermine independence of the judges if it were continued.

The ordinary judges constitute a judicial cadre and serve until retirement, unless they are removed as a result of disciplinary actions. Like a vast majority of countries,²⁶¹ Afghanistan requires judges to retire at a certain age. The retirement age of ordinary judges is completion of 65 years of age, or completion of 40 years of active work.²⁶² Nevertheless, the term of service of a judge can be extended annually after retirement for up to 10 years provided the High Council of the Supreme Court deems the extension necessary.²⁶³ Extension of tenure is not in compliance with international guidelines on independence of judges since they might bow to influence in exchange for extension of their terms.

The judges cannot be arrested or investigated without a presidential decree, unless an evident crime has occurred.²⁶⁴ Ordinary judges can be removed from their judicial position if they commit a felony or crimes originating from their job.²⁶⁵ The High Council of the Supreme Court can proceed with interim suspension of a judge once the investigations are complete and the judge's defence is not accepted.²⁶⁶ Subsequently, removal of the concerned judge will be proposed to the President and trial of the judge begins in the High Council of the Supreme Court.²⁶⁷ Similar to the rationale that gave the President the power to appoint judges, removal of judges, i.e., withdrawal of their judicial commission, can also take place via the signature of the President. If a judge commits crimes other than felony or crimes related to his job, he will be prosecuted by ordinary courts, though his job will be suspended until the decision of the court is announced.

Early court appointments during the interim and transitional administration are criticised for lack of merit.²⁶⁸ The 2007 Strategy of the Supreme Court with a Focus on Prioritization²⁶⁹ accepted that the majority of judges are appointed through political connections and many do not possess the required legal education. Gradually and after new appointments in the Supreme Court in 2015, the appointment processes are reformed with increased transparency. In addition, there is less opportunity for *madrassa* judges to be accepted as judges. For instance, in 2019 from 600 participants, only 2 or 3 graduates of *madrassas* were admitted in the judicial stage.²⁷⁰ As a result, more qualified individuals are appointed as judges. There is a general understanding that the recent appointments have been more transparent since 2001.

260 Abdul Ali Mohammadi (former Legal Advisor of President Ghani from 2014 to 2016), online pers. comm., 9 July 2020. Along with President Ghani, Mr Mohammadi took part in those interviews with the President of Provincial Appellate Courts.

261 Shetreet, "Judicial Independence," 623.

262 Law on Jurisdiction and Organization of the Judiciary. article 87.

263 "Amendments to Law on Organization and Jurisdiction of Judiciary," Official Gazette 1115 § (2013). Article 1.

264 Law on Jurisdiction and Organization of the Judiciary. article 91.

265 Definitions of felony and crimes that originate from the job are discussed in the preceding section regarding removal of Supreme Court members.

266 Law on Organization and Jurisdiction of Judiciary. article 91.3.

267 Law on Jurisdiction and Organization of the Judiciary. article 91.

268 International Crisis Group, "Reforming Afghanistan's Broken Judiciary." 2.

269 The 2007 Strategy of the Supreme Court with Focus on Prioritization, 3.

270 Attayee, pers. comm., 18 February 2020.

To hire individuals with higher qualifications and train them, a 2-year judicial stage is organised; in addition, judges can be assigned to on-the-job trainings.²⁷¹ The judicial stage programme consists of in-class and practical sessions and has trained many judges, though a revision of the curriculum with a focus on concepts such as separation of powers, judicial independence, and international norms seems necessary. The programme is competitive and applicants should pass an exam to be considered for the 2-year training.²⁷² From the establishment of the stage programme, the quality of judgement has improved and the young generation of judges is better qualified to manage the powerful disputants, including the government.²⁷³ Though trainings can be helpful for the short term, only hiring highly educated individuals can change the fortune of the judiciary and build a real independent branch. Undermining a competent judiciary is never easy for the other two branches.

In a sign of the international community's desire to make appointment of judges more merit-based, an anti-corruption benchmark to establish an independent commission for appointment of judges was proposed in 2018, but was rejected by the Head of the Supreme Court since it could undermine the authority of the President.²⁷⁴ If it had been accepted, it could have been a positive step for merit-based appointment process of judges and it is still a measure that is worth being examined. Alternatively, the benchmark was revised for establishment of two commissions inside the judiciary, one for appointment of judges and one for recruitment of civil servants, which conducted appointment and transfer of 527 judges and 560 administrative staff, respectively, in 2018.²⁷⁵ In conclusion, the process of appointment, removal and tenure of judges contains risks to their independence because the executive branch is involved in regular appointment of judges. In addition, the possibility to extend their tenure makes judges prone to influence. Conversely, the tenure of judges is long and, unless they commit a crime, they can serve until retired, which is necessary for an independent performance.

2.2.3. Impartiality of judges in decision making

Concerned of independence of the judges, international and regional instruments emphasise impartiality of judges. The UN Basic Principles on Independence of the Judiciary for example requires the judiciary to decide cases with full impartiality and without accepting any kind of undue pressure from outside.²⁷⁶ In line with international standards, Afghanistan has also recognised and incorporated these restrictions in its legislative instruments.

271 "Regulation on Judicial Education," Official Gazette no. 1343 § (2019). articles 8 and 21.

272 Ibid. article 10.

273 Muzafari, pers. comm., March 14, 2020.

274 Decisions of High Council of Rule of Law and Anti-corruption, 25 August 2018.

275 "Annual Report of Fiscal Year 2018 on the Implementation of National Strategy for Combating Corruption" (Special Anti-Corruption Secretariat of Afghanistan, 2019), https://sacs.gov.af/en/reports/report_details/210. 147.

276 United Nations, "Basic Principles on the Independence of the Judiciary, Endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985" (New York, 1985).

All procedural laws of Afghanistan have measures for ensuring judicial impartiality. For example, the Criminal Procedures Law requires a judge to be recused in the following circumstances: 1) when the crime is committed against the judge or his family member; 2) when the accused is a family member of the judge; or 3) when judge had served or decided as witness, investigation officer, prosecutor, legal advisor of the parties or has served as an expert in the case.²⁷⁷ The Civil Procedures Law²⁷⁸ and Commercial Procedures Law²⁷⁹ have similar measures to prevent bias and conflict of interest when cases are examined and decided in the court. Moreover, the laws ask judges to recuse themselves from cases if they are under unavoidable influence.²⁸⁰ The Afghan legal system has fairly covered the subject of impartiality of each judge and has ensured decisions are made based on law and the evidence.

2.2.4. Financial remuneration

Afghan judges are not allowed to take any other occupations besides being a judge;²⁸¹ thus, salary is the only source of funding for most of them. Legally, the judges should be paid an appropriate salary.²⁸² Members of the Supreme Court and judges are considered as senior officials of the state who receive a salary based on a formula introduced by the law. The base is the salary of the highest ranked civil servant in a month which equals to AFN32,500 (approximately USD425).²⁸³ The base salary is multiplied based on the ranking of each state official. Supreme Court members receive a salary that is comparable to that of ministers with a multiplier of “6”.²⁸⁴ The multiplier used for the salary of the Head of the Supreme Court is “7”, which is equal to the speakers of the two houses of the parliament but lower than the Vice Presidents, who receive a salary with a multiplier of “8.5”.²⁸⁵ The salary multiplier for judges ranges from “4” to “2.5” based on their rank.²⁸⁶ Increase in salary had a direct impact on the level of corruption in the judiciary.²⁸⁷ A number of judges and those involved in judicial affairs consider the current salary adequate for a normal life.²⁸⁸ Comparatively, the salary of prosecutors and staff in Ministry of Justice is substantially lower than the salary of judges, though the nature of their work is similar.²⁸⁹ While the salary of judges is deemed to be adequate, the difference in salary between judges is substantial, which could be a motivation for judges to bow to decision makers in the judiciary and the executive branch.

Members of the Supreme Court are also entitled to a few other financial entitlements such as housing, some money for hospitality and a payment based on their level of higher education. In addition, they get financial remuneration for the rest of their life provided they are not legally dismissed, do not take over another occupation, do not quit Afghan nationality and are not deprived of civil rights.²⁹⁰ In addition, housing, security, political passport and health services will be offered for free to the members of the Supreme Court from after their tenure until death.²⁹¹ Supreme Court members

277 Criminal Procedures Law. article 16.

278 Civil Procedures Code. articles 60, 65, 66, 68, 70, 72, 76 and 77.

279 “Commercial Procedures Law” (1964). articles 16-22.

280 Regulation on Judicial Conducts of Judges of Islamic Republic of Afghanistan. article 6.

281 Law on Jurisdiction and Organization of the Judiciary. article 21.

282 Ibid. article 88.

283 Hashimi, pers. comm., 14 April 2020.

284 “Law on Determination of Salary of High Officials” (2013). article 3.

285 Ibid. article 3.

286 Ibid. article 4.

287 Judge in Kabul Primary Court (anonymity requested) pers. comm., 1 December 2019.

288 Judge in Herat Primary Court (anonymity requested) pers. comm., 10 February, 2020. Popal, pers. comm., 25 December 2019. Shamsurahman Shams (retired judge), online pers. comm., 1 April 2020.

289 Popal, pers. comm., 25 December 2019.

290 Law on Determination of Salary of High Officials. article 5.3 and 5.5. Also, Constitution of Afghanistan, 2004. article 126.

291 Ibid. article 5.3.

are respected individuals and payment of salary after their tenure is to stop them from working in positions that may not be appropriate to them. None of the Supreme Court members who had been appointed after 2004 and finished their term joined the government institutions or engaged in political activities. This proves the effectiveness of the payment of lifetime remuneration.

2.2.5. Security of judges

Security of judges and working conditions are consequential factors on independence of the judges.²⁹² This is especially consequential in Afghanistan due to the different range of security challenges. Directorate of Protection of Senior Officials and Ministry of Interior and other relevant agencies are legally obliged to ensure security of the judges and the courts.²⁹³ However, due to the involvement of police in the war with the military opposition, security personnel are not provided to all judges in the provinces and districts, which drew criticism from the Head of the Supreme Court.²⁹⁴ In conflict situations, long-term tenure does not mean much if the judge is at risk of physical assault.²⁹⁵ As one member of the parliament said, in the absence of security, courts cannot enjoy independence.²⁹⁶ The judiciary and its personnel have been a prime target for insurgents and criminal groups²⁹⁷ and thus they have undertaken attacks on the Supreme Court, provincial courts and district courts on frequent basis. In 2019, 13 judges and three judicial staff died as a result of targeted killings; proper investigations into these incidents did not take place.²⁹⁸ There are also reports that claim a few judges have been in Taliban's captivity.²⁹⁹ Lack of security coupled with a lack of basic facilities discourages judges from traveling to districts and insecure provinces.

Insecurity coupled with other factors such as lack of facilities has resulted in 590 out of 2,614 judge positions being vacant across Afghanistan and the presence of a disproportionate number of women, 257, as judges.³⁰⁰ With their life at risk, judges make assessments of the parties and the risks associated with a decision against the powerful disputant. As a result, they come up with decisions that drastically lower the sentence.³⁰¹ Lack of security is a prime reason for judges to gamble their impartiality, a situation that endangers the overall integrity of the judiciary.

2.2.6. Restricted activities

International guidelines on judicial independence and legal systems around the world outline various categories of restricted activities for judges. International standards also restrict judges from remunerated jobs or business activities though teaching in educational institutions and owning or running a personal business is fine as long as it does not affect the image of the judge or his judicial responsibilities.³⁰² This is a vital conditionality because it is difficult to restrict a judge from other activities or practicing his fundamental rights.

292 Jackson, "Judicial Independence: Structure, Context, Attitude," 53-54.

293 Law on Jurisdiction and Organization of the Judiciary. Art. 104, and Law on Salary of the High Officials. article 6.

294 Decisions of High Council of Rule of Law and Anti-corruption, 2 May 2018.

295 Jackson, "Judicial Independence: Structure, Context, Attitude," 56.

296 Monawar Shah Bahaduri (member of parliament), pers. comm., 15 March 2020.

297 "Afghanistan's Fight Against Corruption: Crucial for Peace and Prosperity." 40.

298 Ibid.

299 Judge in Kabul Primary Court (anonymity requested) pers. comm., 1 December 2019.

300 "Afghanistan's Fight Against Corruption: Crucial for Peace and Prosperity." 41.

301 Ibid.; Bahaduri, pers. comm., 15 March 2020.

302 Ibid. principle 7.4.

In line with international guidelines, the laws in Afghanistan ask judges not to engage in activities that undermine their judicial duties.³⁰³ Supreme Court members cannot enter into profitable business with the state, take other jobs or be a member of a political party during their term of office.³⁰⁴ Likewise, ordinary judges cannot have other occupations or have membership in political parties during their term of office.³⁰⁵ Judges cannot work as formal *Imams* (the person who leads prayers in the mosque),³⁰⁶ and cannot support any candidate in the election.³⁰⁷ Teaching (except in the judicial stage) is another example of restrictive measures. Although many of the introduced restrictions are reasonable, extreme application of restrictions has deprived judges of enjoyment of their fundamental rights. For instance, judges are not permitted to participate in training workshops or enrol in master's degree programmes without permission of the relevant authorities in the judicial branch.³⁰⁸ Making interviews with the media without authorisation is also not permitted.³⁰⁹ The Supreme Court has even threatened to prosecute researchers who found that the majority of people refer to informal settings to resolve their disputes and believe the courts are among the most corrupt institutions in the country.³¹⁰ A more careful review of restrictions is needed to avoid violating the fundamental rights of judges. An outright ban on outside activities is not the right choice of action. Overall, judges should be allowed in activities that do not have negative impact on their neutrality.

Except for female judges who have their association,³¹¹ other judges are not part of an association or union. Initially, the Supreme Court had been hostile to the idea of establishing associations by the judges as seen after the first association of female judges was established in 2007.³¹² Shortly after, the Supreme Court approved a charter for establishment of a judges' association.³¹³ This is a Supreme Court-dependent entity that requires mandatory membership of all current judges.³¹⁴ The association is not established yet and its charter seems to violate the fundamental rights of the judges.

2.3. Intra-judiciary independence

Independence of judges from their own supervisors and high ranking officials of the judiciary has received less attention compared to institutional independence and individual independence of the judges.³¹⁵ In Afghanistan, independence of the lower court judges from their supervisors is critical. Some interviewees for this paper said the provincial courts are heavily dependent on the Supreme Court and Directorate General of Administration of the Judiciary.³¹⁶ Intra-judiciary independence is important because the judges in Afghanistan are following the same rules applied in a hierarchical administration. Proposal of appointments, transfer, promotion, disciplinary actions, rewards and provision of security and other privileges are all facilitated by the superior judges and departments of the Supreme Court, which means resistance to their orders can end in loss of support and benefits the lower court judge is entitled to receive. The following sub-sections discuss three areas important for intra-judiciary independence in Afghanistan.

303 Regulation on Judicial Conducts of Judges of Islamic Republic of Afghanistan.

304 Ibid. articles 118, 151 and 152.

305 Ibid. article 152 and 153.

306 *Collection of Supreme Court Circulars, Decisions, and Guidelines for 1389-93 (2010-14)*. 657.

307 Ibid. 144.

308 Ibid. 449 and 627.

309 Haress, pers. comm., 17 October 2019.

310 Dr. Ali Wardak (Professor of Criminology at University of South Wales) online pers. comm., 16 May 2020.

311 "Afghanistan's Female Judges Discuss Challenges in Justice Delivery."

312 *Collection of Supreme Court Circulars, Decisions, and Guidelines for 1385-89 (2006-10)*. 404.

313 "Charter of Association of Judges of Afghanistan" (Official Gazette 975, March 5, 2009).

314 Ibid. articles 7 and 8.

315 Shetreet and Forsyth, *The Culture of Judicial Independence*, 2.

316 Timory, pers. comm., 30 November 2019; Saeed, pers. comm., 25 January 2020.

2.3.1. Independence of each court and each judge

The Regulation on Judicial Conduct of Judges recognises the threat of undue influence from within the judiciary and instructs judges not to bow out to any kind of influence: “Independence and impartiality of judge are the only guarantees for realization of right and justice. Thus, judge should stop any kind of attempts or actual interference in his judicial tasks whether it is coming from senior officials or others, including his relatives.”³¹⁷ Further, it adds that judges are obliged to follow instructions of senior officials of judiciary to the extent his independence and impartiality are not intact.³¹⁸ In spite of this, the possibility of interference is high. Senior judges, especially at the high court level, are highly influential over judges of the lower courts since they make decisions over promotions and transfer of the judges in lower courts.

Each court in Afghanistan is independent in its decision making and should base its decision on law.³¹⁹ In addition, each judge is free in offering her opinions and should not dictate her opinions to others or follow others’ opinions against her well.³²⁰ One way to allow each judge to decide on her understanding of the law is to allow dissenting opinions, which is allowed in Afghan legal system.³²¹ However, the judges rarely use this right. According to one defence attorney, in around 1,000 cases he defended in the courts, he witnessed only one judge filing a dissent opinion.³²² He argues that the reason for lack of dissent is the obedience of the bench members from the the Head of *Diwan* who has a big role in assessment of the court members and thus their promotion.³²³ On the other hand, court decisions are not usually published, which makes it impossible to analyse arguments of judges.³²⁴ In districts especially, only one judge sits on the bench, so there is not a chance for dissent. Reforming the performance assessment process can let judges express their arguments more freely.

Members of the bench have responsibility for their collective decisions and their individual behaviour.³²⁵ However, there are examples of Supreme Court decisions that undermine the independence of the primary courts. Under article 121 of the Constitution, courts can request the Supreme Court to conduct judicial review. However, the Supreme Court has asked the primary courts not to share their requests for *estihda* (request for guidance) directly and to share their questions with their respective appellate court.³²⁶ The Supreme Court argues that if the head of appellate court could not respond to the question, he will write to the Supreme Court.³²⁷ This administrative decision defeats the concept of independence of the primary courts and is an obstacle for implementation of article 121 of the Constitution.

Because of the influence the Supreme Court exercises over the courts, decisions of the High Council of the Supreme Court are followed strictly by the lower courts, even if there are laws that are more relevant to the subject matter.³²⁸ As pointed out a number of times in this paper, the Supreme Court has made decisions that have not been compatible with the laws or the Constitution. However, the lower courts followed those decisions without raising any objection.

317 Regulation on Judicial Conducts of Judges of Islamic Republic of Afghanistan. article 3.

318 Ibid. article 7.

319 Law on Jurisdiction and Organization of the Judiciary. article 19.

320 Regulation on Judicial Conducts of Judges of Islamic Republic of Afghanistan. article 5.

321 “Civil Procedures Code,” Official Gazette 722 § (1990). article 251; “Criminal Procedures Law,” Official Gazette 1132 § (2013). article 231. Article 26 of the Law on Organization and Authorities of the Judiciary prescribes that decisions in the High Council of the Supreme Court are made by two third majority which literally allows dissents.

322 Mohammad Zaki Ayoubi (former defense attorney), online pers. comm., 21 January 2020.

323 Ibid.

324 Mahmoodi, pers. comm., 2 January 2020.

325 Law on Jurisdiction and Organization of the Judiciary. article 71

326 *Collection of Supreme Court Circulars, Decisions, and Guidelines for 1385-89 (2006-10)*. 457-58.

327 Ibid. 217.

328 Kalim, pers. comm., 18 November 2019.

In addition, promotion and transfer of the judges is dependent on how the judge's decisions were made. The fear that their decisions could be overruled by the superior judges, or they might have an impact on their future promotion and transfer, make the judges of the lower courts more conservative. A look at the types of questions the lower courts sent to Supreme Court as *estihda* gives the impression that lower court judges did not want to be proactive in the case; even if they are in a little doubt, they seek support from Supreme Court to avoid adverse ramifications.

2.3.2. Performance assessment and promotion of judges

Assessment of judges is generally conducted by Directorate of Inspection of the judiciary after receiving inputs from the supervising judge. For promotion, a judge should receive a grade of average or above.³²⁹ The assessment does not focus on the substance of the cases; rather it confirms whether legal procedures have been followed by the concerned judge.³³⁰ However, the Law on Organization and Jurisdiction of the Judiciary insists on consideration of how decisions were made by the judge in the assessment.³³¹ The result of the assessment is shared with the Appointment Committee in which a Supreme Court member is also sitting. Based on the assessment report of the Directorate of Inspection, the assessment of the judge's supervisor and a report from the Directorate of Judicial Control and Surveillance, the assessment concludes and a recommendation for promotion or transfer will be made to the High Council of the Supreme Court.³³² The assessment process is quite elaborate; however, it gives substantial power to the Directorate of Inspection, since the assessment is built up on the inspection report. If the team from this Directorate is not on good terms with the assessed judge, the report may not reflect the judge's real performance.

In absence of clear and measurable indicators for assessment, there are reports that the assessments are treated arbitrarily.³³³ An official of the Supreme Court recognised there had been issues with the inspection; however, he adds the process has improved and there are standards that are followed.³³⁴ The new Draft Law on Organization and Jurisdiction of the Judiciary has outlined benchmarks for assessment of judges based on which the judge can be promoted, stay in her current position, be demoted or even marched to retirement.³³⁵ Similarly, commending judges is subjective since it gives full authority to the President or the Head of the Supreme Court to issue commencement letters to judges.³³⁶ Overall, the assessment process of judges is flawed and arbitrary and needs urgent attention. It is expected the new criteria introduced in the new Draft Law on Organization and Jurisdiction of the Judiciary make the process acceptable.

329 Attayee, pers. comm., 18 February 2020.

330 Ibid.

331 Law on Organization and Jurisdiction of Judiciary. article 87.2.

332 Ibid. article 83.

333 Saeed, pers. comm., 25 January 2020.

334 Attayee, pers. comm., 18 February 2020.

335 Draft Law on Jurisdiction and Organization of the Judiciary (approved by cabinet in 2018 and submitted to the National Assembly). article 57.

336 "Amendments to Law on Organization and Jurisdiction of Judiciary," Official Gazette 1146 § (2014). Article 1.

2.3.3. Transfer of judges

In some countries, transfer of a judge to unfavourable places is a tactic to undermine their independence.³³⁷ In France, transfer of judges cannot take place without consent of the judge himself.³³⁸ In India, which has regions with different facilities and challenges, the transfer of judges has been considered as de facto dismissal.³³⁹ In Afghanistan, transfer of judges has been used both as a disciplinary action and as a normal administrative matter, which can be also interpreted as a reward. Transfer of judges should take place every 3 years, though transfer can happen at the judge's request or at the discretion of the relevant authorities of the judiciary at any time.³⁴⁰ The law gives substantial power to the judicial authorities, especially the Director General of Administration and members of the High Council of Supreme Court, who are part of a committee of appointments and transfers, that can decide on the transfer of a judge at any time. As a result, there are many cases of transfer of judges before a completion of 3 years and cases that judges remained in one position for 7 to 10 years.³⁴¹ Some persons interviewed for this paper also said the Supreme Court transfers judges if there are complaints by politicians or parliamentarians against a judge to avoid scrutiny by the media or confront political figures.³⁴² Several persons interviewed for this paper pointed to transfer of judges to favourable or unfavourable regions as one of the main challenges for independence of judges in Afghanistan.

One common criticism of the judiciary is that judge transfer has become a tool in the hand of the senior judges who can use for favouritism.³⁴³ For example, one judge told that during the time of Shinwari and Azimi, members of the Supreme Court and other top officials of the judiciary were asking the judges directly to decide cases according to their instructions; otherwise, the judge would be transferred to unfavourable locations.³⁴⁴ There has been a popular saying quoted from the senior judges which said: "if you do not take care of it, we will take care of you."³⁴⁵ In fact, a number of judges left their jobs since they thought by accepting to move to insecure locations, they were risking their life.³⁴⁶ Besides, the approach has made many judges conservative and receptive to tips from their supervisors and high-ranking officials of the judiciary.

Overall, the process that leads to transfer of judges needs a serious reconsideration and attention. This is a critical point of pressure on the judges who should either accept the instructions they receive from senior members of the judiciary or gamble their life by being sent to insecure provinces. The transfer procedure is one of the main causes that undermine independence of the judges.

337 Jackson, "Judicial Independence: Structure, Context, Attitude."

338 Grivart de Kerstrat, "France." 64.

339 Shetreet, "Judicial Independence," 608.

340 Law on Organization and Jurisdiction of Judiciary. article 84.

341 Judge in Herat Primary Court (anonymity requested) pers. comm., 10 February, 2020.

342 Ibid.

343 Saeed, pers. comm., 25 January 2020.

344 Judge in Herat Primary Court (anonymity requested) pers. comm., 10 February, 2020.

345 Ibid.

346 Saeed, pers. comm., 25 January 2020.

3. Other Considerations on Practical Application of Judicial Independence

In addition to three aspects of independence, there are several other subjects that need close attention since they impact judiciary independence. These include the power of courts to practice judicial review, accountability of courts, impact of judicial independence on human rights of citizens and a number of other topics, which are discussed below:

3.1. Judicial review: a pillar of independence or a point of weakness?

Judicial review is the process of ensuring compatibility of laws and executive decisions with the Constitution. Generally, judicial review makes the judiciary more powerful, as was seen in the aftermath of *Marbury v. Madison* in the US. One of the main reasons for countries to authorise their judiciaries to conduct judicial review is the notion that the judicial branch is independent of politics and makes decisions with neutrality. In this sense, judicial review and judicial independence can be “complementary and self-supportive.”³⁴⁷ However, there are also examples that judicial review has been designed to protect the executive branch from the legislature. In Japan, the courts with constitutional review authority have been reportedly protecting the executive branch, while a similar structure was in place under the Constitution of 1958 in France.³⁴⁸ When the judiciary is required to answer political questions, judicial review becomes a nuisance for the judicial branch rather than a source of power. How the judiciary responds to those political questions is an indicator of independence of the courts.³⁴⁹ Courts can use judicial review power to prove their independence, while they can seem biased and dependent if they do not apply their judicial review power wisely.

Judicial review and constitutional interpretation in Afghanistan are inconsistent and controversial. The Constitution of 2004 provides that at the request of government or the courts, the Supreme Court can review the compatibility of laws, legislative decrees and international treaties with the Constitution and interpret them.³⁵⁰ While there is less controversy over authority of the Supreme Court to conduct judicial review, there is no agreement on which entity has the authority to interpret the Constitution. Nevertheless, the Supreme Court has asserted it has this authority and has interpreted the Constitution on several occasions since 2004.

Article 121 of the Constitution has contributed to establishing a notion that the Supreme Court is deciding cases in favour of the government.³⁵¹ In fact, the Supreme Court has decided in favour of the government in all cases of requests for constitutional interpretation except for one case in which it chose to remain silent. There are several reasons for the mass of favourable decisions that benefited the government. The Constitution only allows the government and the courts to make a request for judicial review or interpretation. The courts are not adequately competent and are unfamiliar with the culture of judicial review. Thus, there has never been a review requested by the courts in the context of an actual case, though there have been requests for interpretation in the form of *estihda*. On the other hand, the executive branch has used this opportunity to the extent possible when it felt its justifications will prevail in the Supreme Court. For these reasons, legislations that are seemingly unconstitutional, like the National Reconciliation and Amnesty Law, were never referred to the Supreme Court for review of their constitutionality.

347 Kamali, “Appellate Review and Judicial Independence in Islamic Law,” 50.

348 Jackson, “Judicial Independence: Structure, Context, Attitude,” 44.

349 Ibid. 26.

350 Constitution of Afghanistan, 2004. article 121.

351 International Crisis Group, “Reforming Afghanistan’s Broken Judiciary.” i.

Several requests of judicial review and constitutional interpretation have been political in nature; however, the Supreme Court has not argued whether the requests are justiciable or not. “Justiciability” is a key phenomenon that can protect the courts from undue pressure from outside actors. Using this excuse, the judge can reject reviewing the case due to the political nature of the question before the court. This has been a critical feature of the judicial system in the US based on which the courts use “passive virtues” to delay or reject decision making.³⁵² By not exercising judicial review due to non-justiciability, the courts would expose themselves to political pressure, but it also proves their resilience and independence if they do not bow to such requests.

Treatment of political matters by the Supreme Court has attracted criticism in Afghanistan. For example, in the case of *Spanta*, while there had been arguments that the case is political, the Supreme Court did not reject examining the case. However, in a similar case of impeachment in 2016, the Supreme Court did not decide the case and let it die by itself. One author praised the inaction of the Supreme Court as a smart decision since it did not want to intervene in a politically charged dispute.³⁵³ However, given the fact that the *Spanta* case had established a precedent, the position of the Supreme Court on the question of the impeachment of seven ministers created more questions than answers. Legally, the courts in Afghanistan cannot decide not to decide a case before them. The Law on Organization and Jurisdiction of the Judiciary says “The court cannot refuse making a decision or a verdict in a case legally referred to it. The case under court consideration cannot be removed from the court before a decision is made.”³⁵⁴ As a result, eyebrows rose on whether the Supreme Court chose the right stance. Disagreement over judicial review and constitutional interpretation has a direct impact on the confidence of the people over the judiciary.³⁵⁵ The above reasons resulted in politicisation of the judicial review and constitutional interpretation in Afghanistan, which signals urgency of reform.

3.2. Judicial independence vs. judicial accountability

Like any other institution that is using public funds, the judiciary should give an account of its activities and how its public funds are spent. In addition, it should show that court decisions are based on law and are taken without any bias. A frequent concern raised about the judiciary in Afghanistan has been its lack of accountability and transparency.³⁵⁶ Some individuals interviewed said the courts and members of the judiciary avoid questions, citing independence of the judiciary.³⁵⁷ In contrast to this belief, accountability and transparency are not in conflict with independence.³⁵⁸ Judicial independence is the core principle the judiciary is built on, but it does not preclude accountability. In fact, an independent judiciary must be accountable for its conduct, its decisions and the funds it expenses; this, in return, increases public confidence in the courts.

Though Afghanistan holds an unacceptable position in the world’s corruption ranking,³⁵⁹ the fight against corruption has yielded some results in recent years. For example, while surveys revealed that 34% of respondents in 2012 and 2014 considered courts and the police as the most corrupt

352 Jackson, “Judicial Independence: Structure, Context, Attitude,” 45.

353 Shamshad Pasarlay, “When Courts Decide Not to Decide: Understanding the Afghan SC’s Struggle to Decide the Fate of the Dismissed Ministers,” *Blog of the International Journal of Constitutional Law* (blog), 22 March 2017, <http://www.icconnectblog.com/2017/03/when-courts-decide-not-to-decide-understanding-the-afghan-supreme-courts-struggle-to-decide-the-fate-of-the-dismissed-ministers/>.

354 Law on Organization and Jurisdiction of Judiciary. article 17.

355 Shetreet and Forsyth, *The Culture of Judicial Independence*, 2.

356 Mahmoodi, pers. comm., 2 January 2020.

357 Timory, pers. comm., 30 November 2019.

358 Jackson, “Judicial Independence: Structure, Context, Attitude,” 61.

359 “Corruption Perceptions Index 2019” (Transparency International, January 2020), <https://www.transparency.org/cpi2019?news/feature/cpi-2019>. 3.

institutions,³⁶⁰ this number dropped to 14% in 2018.³⁶¹ This is a good rise in the ranking; however, it still shows that fighting corruption is a key challenge in the judiciary that has hampered the achievements of the recent years.

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 one judge, six court clerks, six defence lawyers and five other individuals from outside the judiciary who committed corruption or facilitated corrupt practices during SY 1397.³⁶² Similarly, this office uncovered 81 alleged cases of corruption which resulted in arrest and conviction of two judges, three administrative staff and two defence attorneys in 2019.³⁶³ A total of 91 judges and administrative staff also faced disciplinary actions including dismissal, transfer, reduction in salary, written warnings or advice notices.³⁶⁴ This office even has secret agents who collect intelligence regarding corrupt practices by the judges and other staff members in the judiciary. Similarly, the judiciary took highly successful transparency measures in the form of registration of assets of members of the Supreme Court and judges.³⁶⁵ The other measure for transparency was to make the recording of court proceedings mandatory, which seems to have experienced some progress.³⁶⁶

A strong culture of secrecy in the judiciary³⁶⁷ also contributes to the notion that the judiciary is not accountable. Though there have been calls from the anti-corruption agencies on the judiciary for courts to publish their corruption-related decisions, these calls have not been welcomed so far,³⁶⁸ and there are only a few court decisions published.³⁶⁹ In fact, the Penal Code considers publishing the decisions of the court as a complementary punishment in criminal cases, which can be applied if permitted by the court.³⁷⁰ However, given the importance of the need to assess decisions of courts for rule of law and provision of justice, relaxing the limitations on publishing decisions is a pressing necessity. The Law on Access to Information should provide a process for obtaining court documents.

The Anti-corruption Secretariat has shown satisfaction with the reports of the Supreme Court,³⁷¹ and the efforts of Supreme Court in fighting corruption have been acknowledged in reports of UNAMA.³⁷² Overall, the judiciary has progressed in the fight against corruption. According to the Special Anti-corruption Secretariat, transfer of judges is more merit-based today, more young judges are hired, the number of outstanding cases has decreased substantially and the number of disciplinary actions and dismissal of judges are also published.³⁷³ These are great signs that can help the judiciary to prove itself as a credible institution that can be trusted, though much more needs to be done. Accountability and independence of the judiciary should be designed in a balanced manner.

360 Integrity Watch Afghanistan, “National Corruption Survey 2014” (Kabul, 2014), <https://iwaweb.org/wp-content/uploads/2016/12/NCS-2014-English.pdf>. 4.

361 Integrity Watch Afghanistan, “National Corruption Survey 2018” (Kabul, 2018), https://iwaweb.org/wp-content/uploads/2014/12/NCS_2018__English__WEB.pdf. 2.

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

363 “Afghanistan’s Fight Against Corruption: Crucial for Peace and Prosperity.” 41.

364 Ibid.

365 Ibid. 30.

366 Ibid. 41.

367 Torabi, pers. comm., 5 February 2020.

368 Ibid.

369 “First Semiannual Report of Fiscal Year 2019 on the Implementation of National Strategy for Combatting Corruption” (Special Anti-Corruption Secretariat of Afghanistan, 2019), https://sacs.gov.af/uploads/reports/semi_annual/258.pdf. 32.

370 Afghanistan Penal Code. article 183.

371 Torabi, pers. comm., 5 February 2020.

372 “Afghanistan’s Fight against Corruption: From Strategies to Implementation.” 30.

373 Torabi, pers. comm., 5 February 2020.

3.3. Impact of judicial independence on fundamental rights of the citizens

Protection of human rights and independence of the judges are interdependent.³⁷⁴ Independent courts perform as the guardians of the fundamental rights of individuals. The enforcement of rights is assured by an independent and impartial tribunal.³⁷⁵ Besides, the judiciary has the duty in pursuing cases of violation of human rights and ensuring that perpetrators face justice.

Historically, the Afghan courts have failed to protect the human rights of the citizens in two fronts: first, they were used as justifiers of atrocities and human rights violations under some regimes; second, they failed to uphold and protect constitutionally recognised fundamental rights of individuals. As discussed under the subject on the history of judicial independence, courts were unfortunately used to make harsh sentences against the political oppositions during the communist and the Taliban regimes. Following the collapse of the Taliban regime, there have been reports of courts siding with influential individuals, making arbitrary decisions, ignoring principles of rule of law or deviating from the principle of legality, leading to the abuse of the human rights of the citizens.³⁷⁶ Politicisation of courts has caused loss of trust in the judicial branch, which is difficult to rebuild. A possible investigation into international crimes by the International Criminal Court in Afghanistan could take place, since the local judicial bodies, including courts, do not have capacity or willing to adjudicate such crimes.

Furthermore, courts failed to act as the protectors of human rights in Afghanistan. The case of Farkhunda that jolted Kabul is a prime example. A day before the Persian year-end celebrations in 2015, dozens of men beat a woman, Farkhunda Malikzada, to death before setting her dead body on fire, while hundreds of people and the police witnessed indifferently.³⁷⁷ There were false claims that she has put pages of Holy Quran on fire. The murder caused a national outrage and call for action. The trial of the accused began hurriedly and the primary court sentenced five persons to death while the others received life prisons or shorter sentences; similarly, the 20 policemen who did not stop the mob were sentenced to 1 year in jail.³⁷⁸ The trials at the primary and appeal stages were marred with concerns over a fair trial and whether all those individuals who were part of the mob were arrested. There were also reports of a presidential advisor pushing for a quick trial, a push that eased once several police officers got involved in the case.³⁷⁹ Sources outside the government acknowledged there was less influence from the government in the case of Farkhunda compared to case of Paghman.³⁸⁰ Lawyers and a fact-finding committee of the *Wolesi Jirga* also claimed the judicial institutions failed in upholding due process and tried to downplay the case.³⁸¹ It is believed the primary court announced harsh sentences amid public pressure and demands from the executive branch to calm down the criticism. The case of Farkhunda questioned the independence and responsibility of all institutions including the courts.³⁸² This case is another example of political and social influence over the courts and importance of judicial independence in upholding human rights.

374 S. Shetreet and J. Deschenes (editors), *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff Publishers, 1985), 4.

375 Ibid.

376 Mahmoodi, pers. comm., 2 January 2020.

377 Ali M. Latifi, "A Year Later, Afghans Reflect on a Mob Lynching of a Woman Falsely Accused of Burning Koran," *Los Angeles Times*, 18 March 2016, <https://www.latimes.com/world/asia/la-fg-afghanistan-killing-20160318-story.html>.

378 Allisa J. Rubin, "Flawed Justice after a Mob Killed an Afghan Woman," *New York Times*, 26 December 2015, <https://www.nytimes.com/2015/12/27/world/asia/flawed-justice-after-a-mob-killed-an-afghan-woman.html>.

379 Ayoubi, pers. comm., 21 January 2020.

380 Frozish, pers. comm., 27 February 2020.

381 Anisa Shaheed, "Lawyer Calls on Ghani to Review Farkhunda Case," *Tolo News*, 19 March 2017, <https://tolonews.com/afghanistan/lawyer-calls-ghani-review-farkhunda-case>.

382 Hasina Safi (former Acting Minister of Information and Culture) pers. comm., 19 February 2020.

3.4. Importance of proper protocol

Protocol considerations to the Head and members of the Supreme Court and other judges indicate how much importance is given to the judiciary. The Law on Organization and Jurisdiction of the Judiciary regulates the protocol for presence of Supreme Court members in official events by stipulating that the Head of the Supreme Court stands on the right side of the President after the Vice Presidents, and members of the Supreme Court stand beside the ministers.³⁸³ In addition, heads of the appellate courts stand on the right side of provincial governors and heads of district courts on the right side of the district governors.³⁸⁴ The above order is usually respected, though there have been instances that other officials got priority over the Head or members of the Supreme Court. The laws do not specify any protocol to the ordinary judges; however, in practice, the judges are usually given respect and high protocol in official meetings.

3.5. Unchanged attitudes toward the judiciary

As prerequisites, different aspects of judicial independence should be reflected in the constitution and the laws; however, it is also mandatory that textual recognition be translated into de facto or positive independence. For this to happen, existence of a culture of judicial independence is necessary. A prominent constitutional law scholar reinforces this necessity by saying “whether and to what extent the judiciary in any country can be viewed as independent will not only depend on the law and constitution of that country, but also on the nature and character of the people who hold the office of judge, on the political structure and social climate, on the traditions prevailing in that country, and on the institutional and constitutional infrastructure of judicial independence.”³⁸⁵ Creating a culture of respect for judicial independence takes decades and generations and needs efforts and vigour from all institutions and individuals. It is due to this fact that, in countries like France and Japan, the courts perform independently despite the extensive role of the executive branch in the judiciary.

The concept of independent institutions is not institutionalised in Afghanistan. In the judiciary, which is designed to be the most important independent institution, the biggest missing aspect is an independence attitude. Many old judges are used to working in a judiciary that had been controlled by the executive branch. That attitude has resulted in consideration of political preferences in courts’ decisions.³⁸⁶ Overall, treatment of the judiciary as an equal branch that can challenge those with executive power is not a familiar phenomenon in Afghanistan. Heads of state, no matter whether they were kings, presidents or *Amirs*, had absolute power for most of history in Afghanistan. Politicians also used the judiciary to rubber stamp their own decisions. For example, President Karzai organised a meeting in which the Head of the Supreme Court, Attorney General, President of Independent Commission on Overseeing Implementation of the Constitution and the Minister of Justice discussed political questions and proposed solutions.³⁸⁷ This is a mere example of how the judiciary is used to rubber-stamp decisions of the executive power with less concern on the effects of such behaviours on the credibility of the judiciary.

383 Law on Organization and Jurisdiction of Judiciary. article 106.

384 Ibid.

385 Shetreet, “Creating a Culture of Judicial Independence,” 45.

386 Mahmoodi, pers. comm., 2 January 2020.

387 Saeed, pers. comm., 25 January 2020.

Furthermore, the Sharia-rooted belief that judges are the representatives of the head of the state is an impediment to independence. This is in gross contradiction of the principles of a government of separation of powers. Unlike other countries where judges consider themselves as guardians of fundamental rights and rule of law, the Afghan judges have been conservative and hesitant to stand in the face of the executive branch. The Supreme Court at times has acted in a way that questioned its own independence. For example, following the impeachment of Supreme Court members in 2010 by the *Wolesi Jirga*, the Supreme Court wrote the following text in its *Mizan* periodical: “In accordance with Article 64 of the Constitution of the land and the rulings of the Islamic Shari’a, the power to dismiss judges, from a judge of the Primary Court to the Judge of Supreme Court is only vested in the authority of the President.”³⁸⁸ It is obvious this statement is incorrect since the President does not have the constitutional power to remove Supreme Court members, nor can he initiate removal of ordinary judges. However, it reflects the reality of the existence of a mentality of dependence in the highest level of the judiciary.

A culture of independence needs a change of attitudes of judges, but also a change in behaviour of everyone that is involved in the rule of law sector, the public, civil society and the media. Furthermore, there is a need for organisational change in the judiciary which requires a generational change.³⁸⁹ Recruitment of young judges has provided an opportunity for change, but it needs the efforts and respect of all relevant actors to respect the role of the judiciary before a claim can be made for an independent judiciary.

388 Haress, *Adjudicating Election Disputes*, 27.

389 Torabi, pers. comm., 5 February 2020.

PART FOUR: CONCLUSION AND RECOMMENDATIONS

4. Conclusion

In line with international guidelines, the post-2004 legal framework has adopted unprecedented measures to ensure institutional independence of the judiciary, and individual independence of the judges. Key measures include constitutional recognition of the judiciary as an independent branch, appointment of Supreme Court members as a result of joint engagement of executive and legislative branches, engagement of the judicial branch in preparation of its budget and management of expenditures, authority to propose laws in the area of judicial affairs, security of tenure, suitable salary and restriction of judges in membership in the political parties or taking over other occupations during term of office. Overall, the measures to protect individual independence of the judges are stronger compared to those designed for institutional independence of the judiciary and protecting the judges from undue influence of their supervisors and senior members of the judiciary.

Unfortunately, some of the measures foreseen in the laws of Afghanistan are either flawed or have not been translated into practice, which further contributed to dependency of the judiciary to the executive branch. The ineffectiveness of autonomy of the judicial branch in budgeting and financial spending and politicisation of the constitutional review process prove the flaws in the process. The continuation of these practices, which are the legacy of the time when the independence of judiciary was not recognised, have neutralised the constitutional mandate and authority of the judicial branch and has damaged the credibility of the judicial branch as an independent institution.

The ordinary legislation has also introduced restrictions that undermine the independence of the judicial branch. For example, the obligation of the Head of the Supreme Court to provide reports on judicial and administrative affairs to the President is not compatible with the principle of “separation of powers”. Furthermore, while the Constitution requires initial appointment of judges by the President and subsequent appointments by Supreme Court, the Law on Organization and Jurisdiction of the Judiciary gives the authority of regular appointment of senior judges (apart from awarding judicial commission) to the President. Since appointment of judges takes place every 3 years, or more frequently, this can push the judges to adopt a conservative approach in deciding cases when the government is involved in disputes. Under these circumstances, the judiciary could not manoeuvre as a strong branch of the state and has been largely overshadowed by the other two branches.

The hierarchical order in the judiciary is also a strong cause of the influence by supervisors and senior judiciary officials over lower court judges. This is the hidden phenomenon in the judiciary that has not only resulted in applying a passive and conservative approach by the judges, but also changed the judiciary to an administrative institution. 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 to the executive branch and the attitude of capitulation to orders of outside actors 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 the consideration of protocol arrangements to the Supreme Court members in official events or the attempt to impeach them by the parliament. As argued in this paper, judicial independence needs a culture. A culture of independence is not created only by judges. Each branch of the state, the legal community, politicians, media and the public must also contribute in creating this culture. As recommended by UNAMA, both the government and the judiciary should do their part in enhancing judicial independence in Afghanistan.³⁹⁰ Judicial independence is not born overnight. It comes when the attitudes reflect and respect the independence of the courts and judges. The fear that an

390 “Afghanistan’s Fight Against Corruption: Crucial for Peace and Prosperity.” 77.

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, the judiciary in Afghanistan is obliged to rely on state laws as the main source of its decision making. An independent judiciary in a government of “separation of powers” will certainly advance the rule of law and plays an important role in accountable governance.

5. Recommendations

General

- To ensure independence of the judiciary 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 judicial review and constitutional interpretation more consistent. However, for the long run and through the constitutional amendment process, establishing a court to conduct 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 who fail to enforce decisions should be indicted. The other measure is to establish a follow-up directorate in the judiciary which can also indict those officials and persons that do not enforce court decisions.
- Legislations that undermine independence of the judiciary 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, legislations should clearly define what constitutes “job-related crimes” and elaborate the process of prosecution of Supreme Court members for crimes other than felonies or those unrelated to conduct of their duties. In addition, a selective approach for extension of the tenure of judges after retirement should stopped.

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 appointment and transfer of judges. As article 132 of the Constitution requires, the role of the President should be limited to awarding judicial commissions, dismissal of judges at the proposal of High Council of Supreme Court 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 meetings of the Rule of Council and other committees.

- The Supreme Court should reform the hierarchical order in the judiciary 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 making interviews with the media, letting them establish associations outside judiciary and relaxing restrictions on inclusion of judges in educational programmes.
- Inclusion of graduates of *madrasas* in the judicial stage should be stopped altogether. Stage programmes and on-the-job trainings 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 his 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 transfer and promotion of judges.
- The courts in the Ministry of Defence should be discontinued. Similar to prosecution of members of the police and the Directorate of National Security, courts under the judicial branch 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 members of the parliament 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 qualifications of the Supreme Court members 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 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 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. In addition, after undergoing the required administrative reforms, the judiciary should be given more autonomy in administrative and financial affairs.
- The decree that requires the President approve trips of members of the judiciary should be amended to only require notification to the Office of the President.

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Annex I

Interviews

Due to the outbreak of COVID-19, interviews were conducted online. The names of the persons, who were interviewed for this paper, remain anonymous and only the names of their organisations and departments are given below. In addition, because of restrictions for making interviews, the judges who shared their experiences with me chose to remain anonymous, which is completely understandable and respected.

No.	Title
1	Director of Judicial Education of the Supreme Court
2	Former defense attorney
3	Prosecutor in Takhar
4	Member of <i>Wolesi Jirga</i>
5	Member of <i>Wolesi Jirga</i>
6	Officer in United Nations Assistance Mission for Afghanistan
7	Director of Cabinet Affairs in Administrative Office of the President and former attorney
8	Director General of Government Cases, Ministry of Justice
9	Commissionaire at the Independent Human Rights Commission
10	Assistant Professor of Law at American University of Afghanistan and former member of Afghanistan Independent Commission of Oversight on Implementation of the Constitution
11	Professor of Rule of Law at Stanford University
12	Director of Kakar Advocates
13	Former Secretary General at the Independent Human Rights Commission
14	Legal expert in Asian Foundation Kabul Office and former defence attorney
15	Director of Government Cases in Kabul
16	Director of Prosecution of Balkh
17	Assistant Professor at the American University of Afghanistan
18	Professor at Sharia Law Faculty of Kabul University and former member of Afghanistan Independent Commission of Oversight on Implementation of the Constitution
19	Acting Minister of Information and Culture
20	State Minister on Human Rights and former Chair of Independent Human Rights Commission
21	Member of team that supports the UN Special Rapporteur on Independence of Judges, Lawyers, Prosecutors and Jurors
22	Retired judge
23	Head of Communication in Integrity Watch Afghanistan
24	Head of Special Anti-corruption Secretariat at the Office of Chief of Staff of the President
25	Professor of Criminology at University of South Wales
26	Deputy Minister of Women Affairs
27	Judge in a Primary Court of Kabul
28	Judge in a Primary Court of Herat

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- Suggested areas of research
- Your favourite AREU publications or events
- What you believe we could do better
- Your field of interest, employment or study, as well as location

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September 2020	Women's Participation in the Afghan Peace Process: A Case Study	Shukria Azadmanesh and Ihsanullah Ghafoori	✓	✓	Gender	Case Study
July 2020	Gender Alert on COVID-19 in Afghanistan Issue XII: The Impact of COVID-19 on Women Affiliated with Opium Poppy Cultivation				Gender	Newsletter
July 2020	Mules, Pick-ups and Container Traffic: Cross-Border Production and Trade and the Shaping of the Political Economy of Nangarhar	David Mansfield			Governance and Political Economy	Issues paper

June 2020	When the Water Runs Dry: What is to be done with the 1.5 million settlers in the deserts of southwest Afghanistan when their livelihoods fail?	David Mansfield	✓	✓	Natural Resources management	Briefing Paper
May 2020	The Helmand Food Zone: The illusion of Success	Shahlla Matin			Natural Resources Management	Policy Note
May 2020	Surface-groundwater interaction in the Kabul region basin	Najibullah Sadid			Natural Resources Management	Policy Note
April 2020	When the Water Runs Out: The Rise (and Inevitable Fall) of the Deserts of Southwest Afghanistan and its Impact on Migration, Poppy and Stability	David Mansfield	✓		Natural Resources Management	Synthesis Paper
April 2020	Surface-groundwater interaction in the Kabul region basin	Najibullah Sadid	✓		Natural Resources Management	Issues Paper
March 2020	Can the Afghan state intervene successfully in the conflict between nomads and settlers?	Dr. Antonio Giustozzi	✓	✓	Natural Resources Management	Policy Note
March 2020	Technology and Humanitarian Aid in Afghanistan: Using technology for data collection and communication in the context of conflict	Dr. Rodrigo Mena			Livelihood	Working Paper
February 2020	Taxation, the prerequisite of state building, an overview of tax achievements and challenges in Afghanistan	Sarajuddin Isar			Governance and Political Economic	Policy Note
December 2019	The Helmand Food Zone: The Illusion of Success	David Mansfield	✓	✓	Natural Resources Management	Synthesis paper
December 2019	Violence Against Women in Afghanistan's 2018 Parliamentary Elections	Noah Coburn, Mohammad Hassan Wafaey			Gender	Briefing Paper



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