

**THE PROMISE OF EQUALITY: RESTORING THE RIGHT OF  
JUDGES TO THREE-TIERED JUDICIAL REVIEW  
IN AFGHANISTAN**

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ABSTRACT

Under Afghan law, when judges are charged with crimes, they are tried differently than ordinary citizens. Specifically, under Article 133 of the Afghan Constitution and Article 91 of the Law of Organization and Jurisdiction of the Supreme Court, when judges are accused of crimes, their cases are sent directly to the Supreme Court with no opportunity for review. However, the Code of Criminal Procedure mandates a three-tiered system of trial and review for all Afghan citizens. That being said, judges are deprived of the system of appeals that ordinary defendants enjoy. This disparity exists, even though Article 22 of the Afghan Constitution states, “any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden.”

This Article proposes that Afghanistan should amend Article 133 and should recognize judges as citizens by applying the existing criminal procedure to them. If Afghanistan is unwilling to make this substantial change to the law, it could adopt a new law or make an amendment that is modeled after the Indonesian approach. This approach has been successful in protecting the rights of accused judges

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and in giving them access to a modified system of review. To support the proposal, this Article begins by discussing the formation and role of the judiciary in resolving judicial disputes in Afghanistan. Next, it compares the legal provisions concerning the trial of judges and other citizens of Afghanistan. It further explores the detailed trial process for accused judges in Indonesia, by discussing how this process differs from the Afghan approach. Finally, this Article proposes a specific amendment to Article 91 of the Law of Organization and Jurisdiction of the Supreme Court of Afghanistan, to provide a system of judicial review for accused judges in order to ensure that their rights as citizens are secured.

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## INTRODUCTION

In Afghanistan, when judges are accused of crimes, they are prosecuted under different procedural laws than other Afghan citizens.<sup>1</sup> Through these procedures, judges are not afforded a three-tiered judicial review<sup>2</sup>—a right afforded to all other citizens.<sup>3</sup> Specifically, under Article 133 of the Afghan Constitution<sup>4</sup> and Article 91 of the Law of Organization and Jurisdiction of the Supreme Court (Article 91),<sup>5</sup> cases involving accused judges are sent directly to the Supreme Court with no opportunity for review.<sup>6</sup> In contrast, the Code of Criminal Procedure mandates a three-tiered system of trial and review for all Afghan citizens.<sup>7</sup> This disparity exists, even though Article 22 of the Afghan Constitution states, “any kind of discrimination and distinction

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1. QANUNI TASHKILAT WA SALAHATI QUWAI QAZAIAH JUMHURI ISLAMI AFGHANISTAN [LAW OF THE ORGANIZATION AND JURISDICTION OF THE COURT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] 1392 [2013], art. 91 (Afg.) (Dari).

2. *Id.*

3. The Code of Criminal Procedure also mandates a three-tiered system of trial and review for all Afghan citizens. QANUNI EJRAATI JAZAI [CRIMINAL PROCEDURE CODE] Kabul 1393 [2014], art. 246 (Afg.).

4. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 133 (Afg.) (Pashto).

5. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (Afg.) (Dari).

6. *Id.* art. 91 § 4.

7. CRIMINAL PROCEDURE CODE, art. 246(1) (Afg.).

between citizens of Afghanistan shall be forbidden.”<sup>8</sup> As a result, judges are deprived of the opportunity to have the decisions in their cases reviewed for mistakes of law or lack of evidence.

This Article proposes that Afghanistan should amend Article 133 of the Constitution to ensure a fair trial system for judges where they can enjoy their right to appeal and be prosecuted under the Code of Criminal Procedure. In the alternative, this Article proposes that Afghanistan should adopt a new law to allow for three-tiered review of criminal convictions of judges, emulating the successful Indonesian approach. To support these proposals, Part I discusses the role of the judiciary in resolving judicial disputes in Afghanistan. Part II explains the process of termination and trial of accused judges. Part III explores the right to appeal for Afghan citizens. Part IV discusses the detailed processes for prosecuting judges in Indonesia, explaining how the Indonesian approach differs from the Afghan approach. Finally, this Article proposes amending Article 91 by either directing courts to apply the existing criminal procedure to judges like ordinary citizens, or by providing a specific system of judicial review for accused judges to secure their rights to review.

### I. THE JUDICIAL SYSTEM OF AFGHANISTAN

The Afghan judiciary resolves a wide variety of disputes involving individuals, as well as public and private organizations.<sup>9</sup> Additionally, the judiciary is responsible for interpreting the law, as well as reviewing regulations, legislative decrees, and international conventions for constitutionality and compliance with the law.<sup>10</sup>

The Afghan Constitution separates power into three branches: judicial, executive, and legislative.<sup>11</sup> The power of the judicial branch has evolved over the course of the contemporary history of

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8. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 22 (Afg.).

9. *Id.* art. 120.

10. *Id.* art. 121.

11. *See generally* QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004] (Afg.) (laying out the powers of each branch of government).

Afghanistan, and has expanded to reach its current level.<sup>12</sup> The Supreme Court of Afghanistan includes nine justices appointed by the president with approval of the House of Representatives.<sup>13</sup> Each justice serves a ten-year term.<sup>14</sup>

Before the Constitution of 1964, the judiciary and its affairs were carried out only according to Hanafi jurisprudence.<sup>15</sup> The Constitution of 1964 introduced the judiciary as a power of the state, and the Supreme Court began working independently from the government.<sup>16</sup> The primary courts and the courts of appeals were proposed in the framework of the judiciary's power.<sup>17</sup> Until 1964, there was no unified judicial system in Afghanistan.<sup>18</sup> The special courts and the military courts, unlike the general courts, did not work under the jurisdiction of the Supreme Court.<sup>19</sup> The Constitution of 1964 put an end to this unorganized system of courts and ensured a unified judicial system under the Supreme Court.<sup>20</sup>

#### A. *The Structure of the Judiciary*

Currently, Afghanistan's judiciary is characterized by a three-tiered system of judicial review.<sup>21</sup> There are courts that interpret and apply

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12. GLOBAL RIGHTS, EJRAATI JAZAYI DAR NEZAMI ADLI WA QAZAYI AFGHANISTAN [CRIMINAL PROCEDURE IN JUDICIAL SYSTEM OF AFGHANISTAN] Kabul 1391 [2013].

13. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 117 (Afg.).

14. *Id.*

15. *Id.* art. 130; GLOBAL RIGHTS, EJRAATI JAZAYI DAR NEZAMI ADLI WA QAZAYI AFGHANISTAN, *supra* note 12. Hanafi Jurisprudence, which refers to Hanafi school, is also called Madhab Hanafi in Islam. It is one of the four schools of religious law. The Hanafi legal school developed from the teachings of the Imam Abu Hanifa and has spread by his students Imam Abu Yusuf and Imam Mohamad. The main sources of this school are Quran and Hadith. The school currently has a large number of followers in Central Asia, Turkey, Pakistan, India, and Afghanistan.

16. GLOBAL RIGHTS, EJRAATI JAZAYI DAR NEZAMI ADLI WA QAZAYI AFGHANISTAN, *supra* note 12, at 105-7.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

both Sharia and civil law, as well as some customary law.<sup>22</sup> According to the Constitution of Afghanistan, the judicial branch is an independent pillar of the government of the Islamic Republic of Afghanistan.<sup>23</sup> The judicial system is comprised of the Supreme Court, the courts of appeals, and the primary courts.<sup>24</sup> Each branch of the government in Afghanistan has its own particular function. The function of the judiciary is to ensure justice.<sup>25</sup>

Article 116 of Afghanistan's Constitution establishes the judiciary as an independent organ of the State.<sup>26</sup> Additionally, Article 116 appoints the Supreme Court as the highest judicial organ, which holds all of the judicial power.<sup>27</sup> The remainder of Part I of this Article explains the current structure and jurisdiction of the courts in Afghanistan.

### *1. Primary Courts*

The primary courts in Afghanistan have original jurisdiction over a wide variety of cases, both civil and criminal.<sup>28</sup> These cases range from commercial disputes to the most serious of crimes. There are different types of primary courts under the jurisdiction of the Courts of Appeals.<sup>29</sup> Under the Law on Organization and Jurisdiction of the Supreme Court of Afghanistan, within the jurisdiction of each Court of Appeals, the primary courts are formed as follows: (1) the Central Provincial Primary Court, (2) Commercial Primary Court, (3) Family Issues Primary Court, (4) Juvenile Primary Court, and (5) District

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22. *Id.*

23. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 116 (Afg.).

24. GLOBAL RIGHTS, EJRAATI JAZAYI DAR NEZAMI ADLI WA QAZAYI AFGHANISTAN, *supra* note 12, at 105-7.

25. *Id.*

26. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 116 (Afg.).

27. *Id.*

28. MOHAMMAD ZARIF, OSULI MAHAKMATI JAZAYI [CRIMINAL PROCEDURE] 277-8 (1392) [2013].

29. *Id.*

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Primary Court.<sup>30</sup> Among these primary courts, the Central Provincial Primary Court is further separated into five divisions, which resolve specific disputes within their jurisdiction.<sup>31</sup> These divisions are: (1) general criminal, (2) civil, (3) public rights, (4) public security, and (5) traffic criminal.<sup>32</sup> Each division consists of a head of division and a maximum of four judicial members.<sup>33</sup> When necessary, the head of the Provincial Primary Court can temporarily appoint a member from one division to another division.<sup>34</sup>

The Commercial Primary Court, the Family Issues Primary Court, and the Juveniles Primary Court, are professional special courts that resolve commercial, family, and juvenile issues within their jurisdictions.<sup>35</sup> The District Primary Courts are composed of three judges including a chief of the court and two judicial members.<sup>36</sup> However, in remote areas where there are fewer members available, courts are permitted to decide cases with less than three judges.<sup>37</sup> If there are no judges available in a District Primary Court, the chairman of the Court of Appeals will temporarily appoint one of the judges from the appellate court to serve in that capacity.<sup>38</sup> In the absence of the chairman, his duties will be assigned to the judicial member with the most significant judicial experience.<sup>39</sup> The District Primary Court resolves all disputes happening within its jurisdiction,<sup>40</sup> including ordinary criminal, civil, and family cases.<sup>41</sup> The Supreme Court may, if needed, institute additional primary courts within the structure of the Courts of Appeals, with the president's approval.<sup>42</sup> For example, in

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30. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 61 (Afg.).

31. *Id.* art. 62(1).

32. *Id.* art. 62(1).

33. *Id.* art. 62(2).

34. *Id.* art. 62(2).

35. ZARIF, *supra* note 28, at 72-4.

36. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 69 (Afg.).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* art. 68.

41. *Id.*

42. *Id.* art. 62(3).

2010, after receiving a large number of complaints regarding the 2009 parliamentary election, the Supreme Court of Afghanistan created a special primary election court in order to resolve electoral disputes among candidates.<sup>43</sup>

## 2. Courts of Appeals

Afghanistan is composed of thirty-four different provinces.<sup>44</sup> Each of these provinces has its own court of appeals, and each appellate court generally hears and reviews decisions of the primary courts in its jurisdiction.<sup>45</sup> The appellate courts can modify, reverse, or affirm the lower courts' decision.<sup>46</sup> The Court of Appeals consists of judicial members including a general director and the head of each division.<sup>47</sup> The general director of the Court of Appeals is appointed by judges who have at least ten years of judicial experience, full capability, and full legal competence.<sup>48</sup>

Each appellate court is comprised of a general criminal division, a public security division, a civil and family affairs division, a public rights division, and a commercial division.<sup>49</sup> The head of the criminal division also serves as the vice president of the appellate courts.<sup>50</sup> There cannot be more than six judicial members in a single division.<sup>51</sup>

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43. ARUNI JAYAKODY, AFG. RESEARCH AND EVALUATION UNIT, THE STATE OF ELECTORAL DISPUTE MECHANISMS IN AFGHANISTAN (Aug. 2014), [https://www.ecoi.net/en/file/local/1255804/1226\\_1411542601\\_election-dispute.pdf](https://www.ecoi.net/en/file/local/1255804/1226_1411542601_election-dispute.pdf).

44. MOHAMAD SARWAR DANISH, HOQOGI EDARI AFGHANISTAN [Administrative Law of Afghanistan] 185 (1389) [2010].

45. See RAMIN MUSHTAQI, RAHNAMEH MAKS PLANK BA RAI TSHKILAT WA SALAHAT MAHAKIM AFGHANISTAN [Max Planck Guidelines for the Organization and Jurisdiction of Afghanistan Courts] Kabul 1388 [2009]. Article 50 of Law on Organization and Jurisdiction of the Supreme Court of Afghanistan concerning of appeal courts states that at the center of each province, an appeals court should be established. See generally LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 50(1) (Afg.).

46. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 54 (Afg.).

47. *Id.* art. 52.

48. *Id.*

49. *Id.* art. 53.

50. *Id.* art. 57.

51. *Id.* art. 53.



Appellate courts are required to investigate all aspects of cases before them, and are entitled to modify, reverse, affirm, or invalidate the decisions of the lower courts.<sup>52</sup>

### 3. *The Supreme Court*

In its role as the court of last resort in the three-tiered court system, the Afghan Supreme Court hears all appeals brought before it. This guarantees a second level of review to litigants that pursue further review after the intermediate review by the court of appeals. The Supreme Court of Afghanistan is the highest tribunal in the judicial system.<sup>53</sup> Generally, the Supreme Court performs both administrative and judicial duties.<sup>54</sup> Under the Constitution of Afghanistan, the Supreme Court must be comprised of nine members, appointed by the president and with the endorsement of the House of People.<sup>55</sup> Additionally, under the provisions of clause three of Article 50 and Article 118 of the Constitution, those members must be initially appointed for different terms: three members for a period of four years, three members for a period of seven years, and three members for a period of ten years.<sup>56</sup> The subsequent appointments of new members must be for a period of ten years.<sup>57</sup> Unlike the United States' legal system, Afghan Supreme Court members are allowed to serve only one of these terms—they cannot serve a second term, and they have no opportunity for life tenure.<sup>58</sup>

Additionally, the Supreme Court members must have certain qualifications when they are appointed.<sup>59</sup> They must be at least forty years old and they must be citizens of Afghanistan.<sup>60</sup> Further, they must have acquired a higher education degree in legal studies or Islamic

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52. *Id.* art. 54.

53. *Id.* art. 23.

54. *Id.*

55. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 117 (Afg.).

56. *Id.* art. 117.

57. *Id.*

58. *Id.*

59. *Id.* art. 118.

60. *Id.* art. 118(1).

jurisprudence.<sup>61</sup> They must have expertise and adequate experience in the judicial system of Afghanistan.<sup>62</sup> They must possess good moral character and good reputation,<sup>63</sup> and must not have been convicted of crimes against humanity or civil rights crimes.<sup>64</sup> Finally, the members of the Supreme Court shall not be affiliated with any political party during their term.<sup>65</sup> The Supreme Court is also referred to as the High Council of the Supreme Court,<sup>66</sup> having both judicial authority and administrative authority.<sup>67</sup> These authorities are described further in the sections that follow.

*i. Judicial Authority*

The Supreme Court has either original or appellate jurisdiction, depending on the nature of the case.<sup>68</sup> For example, the Court has original jurisdiction over (1) cases involving judges charged with crimes, (2) disputes of authority between courts, and (3) overview and interpretation of law.<sup>69</sup> The Court extends its appellate jurisdiction over cases concerning a wide variety of matters, including revision of lower court decisions on civil and criminal matters.<sup>70</sup> One important function of the Court, is its authority to, *sua sponte*, issue advisory opinions on the meaning and application of the Constitution, without an active case or controversy.<sup>71</sup>

The duties and authorities of the High Council of the Supreme Court include revising court decisions based on newly discovered evidence,<sup>72</sup> and solving the geographical and material jurisdiction

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61. *Id.* art. 118(3).

62. *Id.*

63. *Id.* art. 118(4).

64. *Id.* art. 118(5).

65. *Id.* art. 118(6).

66. *Id.* art. 118(3).

67. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, arts. 31-2 (Afg.).

68. *Id.* art. 31.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

conflicts among the courts.<sup>73</sup> For example, the Court may exercise its authority to revise a lower court's decision when new evidence is discovered such as when an alleged victim of murder has later been found alive,<sup>74</sup> or when the lower court has not provided the defendant a right to a fair trial.<sup>75</sup> Alternatively, the Court, in the light of newly discovered evidence, may remand the case for further investigation.<sup>76</sup>

Additionally, the Supreme Court transfers jurisdiction from one court to another court,<sup>77</sup> and decides matters involving the extradition of foreign citizens who are suspected or accused of committing a crime.<sup>78</sup> The Court also reviews and explains questions from the lower courts in order to ensure the integrity of the law and to ensure the unity of the judicial system.<sup>79</sup> Another function of the Court is to review and approve regulations, bills, tutorials, and guidelines.<sup>80</sup> This is similar to the process of "certifying a question" in the United States legal system. The Supreme Court also issues a temporary termination of judges from duty, when a judge commits a misdemeanor or felony;<sup>81</sup> and carries out the trials of accused judges.<sup>82</sup>

#### *ii. Administrative Authority*

In addition to its judicial authority, the Supreme Court also has administrative duties, which include creating new courts when needed, and determining financial and budget matters relating to the operations of the judiciary.<sup>83</sup> The High Council of the Supreme Court's authorities, in terms of financial and administrative affairs, include:

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73. *Id.*

74. CRIMINAL PROCEDURE CODE, art. 282(1) (Afg.).

75. *Id.* arts. 282(7), 284(4).

76. *Id.* art. 284(5).

77. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 31(3) (Afg.).

78. *Id.* art. 31(4).

79. *Id.* art. 31(6).

80. *Id.* art. 31(7).

81. *Id.* art. 31(8).

82. *Id.* art. 31(9).

83. *Id.* art. 32. Ultimately, both houses of Parliament must approve the judicial decision regarding the budget.

(1) investigating the budget of the judicial branch;<sup>84</sup> and (2) approving and proposing judicial integration, appointment, transfer, promotion, acceptance of resignation, extension of service, retirement, removal, and alike.<sup>85</sup> In addition, the High Council of the Supreme Court is charged with approving proposals for the establishment of courts and determining their judicial and administrative jurisdiction.<sup>86</sup> It also approves proposals to appoint judges and advisers to the president,<sup>87</sup> provides for the necessary facilities for the activities of the courts,<sup>88</sup> and establishes judicial training facilities.<sup>89</sup> The Court reviews and corrects errors, if any, of the annual report of the lower courts,<sup>90</sup> which includes the results of audits, investigations, and studies of the judiciary.<sup>91</sup> The High Council can also propose to the president, potential pardons and reduction of punishments of convicted judges.<sup>92</sup>

The Supreme Court of Afghanistan has five different divisions. In order to solve the disputes promptly, each division has its own jurisdictional boundaries and duties.<sup>93</sup> These divisions include the Public Criminal Division, Public Security Division, Public and Civil Rights Division, Commercial Division, and Military Crimes and Crimes Against Domestic and Foreign Security Division.<sup>94</sup>

The head of each division is a member of the Supreme Court, and their assignment to these divisions is determined by the High Council of the Supreme Court.<sup>95</sup> Furthermore, the head of each division directs all activities, including the sessions of the respective division<sup>96</sup> and submits annual reports to the Supreme Court.<sup>97</sup>

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84. *Id.* art. 32(1).

85. *Id.* art. 32(2).

86. *Id.* art. 32(3).

87. *Id.* art. 32(4).

88. *Id.* art. 32(5).

89. *Id.* art. 32(6).

90. *Id.* art. 32(8).

91. *Id.* art. 32(9).

92. *Id.* art. 32(10).

93. *Id.* art. 42.

94. *Id.* art. 42(1).

95. *Id.* art. 42(2).

96. *Id.* art. 43.

97. *Id.*

## II. THE PROCESS OF TERMINATION AND TRIAL OF ACCUSED JUDGES

The rules and regulations governing the dismissal and trial of judges are included in Article 133 of the Constitution,<sup>98</sup> Article 91 of the Law on Organization and Jurisdiction of Judiciary Branch of the Islamic Republic of Afghanistan,<sup>99</sup> and in the Regulation of the Investigation of Judicial Misconduct.<sup>100</sup> The discussion below explains the role that each of these laws plays.

### A. *The Constitution of Afghanistan*

The Constitution of Afghanistan establishes a specific procedure for temporary termination of accused judges.<sup>101</sup> It also states that their trials should be conducted “according to the law,”<sup>102</sup> but it does not provide any procedure, nor does it describe a procedure that should be adopted. When a judge commits a crime arising from his or her duties, the investigation of the accusation and the temporary termination process must be done in accordance with Article 133 of the Constitution.<sup>103</sup> Article 133 establishes that when a judge is accused of a crime, the Supreme Court must hear the case,<sup>104</sup> and if it finds that the accusations are accurate, it must present a proposal to the president for dismissal of the judge.<sup>105</sup> After presidential approval, the accused judge must be dismissed and punished according to the provisions of the law.<sup>106</sup> The prosecution and investigation of judges are held by the

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98. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 133 (Afg.).

99. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 91 (Afg.).

100. Moqararat Raseedagi ba Takhalofati Quzat [Regulation on the Investigation of Judges’ Misconduct] Kabul 1387 [2008] (Afg.).

101. MOHAMMAD ASHRAF RASOLY, TAHLIL WA NAQDE QANUNI ASASI AFGHANISTAN [ANALYSIS AND CRITIQUE OF THE CONSTITUTION OF AFGHANISTAN] 280-1 1388 [2009].

102. *Id.* at 176.

103. *Id.* at 280-1.

104. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 133 (Afg.).

105. *Id.*

106. *Id.*

Audit and Study Department of the Supreme Court.<sup>107</sup> However, the General Attorney has the sole authority to investigate and prosecute any other defendant.<sup>108</sup>

Mohamad Ashraf Rasooli emphasizes in his book, “Analysis and Critique of the Constitution of Afghanistan,” that under Article 133, convicted judges have no opportunity for judicial review.<sup>109</sup> A closer look at the language of Article 133 shows that the Article mentions only the procedure of termination of accused judges, and then addresses their trial system without mentioning any specific law or trial stages.<sup>110</sup> Hence, under the provisions of this law, there are no reasons that judges must be limited to a one-tiered court system with no review. In other words, a plain language reading of the Constitution does not necessarily result in a one-tiered court system for accused judges—instead, the provisions applicable to other defendants may be applied to judges.

*B. Law on Organization and Jurisdiction  
of Judiciary Branch of Afghanistan*

In 2014, the National Assembly passed the Law on Organization and Jurisdiction of Judiciary Branch of Islamic Republic of Afghanistan, which includes a total of 110 Articles. Together, these articles describe the structure and authority of the judiciary. Among them, Article 91 explains the procedure for dismissal of accused judges.<sup>111</sup>

Under Article 91, a judge cannot be captured, arrested, or prosecuted without a presidential decree;<sup>112</sup> except when the judge commits an “evident crime,”<sup>113</sup> which are excepted from this

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107. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 91(3) (Afg.).

108. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 134 (Afg.).

109. RASOLY, *supra* note 101, at 280-1.

110. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 133 (Afg.).

111. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 91 (Afg.).

112. *Id.*

113. *Id.*

requirement.<sup>114</sup> After the issuance of the investigation, ordered by the Chief Justice of the Supreme Court, the inspection board completes an investigation of the case.<sup>115</sup> The Board of Studies Department will examine the case, and recommend termination of the judge from the Supreme Court.<sup>116</sup> Subsequently, the High Council of the Supreme Court will consider the pleadings, and hear the judge's defense.<sup>117</sup> If the accusation has merit, the council will approve the judge's temporary dismissal, and pursuant to Article 133 of the Constitution, propose the termination of the judge to the president.<sup>118</sup> Additionally, the judge will be referred for trial.<sup>119</sup> The judge's trial must be conducted by the Supreme Court, while the procedures, penalties, and other related issues must be set forth in a separate legislative act.<sup>120</sup> However, no such unified act has been passed yet.<sup>121</sup>

### *C. How Judicial Misconduct Investigations Are Regulated*

There are various ways that judges violate their judicial duties.<sup>122</sup> Under the Regulation of the Investigation of Judicial Misconduct, offenses committed while performing a duty, include, but are not limited to (1) inappropriate treatment of the parties,<sup>123</sup> (2) inaccurate implementation of legal orders and assigned duties,<sup>124</sup> (3) violations of domestic laws and regulations in judicial and administrative matters,<sup>125</sup>

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114. CRIMINAL PROCEDURE CODE, art. 82 (Afg.). There is an evident crime when the offender is found by the public or the law enforcement agents either in the act of committing a crime or soon after committing the crime, or a crime that is immediately perceived by people.

115. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY BRANCH OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 91 (Afg.).

116. *Id.* art. 91(2).

117. *Id.* art. 91(3).

118. *Id.*

119. *Id.*

120. *Id.*

121. Interview with Ghulam Dastgir Atqa, Judge of the Supreme Court of Afghanistan, Afg. (Dec. 15, 2018).

122. *See* Moqararat Raseedagi ba Takhalofati Quzat [Regulation on the Investigation of Judges' Misconduct] Kabul 1387 [2008] (Afg.).

123. *Id.* art. 5(1).

124. *Id.* art. 5(2).

125. *Id.* art. 5(3).

(4) violations of ethical standards described in the Regulation of Judicial Procedures,<sup>126</sup> and (5) inaccurate maintenance and supervision of the office and supplies of work.<sup>127</sup> Additionally, judges can be found to have violated their duties when they do not comply with their workplace regulations,<sup>128</sup> and when they do not keep their persons or workplaces clean.<sup>129</sup> If the violations of these duties are considered to be crimes, the judge must be prosecuted pursuant to Article 133 of the Constitution, after being removed from the bench.<sup>130</sup>

Given the provisions of the Constitution of Afghanistan, the Law on Organization and Jurisdiction of the Judiciary Branch of Afghanistan, and the Regulation of the Investigation of Judicial Misconduct, cases of judges accused of violating their judicial duties are sent directly to the Supreme Court with no opportunity for review. As a result, these judges are deprived of the system of appeals that other defendants enjoy, where a lower court's decision may be reviewed and revised for mistakes of law or evidence.

Generally, the main purpose of an appeal is to correct errors made by the lower courts.<sup>131</sup> Mechanisms of review are an important feature of developed legal systems.<sup>132</sup> Another function of the right to appeal is to protect defendants from failures of justice.<sup>133</sup> These failures may arise in two ways: first, an innocent defendant may be wrongfully convicted. There are many possible causes for such error; for example, the fact-finder may fail to assess the evidence properly or may be deceived by irrelevant, prejudicial, or false evidence.<sup>134</sup> Second, a defendant may not have received a fair trial for various reasons. Therefore, the right to appeal provides an opportunity for defendants to

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126. *Id.* art. 5(4).

127. *Id.* art. 5(5).

128. *Id.* art. 5(6).

129. *Id.* art. 5(7).

130. *Id.* art. 6.

131. Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT'L L. 1, 2 (2011).

132. *Id.*

133. *Id.* at 3.

134. *Id.*



have these concerns addressed.<sup>135</sup> However, in the case of Afghan judges, there is a lack of recourse when these failures occur.

### III. THE RIGHT TO APPEAL FOR AFGHAN CITIZENS

The rights to appeal and to have equal access to the law for all citizens in Afghanistan are secured by various sources of both domestic and international law, including the Criminal Procedure Code of Afghanistan,<sup>136</sup> the Afghan Constitution,<sup>137</sup> and international conventions such as the United Nations International Convention of Civil and Political Rights,<sup>138</sup> Universal Declaration of Human Rights,<sup>139</sup> and the Universal Declaration of Islamic Human Rights.<sup>140</sup> Together, these sources clearly mandate equality for all Afghan citizens and the right to a fair trial and appeal for every citizen in a criminal proceeding. In the paragraphs that follow, this Article describes and explains how these sources form the basis for due process in Afghanistan.

As explained above, while the Afghan Constitution expresses that there should be no discrimination among citizens, it does not guarantee a three-tiered review of all criminal cases. Instead, the three-tiered system of review is guaranteed through the Code of Criminal Procedure.<sup>141</sup> The Code of Criminal Procedure describes a detailed process of a criminal litigation and the right to appeal at various stages of a criminal trial including: (1) the police and prosecution stage, (2) the preliminary stage, (3) the appeal stage, and (4) the Supreme Court stage.<sup>142</sup> The main purpose of criminal procedure in Afghanistan is to

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135. *Id.*

136. CRIMINAL PROCEDURE CODE, arts. 246, 270 (Afg.).

137. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 22 (Afg.).

138. International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter International Covenant].

139. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 7, 10 (Dec. 10, 1948).

140. World Conference on Human Rights, *Universal Islamic Declaration of Human Rights*, art. III(a), U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).

141. *See* ZARIF, *supra* note 28; CRIMINAL PROCEDURE CODE (Afg.).

142. *Id.*

provide a fair trial system to all Afghan citizens.<sup>143</sup> It strives to achieve the goal that no innocent person is punished, and no criminal remains unprosecuted.<sup>144</sup> Additionally, criminal procedure law protects the individual rights of the suspected, accused, and convicted, while also protecting the community by conducting investigations and prosecutions.<sup>145</sup>

The right to appeal is further protected through Article 246 of the Code of Criminal Procedure. This law establishes that if the defendant, his or her legal representative, or the prosecutor, is not satisfied with the decision of the primary court, he or she may file a complaint and submit it to the appropriate court of appeal, either directly or through the primary court.<sup>146</sup> Article 270 of the Criminal Procedure Code of Afghanistan explains that the Supreme Court may review the appellate courts' decisions, in felony and obscenity cases, following appeals from prosecutors, defendants, or the civil law petitioners.<sup>147</sup>

International law further reinforces these rights through universally accepted international standards or through unilateral agreements signed by Afghanistan. For example, as a member of the International Convention on Civil and Political Rights, Afghanistan has agreed to protect and implement standards of equality and a fair trial system for its citizens.<sup>148</sup> Specifically, Article 14 of the convention states:

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.<sup>149</sup>

Similarly, under Article 7 of the Universal Declaration of Human Rights, which Afghanistan has adopted, “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in

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143. CRIMINAL PROCEDURE CODE, art. 2(4) (Afg.).

144. *Id.*

145. *Id.* art. 2(5).

146. *Id.* art. 246(1).

147. *Id.* art. 270(1).

148. *See* International Covenant on Civil and Political Rights, *supra* note 138.

149. *Id.* art. 14(1).

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violation of this Declaration and against any incitement to such discrimination.”<sup>150</sup> Similarly, Article 10 of this declaration states that “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.”<sup>151</sup> Under Article 7 of the Afghan Constitution, Afghanistan must abide by all international human rights treaties.<sup>152</sup> As a result, Afghanistan became a member of the Universal Declaration of Human Rights, which obliges Afghanistan to incorporate the declaration’s provisions into its domestic law, and to enforce them in practice.<sup>153</sup>

Additionally, Article 3 of the Universal Islamic Declaration of Human Rights (UIDHR), which Afghanistan has adopted, specifically states that “[a]ll persons are equal before the law and are entitled to equal opportunities and protection of the law.”<sup>154</sup> “It is the right and duty of every Muslim to refuse to obey any command which is contrary to the law, no matter by whom it may be issued.”<sup>155</sup> Additionally, section two of Article 5 of the UIDHR states that “[n]o person shall be adjudged guilty except after a fair trial and after reasonable opportunity for defense has been provided to him.”<sup>156</sup> Furthermore, under the UIDHR, if individuals are deprived of their rights in a society, they have the right to rise up against the unfairness:

Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the Law in respect of any unwarranted personal injury or loss; to self-defense against any charges that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person.<sup>157</sup>

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150. G.A. Res. 217 (III) A, *supra* note 139, art. 7.

151. *Id.* art. 10.

152. QANUNI ASSASSI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1383 [2004], art. 7 (Afg.).

153. *Id.*

154. *Universal Islamic Declaration of Human Rights, supra* note 140, art. III(a).

155. *Id.* art. IV(e).

156. *Id.* art. V(b).

157. *Id.* art. IV(b).

Under the International Covenant on Civil and Political Rights, it is the responsibility of every individual to preserve the rights of any other person and the public in general.<sup>158</sup> Furthermore, “everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”<sup>159</sup>

As explained above, both Afghanistan’s domestic law, and international conventions mandate on the right to appeal, and a fair trial system for all Afghan citizens. The Constitution and criminal procedure of Afghanistan provide for equal access to justice and a three-tiered system of trial, for all Afghan citizens, without any exceptions or required qualifications. Additionally, international conventions such as the United Nation International Convention on Civil and Political Rights, Universal Declaration of Human Rights, and Universal Declaration of Islamic Human Rights require a fair trial system and urge on the right to appeal for all citizens of member states with no discriminations. Afghan judges fall within the category of “citizens of Afghanistan.” Thus, to ensure justice and fairness for everyone and to abide by the aforementioned laws and international conventions, judges shall be treated in a fair and equal way as other citizens, and shall have the right to appeal to a higher court for reconsideration of the lower court’s decision.

#### IV. TRIAL OF JUDGES ACCUSED OF VIOLATING JUDICIAL DUTIES IN INDONESIA

This Article looks to the Republic of Indonesia for assistance in identifying and crafting an appropriate proposal to reform the laws governing trial procedures for Afghan judges accused of violating their judicial duties. This Article discusses the laws of Indonesia, in particular, because (1) Indonesia guarantees three-tiered review for accused judges, even in cases involving violation of their judicial duties;<sup>160</sup> (2) Indonesia has a significant and developing relationship with Afghanistan, striving to become important allies in the future;<sup>161</sup>

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158. International Covenant on Civil and Political Rights, *supra* note 138, pmb1.

159. *See id.*

160. KODE TINDAKAN PIDANA [CRIMINAL PROCEDURE CODE] Jakarta 1981 (Indon.) (Bahasa).

161. *Indonesia in the Afghan Foreign Policy*, CENTER FOR STRATEGIC AND REG’L STUDIES (Apr. 15, 2017), <https://csrskabul.com/en/?p=2310>.

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and (3) the official religion of both countries is Islam, they both follow civil law legal systems and have very close ties in terms of diplomatic, historical, cultural, and academic affairs.<sup>162</sup> Due to these ties and similarities, the procedure governing the trial of judges in the Republic of Indonesia, may offer guidance to reform the current procedures governing accused judges in Afghanistan.

Indonesian criminal procedure, like the criminal procedure of Afghanistan, mandates a three-tiered system of review for all citizens.<sup>163</sup> However, unlike Afghanistan, when Indonesian judges commit crimes, their trials are held according to the standard three-tiered system.<sup>164</sup> This means that they have a right to appeal, and they are treated the same way as all other citizens. According to the Indonesian Constitution, “[a]ll citizens shall be equal before the law and the government . . . with no exceptions.”<sup>165</sup> In Indonesia, whenever judges commit a crime relating to their duties, they must be terminated before going to trial.<sup>166</sup> The procedure of their termination is regulated by the Indonesian Procedure of Termination of Judges No. 26/1991 (IPTJ). After the judges are terminated, they will be tried, pursuant to the Indonesian criminal procedure.

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162. *Id.*

163. See KODE TINDAKAN PIDANA [CRIMINAL PROCEDURE CODE] Jakarta 1981 (Indon.).

164. See Faiq Hidayat, *KPK Eksekusi Patrialis Akbar ke Lapas Sukamiskin* [KPK Execution of Patrialis Akbar to Sukamiskin Prison], DETIKNEWS (Sept. 18, 2017, 4:16 AM), [https://news.detik.com/berita/d-3648177/kpk-eksekusi-patrialis-akbar-ke-lapas-sukamiskin?\\_ga=2.268835700.403460155.1522686495-2035090287.1522686494](https://news.detik.com/berita/d-3648177/kpk-eksekusi-patrialis-akbar-ke-lapas-sukamiskin?_ga=2.268835700.403460155.1522686495-2035090287.1522686494) (Afg.).

165. KONSTITUSI INDONESIA [THE CONSTITUTION OF INDONESIA] Jakarta 1945, art. 27(a) (Indon.).

166. See TATA CARA PEMBERHENTIAN DENGAN HORMAT, PEMBERHENTIAN TIDAK DENGAN HORMAT, DAN PEMBERHENTIAN SEMENTARA SERTA HAK-HAK HAKIM AGUNG DAN HAKIM YANG DIKENAKAN PEMBERHENTIAN [INDONESIAN PROCEDURE OF TERMINATION OF JUDGES WITH RESPECT AND WITHOUT RESPECT AND TEMPORARY TERMINATION OF JUDGES AND THE RIGHTS OF TERMINATED JUDGES] Jakarta 1991 (Indon.) (Bahasa).

*A. Law Governing the Termination and Prosecution  
of Accused Judges in Indonesia*

Generally, in Indonesia, the removal of judges is governed by a specific procedure, which identifies three ways in which judges may be terminated.<sup>167</sup> Each type of termination has its own conditions and requirements that are stated in a specific regulation. Under the Indonesian Constitution,<sup>168</sup> if the dismissal of a judge is based on a crime arising from the judge's duties, the trial of the accused judge will be carried out similar to trials of any other Indonesian citizen; in three stages.<sup>169</sup>

*1. Termination of Judges*

The termination process of judges in Indonesia is regulated by the IPTJ.<sup>170</sup> Overall, there are three types of termination processes, including termination with respect, termination without respect, and temporary termination.<sup>171</sup>

*a. Termination with Respect*

Usually, termination with respect occurs when a judge or a supreme court justice has health issues, reaches retirement age, or is required by the Chief Justice to end his or her term. According to Article 2 of the IPTJ, Indonesian judges are terminated with respect upon: (1) their own written request,<sup>172</sup> (2) the existence of physical or mental impairments diagnosed by the Health Examination Team Testers,<sup>173</sup> (3) reaching

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167. *Id.*

168. KONSTITUSI INDONESIA [THE CONSTITUTION OF INDONESIA] Jakarta 1945, art. 27 (Indon.).

169. *See id.*

170. INDONESIA PROCEDURE OF TERMINATION OF JUDGES WITH RESPECT AND WITHOUT RESPECT AND TEMPORARY TERMINATION OF JUDGES AND THE RIGHTS OF TERMINATED JUDGES Jakarta 1991 (Indon.).

171. *See id.*

172. *Id.* art. 1(1)(a).

173. *Id.* art. 1(1)(b).

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retirement age,<sup>174</sup> (4) ineffective performance of duties,<sup>175</sup> and (5) death.<sup>176</sup>

Additionally, termination with respect must be proposed to the president by the Supreme Court Chief Justice for supreme court justices and by the minister of justice with the approval of the Chief Justice for judges.<sup>177</sup> A judge or justice will not be “terminated with respect as a civil servant,” unless: (1) the Supreme Court requests the judge to stop serving as a civil servant,<sup>178</sup> (2) the judge cannot perform his or her duties due to medical issues,<sup>179</sup> or (3) the judge reaches the retirement age limit.<sup>180</sup> Moreover, the decision on termination with respect as a civil servant as referred to in Article 3, must be issued by a competent authority in accordance with applicable laws and regulations.<sup>181</sup>

*b. Termination Without Respect*

Termination without respect is the second type of terminating of judges and supreme court justices in Indonesia. Generally, this type of termination is carried out when a judge violates the law and regulations pertaining to his or her duties. According to Article 7 of the IPTJ, a judge is terminated without respect when the judge: (1) is convicted of a criminal offense,<sup>182</sup> (2) commits a disgraceful act,<sup>183</sup> (3) is constantly neglecting obligations in carrying out his or her duties,<sup>184</sup> (4) violates an oath or promise of the office,<sup>185</sup> or (5) violates the terms of his or her interim position.<sup>186</sup>

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174. *Id.* art. 1(1)(c).

175. *Id.* art. 1(1)(d).

176. *Id.* art. 1(1)(e).

177. *Id.* art. 1(2).

178. *Id.* art. 3(a).

179. *Id.* art. 3(b).

180. *Id.* art. 3(c).

181. *Id.* art. 4.

182. *Id.* art. 7(a).

183. *Id.* art. 7(b).

184. *Id.* art. 7(c).

185. *Id.* art. 7(d).

186. *Id.* art. 7(e).

Under Article 8 of the IPTJ, termination without respect takes place for the reasons referred to in Article 7.<sup>187</sup> Article 8 states, a court that has permanent legal force must propose the termination of a judge to the president after finding the judge guilty of a criminal offense.<sup>188</sup> The Supreme Court Honor Board for Justices and the Supreme Court Honor Board for Judges must investigate alleged wrongful conducts committed by justices and judges.<sup>189</sup> Consequently, the results of the investigation of a supreme court justice must be submitted in writing to the investigated justice and the Chief Justice of the Supreme Court, and in cases involving investigated judges, the results must be submitted to the investigated judge, the Chief Justice of the Supreme Court, and the Minister of Justice.<sup>190</sup>

Subsequently, under the IPTJ, the Chief Justice of the Supreme Court will review the result of the investigation regarding the justice's misconduct and propose the justice's "termination without respect" to the president.<sup>191</sup> Similarly, the Minister of Justice must observe the result of the investigation regarding the judge's misconduct and with the approval of the Chief Justice of the Supreme Court propose the judge's "termination without respect" to the president.<sup>192</sup> In Indonesia, termination without respect is governed by a detailed procedure in a detailed manner, which describes the reasons and conditions of a judge's termination; thus, preventing official and prosecutorial misconduct with respect to the cases of accused judges.

### *c. Temporary Termination*

Temporary termination of judges and supreme court justices refers to a dismissal in which a judge or justice is temporarily terminated while under investigation by the Supreme Court,<sup>193</sup> and before the judge or justice is terminated with no respect, pursuant to Article 7.<sup>194</sup> Under

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187. *Id.* art. 8.

188. *Id.*

189. *Id.* art. 9(1).

190. *Id.* art. 9(2).

191. *Id.* art. 12(1).

192. *Id.* art. 12(2).

193. *Id.* art. 15.

194. *Id.* art. 16(1).



the IPTJ, the temporary termination of a Supreme Court justice due to misconduct is proposed by the Supreme Court Chief Justice to the president after considering all of the relevant evidence.<sup>195</sup> Similarly, the temporary termination of a judge is proposed by the Minister of Justice, with the approval of the Supreme Court Chief Justice, to the president.<sup>196</sup> Once the judge or justice is terminated from his or her position, the case will be transferred to the lower courts for further proceedings.

Under Article 19 of the IPTJ, if the reasons for temporary termination of judges are not proven, a proposal of cancellation of such termination shall be sent to the president.<sup>197</sup> The proposal must be submitted by the Chief Justice of the Supreme Court when the case involves a supreme court justice or by the Minister of Justice when the case involves a judge.<sup>198</sup> Additionally, with the cancellation of temporary termination, the judge's position and other rights and privileges, must be restored to him or her in accordance with the applicable laws and regulations.<sup>199</sup>

### *B. Trial of Judges*

As discussed above, under the Indonesian Constitution, all citizens are equal under the law, and the government is required to respect the law and the people, with no exceptions.<sup>200</sup> Indonesian criminal procedure mandates a three-tiered system of review for all citizens.<sup>201</sup> Therefore, the applicable laws and the decisions of the courts imply that accused judges also have the right to appeal under the Indonesian legal system. For example, once a decision has been reached in a lower court, the defendant can appeal to the relevant court of appeal. Under the Criminal Procedure Code of Indonesia, “[a]n accused or the public prosecutor shall have the right to appeal against a judgment of a court

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195. *Id.* art. 17(1).

196. *Id.* art. 17(2).

197. *Id.* art. 19(1).

198. *Id.* art. 19(2).

199. *Id.* art. 19(3).

200. KONSTITUSI INDONESIA [THE CONSTITUTION OF INDONESIA] Jakarta 1945, art. 27 (Indon.).

201. *See* KODE TINDAKAN PIDANA [THE CODE OF CRIMINAL PROCEDURE] Jakarta 1981 (Indon.).

of first instance except against a judgment of acquittal, a dismissal of all charges which relates to a matter of the inappropriate application of law and a judgment under express procedures.”<sup>202</sup>

Additionally, the Criminal Procedure Code of Indonesia establishes that a request for an appeal may be brought to a higher court by the defendant, by someone who is specifically authorized, or by the public prosecutor.<sup>203</sup> The request for appeal “may be accepted by a clerk of a district court within seven days after a judgment has been rendered . . . .”<sup>204</sup> “If the time limit . . . has expired without a request for an appeal being lodged by the person concerned, then the person concerned shall be deemed to have accepted the judgement.”<sup>205</sup> For example, an Indonesian judge, Patrialis Akbar, who was accused of accepting a bribe, was convicted and sentenced to eight years in prison. Following the decision of the court, Akbar decided not to appeal his case to the higher court, even though he had the right to take advantage of the appeals process.<sup>206</sup> Additionally, in 2012, the South Jakarta District Court ruled against the Corruption Eradication Commission (KPK) in a civil lawsuit brought by former judge Syarifuddin Umar who was convicted of bribery for receiving 250 million Rupiah in bribes.<sup>207</sup> The court ordered the KPK to pay \$11,000 in damages to convicted Syarifuddin Umar, for acting beyond its authority.<sup>208</sup> After the decision of the South Jakarta District Court, Chaidir Ramli, a lawyer for the KPK, said that the commission would appeal the ruling of the court.<sup>209</sup> This case illustrates how accused judges in Indonesia can enjoy the right to appeal.

In summary, in Indonesia, there is no discrimination against or distinction among citizens in their three-tiered court system. Both ordinary citizens, as well as judges, are treated equally under the law. Given the similarities between Indonesia and Afghanistan, as well as

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202. *Id.* art. 67.

203. *Id.* art. 233(1).

204. *Id.* art. 233(2).

205. *Id.* art. 234(1).

206. *See* Hidayat, *supra* note 164.

207. Constance Johnson, *Indonesia: Corruption Court Judges Arrested*, LIBRARY OF CONG. (Aug. 23, 2012), <http://www.loc.gov/law/foreign-news/article/indonesia-corruption-court-judges-arrested/>.

208. *Id.*

209. *Id.*

the success of the Indonesian judicial system, Afghanistan should use the Indonesian approach as a springboard for its own reform efforts.

#### V. HOW THE INDONESIAN MODEL COULD HELP AFGHANISTAN MEET ITS OBLIGATIONS UNDER DOMESTIC AND INTERNATIONAL LAW

The Indonesian approach to prosecuting judges can serve as a useful model for Afghan legal reform efforts, primarily because their judicial systems are very similar, except that Indonesia has successfully protected the right to review for judges. Emulating and adapting this approach in Afghanistan would not only be reasonable but would also be prudent given Afghanistan's obligations under its Constitution, and the existing laws and principles governing prosecutions of Afghan citizens. The Indonesian Procedure of Termination of Judges No. 26/1991 creates an unambiguous termination procedure regarding accused judges and supreme court justices. Additionally, as previously discussed, the prosecution of accused judges and justices is carried out in accordance with the Criminal Procedure Code of Indonesia—guaranteeing the right to appeal to all citizens, including judges.

As discussed above, Article 133 of the Constitution and Article 91 of the Law on Organization and Jurisdiction of Judiciary Branch of Afghanistan, jointly regulate the termination of accused judges. However, these provisions should be more comprehensive in order to prevent ambiguity in the procedure for accused judge's termination. Pursuant to these Articles, following presidential endorsement, the accused judge is dismissed and punished under the applicable provisions of the law. However, Article 91 does not comply with the domestic laws of the Afghanistan or with the international conventions, which Afghanistan has signed; therefore, Afghanistan should revise Article 91. To solve ambiguities and conflicts of law, and to ensure a fair trial system for accused judges, the legislature should adopt the Indonesian model of removing and prosecuting judges. Adoption of this approach would guarantee Afghan judges a right to appeal any adverse judgment against them—a right that is already afforded to all other Afghan citizens under the Constitution of Afghanistan.

Additionally, mirroring the Indonesian Procedure of Termination of Judges, the legislature should prosecute accused Afghan judges under the Criminal Procedure Code of Afghanistan, which already provides Afghan citizens with a fair tiered trial system, including the

right to appeal. Providing access to a fair legal system is one of the most important duties of a civilized government. Therefore, Afghanistan should consider adopting the Indonesian approach regarding the termination and prosecution of judges and should amend Article 91 in order to promote justice and fairness. This way, Afghanistan can ensure that all of its citizens have equal rights under its constitution.

### *A. Suggestions for Reform*

The government of Afghanistan should consider providing a three-tiered system of trial for judges that are accused of violating their judicial duties—an approach that would promote justice and equality, and prevent judicial misconduct, errors, and flaws. In the discussion that follows, this Article presents various suggestions for how Afghanistan can improve its approach to prosecuting judges. Such suggested approaches will protect due process and promote fairness.

#### *1. Adopting a New Regulation Regarding the Termination Procedure of Accused Judges*

While Article 133 of the Afghan Constitution generally governs the termination of judges who commit felonies while acting in their official capacity; unlike Indonesia, Afghanistan does not have a specific act for regulating termination of accused judges. The Indonesian Procedure of Termination of Judges No. 26/1991, calls for the types of termination, the conditions, and the entire procedure of termination. Accordingly, the termination process of Indonesian judges is strictly governed by specific rules and regulations.

Observing the Indonesian legal system, Afghanistan should adopt a new regulation, which describes the specific conditions and procedures of termination of accused judges. For example, the regulation should clearly outline the termination process and the conditions of termination and should specify the crimes that warrant termination.

Similar to the Indonesian approach, Afghanistan should also consider creating a judicial board, consisting of members of the Audit Department and Investigations and Study Department of the Supreme Court. This board should investigate the allegations and should issue their findings to the Supreme Court. Then, if the Supreme Court finds

the allegations valid, it could propose termination of the accused judge to the president, similar to how the Court currently proposes termination to the president. Additionally, the board should oversee all administrative procedures regarding the termination of accused judges. Furthermore, Afghanistan could adopt specific provisions establishing the condition of termination of judges. As a result, Afghanistan would have a specific and detailed act regarding the termination procedure of accused judges.

### *2. Adopting the Indonesian Approach for the Afghan Context*

Modeling its approach after the Indonesian system, Afghanistan should consider repealing Article 91 altogether, and should apply its currently existing Criminal Procedure Code to judges—as it already does with all other Afghan citizens. As previously discussed, the Criminal Procedure Code of Afghanistan currently has sufficient provisions affording all Afghan citizens the right to appeal through the three-tiered system of the judiciary. If Article 91 were repealed, judges would be prosecuted under the same provisions similar to all other citizens.

The strongest argument in favor of repealing Article 91 is that Article 91 contradicts both Article 22 of the Constitution of Afghanistan and the Criminal Procedure Code of Afghanistan. Additionally, Article 91 does not meet the requirement of Article 7 of the Constitution, which requires Afghanistan to comply with the United Nations Charter, interstate agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights. If Article 91 were repealed, the conflict between the domestic laws of Afghanistan and international conventions could be solved and the government could afford accused judges their basic rights as citizens.

### *3. Creating a Specialized System of Trial with the Right to Appeal*

If Afghanistan is unwilling to allow judges to be prosecuted under the standard three-tiered system, it should at least create a specialized court—apart from the trial system created for ordinary Afghan citizens—which could guarantee the same right to appeal afforded to other high government officials. This specialized system of trial for accused judges would provide judges with the right to appeal, similar to the other citizens. It should be at least a two-tiered judicial system,

which includes a primary stage and an appeal stage. The primary stage of trial should consist of five competent judges—judges who have broad experience in the judicial system. These judges should be selected by the current heads of the appellate courts.

The appeal stage of this specialized system should also consist of five judges. Three of these judges should be selected from the experienced judges that currently serve on the Supreme Court divisions. The remaining two should be members of the Supreme Court. These judges are experienced and understand how a judgement will affect the life of the individual appearing before the court. Both bodies should meet four times annually, in order to adjudicate the cases of accused judges. As such, the structure of the court and related affairs would be regulated under a special legislative act.

#### CONCLUSION

This Article explains how, and why Afghan law should provide for a system of appellate review in cases involving accused judges. The Article emphasizes that judges are still Afghan citizens, and that as citizens, they should be treated equally under the law; thus, should be afforded appellate review of their cases. This Article argues that this right must be guaranteed under the Constitution of Afghanistan, the Code of Criminal Procedure, and the International Conventions such as the United Nation International Convention on Civil and Political Rights, Universal Declaration of Human Rights, and Universal Declaration of Islamic Human Rights. Article 91 of Law on Organization and Jurisdiction of the Supreme Court of Afghanistan is contrary to these guarantees and standards because it deprives accused judges of their basic right to appeal by providing them only one trial with no right to appeal.

To restore this right to judges, Afghanistan should reform Article 91 to indicate that accused judges are equal to other citizens and that existing criminal procedure laws must be equally applied to their cases. This approach would be very similar to what is currently implemented in Indonesia—a system that works well. In the alternative, Afghanistan could create a specialized two-tier court system for cases against judges. This system would at least give judges a review of their cases. It is vital to the integrity of the judiciary to treat all citizens equally and to prevent discrimination among them. As a result, the judiciary will retain the public trust by providing fairness and impartiality in its decisions and outcomes.