

PUBLIC TRIALS AND TRIAL BROADCASTING AS COMBATING TOOLS FOR JUDICIAL CORRUPTION IN AFGHANISTAN

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Abstract

Although Afghanistan has a very effective judicial system in theory, in practice, a lack of accountability, oversight, and public involvement have enabled judicial corruption to continue. The Constitution of Afghanistan has a provision providing for public trials, but it does not have any provision clarifying that the broadcasting of court hearings is permitted. Moreover, the Penal Code of Afghanistan has expressly prohibited the broadcasting of court hearings without the permission of the court. The resulting lack of oversight and public awareness about trials has enabled and perpetuated corrupt practices like bribery, nepotism, misinterpretation of the law, and consequently, weakness of the rule of law. This paper suggests that by reinforcing and strengthening the law to force courts to conduct trials publicly (unless otherwise prohibited for the protection of the litigants), and to broadcast them in the media, Afghanistan could encourage judges not only to closely follow the law, but also to curb the culture of taking bribes and engaging in other corrupt practices that may otherwise go unnoticed.

“If you can buy a judge, you do not need to hire a lawyer”¹
 –Kenyan proverb.

I. INTRODUCTION

Despite various law reforms and efforts to promote good governance over the past decade, Afghanistan remains one of the most corrupt countries

1. I heard this proverb from one of my classmates, Francis who is from Kenya and has experiences of working with Transparency International of Kenya. Francis is graduating this year from Sustainable International Development Program of Law School, University of Washington.

in the world.² With this tragic story of corruption, one cannot point blame at any one institution; it is widespread and deeply rooted in the political, military, judicial, and bureaucratic systems of the country. Although Afghanistan has a very effective judicial system in theory, in practice, a lack of accountability, oversight, and public involvement have enabled corruption to flourish in the Judiciary; and with the wide acceptance of corrupt practices like bribery, corrupt officials enjoy cultural impunity as well. In this article, the term “judicial corruption” means “behaviors conduct[ed] by judges who try to influence adjudgement with their official authorities so as to obtain some personal interests.”³

Studies show that judges, prosecutors, and police are the most corrupt government officials in Afghanistan.⁴ About 55% of people, who dealt with courts in 2016, were asked for bribes.⁵ The general reasons for bribing Afghan officials are “no other way to obtain a service,” “to speed up the process,” or “to be sure [they] get what [they] need.”⁶ Judges and judicial officials are not exceptions in the case of bribing. In addition, nepotism, and influences of high-ranking officials and politicians are also ever present in the every-day conduct of the Judiciary.

This article posits that public trials and trial broadcasting offer two effective ways to increase transparency and reduce corrupt practices in the Judiciary, and Afghanistan would be well served by promoting and facilitating both. To this end, the first part of this article describes the state of judicial corruption in Afghanistan, discussing the results of surveys and studies by national and international institutions about judicial corruption there. Next, the article argues that open court proceedings, including promotion and facilitation of public trials and trial broadcasting, could help

2. In 2016, Afghanistan ranks 169th among 176 countries in Transparency International’s Corruption Perceptions Index (CPI). See *Corruption Perception Index 2016: Afghanistan*, TRANSPARENCY INT’L (Jan. 25, 2017), http://www.transparency.org/news/feature/corruption_perceptions_index_2016. In the World Justice Project (WJP)’s Rule of Law Index, Afghanistan ranks 111th among 113 countries. See WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2016: AFGHANISTAN 47 (2016), https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf [hereinafter WJP RULE OF LAW INDEX 2016]. The Integrity Watch of Afghanistan’s 2016 survey report reveals that Afghans give \$3 billion dollars in bribes annually. See *Afghans Pay Close to \$3B in Bribe Annually*, INTEGRITY WATCH AFG. (Dec. 26, 2016), <https://iwaweb.org/integrity-watch-afghans-pay-close-to-3b-in-bribes-annually-4/>.

3. Yaxin Wang, “*Judicial Corruption*” *Understanding - Several Theoretic Reflections Based on Empirical Investigations*, 2 CIV. PROC. REV. 74, 76 (2011).

4. INTEGRITY WATCH AFG., NATIONAL CORRUPTION SURVEY 2016: AFGHAN PERCEPTIONS AND EXPERIENCES OF CORRUPTION x (2016), <https://iwaweb.org/wpcontent/uploads/2016/12/Executive-NCS2016.pdf> [hereinafter IWA 2016 SURVEY].

5. *Id.* at 33.

6. *Id.* at 36.

Afghanistan fight judicial corruption and improve the justice system. Then, the paper examines and presents the judicial practices in the United States (U.S.) and Kenya, particularly with respect to the way they facilitate open courts. From there, the article discusses current international law and policy that supports and recommends open trials, describing and identifying international norms for facilitating open court proceedings. The article concludes with practical recommendations for reforms related to promoting and facilitating open trials in the Afghan judiciary.

II. JUDICIAL CORRUPTION IS WEAKENING THE RULE OF LAW IN AFGHANISTAN

A. *Everyday Corruption*

Afghanistan, with an illiteracy rate of over 60%,⁷ has been plagued by instability, war, poverty, backwardness, and corruption.⁸ Since 2007, it has consistently remained among the five most corrupt countries in the world (with the exception of 2016, when it was ranked 169 among 176 countries).⁹ The World Justice Project (WJP),¹⁰ Rule of Law Index, ranked Afghanistan at 111th amongst 113 countries in 2016; and about the corrupt status, Afghanistan falls at the bottom of the list: 113 out of 113.¹¹

Corruption in Afghanistan is an increasing problem in people's lives. In a survey conducted by Integrity Watch Afghanistan (IWA), 55% of the

7. *The World Factbook: Literacy*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2103.html> (last visited Oct. 15, 2017).

8. Larry Sage, *Rule of Law Development in Afghanistan: A Brief Report*, NEV. LAW., June 2010 at 6, 10.

9. *See Corruptions Perception Index*, TRANSPARENCY INT'L, <https://www.transparency.org/research/cpi> (last visited Dec. 13, 2017) (analyzing the reports from 2007–2016).

10. *Measuring the Rule of Law*, WORLD JUST. PROJECT, worldjusticeproject.org (last visited Oct. 15, 2017). The WJP is an independent, multidisciplinary organization working to advance the rule of law around the world. "It is the foundation for communities of peace, opportunity, and equity—underpinning development, accountable government, and respect for fundamental rights." WJP RULE OF LAW INDEX 2016, *supra* note 2, at 4. The WJP measurements rule of law across the countries. Its Rule of Law Index (RoLI) contains factors such as:

- 1) constraints on government powers;
- 2) absence of corruption;
- 3) open government;
- 4) fundamental rights;
- 5) order and security;
- 6) regulatory enforcement;
- 7) civil justice; and
- 8) criminal justice. *Id.*

11. WJP RULE OF LAW INDEX 2016, *supra* note 2, at 3.

respondents were asked for bribes.¹² In this survey, the overwhelming majority, approximately 80% of respondents considered corruption as a serious problem in their lives.¹³ Similarly, in a survey by the Asia Foundation in 2014, 62.4% of respondents considered corruption to be a major problem.¹⁴ Further, in a 2010 survey by United Nations Office of Drugs and Crimes (UNODC), a Survey of the Victims of the Corruption, identified the Judiciary as the most corrupt and bribe-demanding agency in Afghanistan.¹⁵ In fact, corruption in the justice sector (the police, the prosecution offices and the courts) accounted for 43% of corruption in Afghanistan, almost half of the total corruption in the country.¹⁶

B. Judicial Corruption

1. Definition of Judicial Corruption

In his influential book, “Corruption and Political Development, A Cost Benefit Analysis,” Joseph S. Nye, defines corruption as an “abuse of office by a public official for personal gains,” and he explains that it includes any behavior that deviates from the normal duties of a public officer.¹⁷ These deviations may also be tied to family or close private cliques, and they may result in pecuniary or status gains, or they may violate rules as well.¹⁸ The judiciary, as a public office, is not immune to corruption of this kind.

Amélie Arvidsson and Emelie Folkesson define judicial corruption as conduct that results in some kind of advantage for judges, judicial officials, or others involved in the judiciary.¹⁹ This behavior typically leads to

12. IWA 2016 SURVEY, *supra* note 4, at 33.

13. *Id.* at 25.

14. ZACH WARREN, ASIA FOUND., AFGHANISTAN IN 2014: A SURVEY OF THE AFGHAN PEOPLE 91 (Nancy Hopkins ed., 2014), <https://asiafoundation.org/resources/pdfs/Afghanistan2014final.pdf>.

15. UNITED NATIONS OFFICE ON DRUGS & CRIME, CORRUPTION IN AFGHANISTAN: BRIBERY AS REPORTED BY THE VICTIMS 25 (Ragnhild Johansen & Suzanne Kunnen, eds., 2010), <https://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghanistan-corruption-survey2010-Eng.pdf>.

16. *Id.*

17. POLITICAL CORRUPTION: CONCEPT & CONTEXTS 26 (Arnold J. Heidenheimer & Michael Johnson eds., 3d ed. 2002).

18. *Id.*

19. Amélie Arvidsson & Emelie Folkesson, *Corruption in the Judiciary: Balancing Accountability and Judicial Independence*, ÖREBRO UNIV. DEP'T OF LAW, PSYCHOL. & SOC. WORK 1, 5 (2010), https://www.academia.edu/5046438/Corruption_in_the_Judiciary_Balancing_Accountability_and_Judicial_Independence.

extralegal or unfair court decisions.²⁰ Arvidsson and Folkesson explain that judicial corruption may include “payment or acceptance of bribes, extortion, embezzlement, threats, abuse of the procedural rules, or other improper pressures that can affect the independence and impartiality of the judicial outcome”²¹

Similarly, Yaxin Wang²² explains that judicial corruption involves bribes, intercessions of family, friends, or colleagues, and interventions from internal or external leaders, when affecting the judicial decisions in such manner as “swearing black is white” or more abusively, preventing the implementation of the law.²³ Wang, focuses on the misinterpretation, or misapplying the law, under the influences of externalities.²⁴ Transparency International,²⁵ the United Nations (U.N.) Convention Against Corruption of 2003,²⁶ and the WJP,²⁷ independently enumerates what judicial corruption consists of.

2. Status of Judicial Corruption in Afghanistan

Judicial corruption prevents a government from establishing a firm rule of law,²⁸ and in this way, it is at the heart of many of Afghanistan’s struggles with and attitudes about the rule of law. Many Afghans are skeptical about the level of corruption they see in the Judiciary—viewing

20. *Id.*

21. *Id.*

22. Wang, *supra* note 3, at 74. Mr. Wang is a Professor of the School of Law at the Tsinghua University, Beijing, China. *Id.*

23. *Id.* at 77.

24. *Id.*

25. *Judiciary: Problem*, TRANSPARENCY INT’L, <http://www.transparency.org/topic/detail/judiciary> (last visited Oct. 15, 2017). Transparency International (TI) asserts that “judicial corruption” consists of, (i) bribes to fast-track backlog cases; (ii) payment to court personnel “to slow down or speed up a trial, or dismiss a complaint”; and (iii) involving judges in: bribing, suffering pressure from above, and influencing by the politicians in decisions which can distort the appointment process. *Id.*

26. G.A. Res. 58/4, at arts. 15–20 (Oct. 31, 2003). The United Nations Convention Against Corruption of 2003 lists certain types of corruption such as bribery, embezzlement, trading in influence, abuse of functions, and illicit enrichment. *See id.*

27. *Absence of Corruption (Factor 2)*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/factors/absence-of-corruption> (last visited Oct. 15, 2017). In the WJP’s Rule of Law Index, judicial corruption includes: “bribery, improper influence by public or private interests, and misappropriation of public funds or other resources [in the judicial system].” *Id.* These forms of corruption could also be in executive, police, and military, or legislative branches of a state. *Id.*

28. BEN WHEATLAND, U4 ANTI-CORRUPTION RES. CTR., AFGHANISTAN: CORRUPTION AS A DRIVER OF CONFLICT 6 (2015).

Afghanistan's courts as one of the country's most corrupt institutions.²⁹ In a 2016 survey by the WJP, only 7% of respondents maintained that there is "[n]o corruption in the Judiciary"; the remaining 93% answered that there is corruption in the Judiciary.³⁰ In the survey of Criminal and Civil Justices of Judiciary: 23% of the respondents said that there is no corruption in the criminal justice system, while the remaining 77% affirmed that there is.³¹ Only 6% of the respondents said that there is "no corruption" in the civil justice system, while the remaining 94% of them said that there is corruption in civil justice.³²

In Afghanistan, judicial corruption affects justice in a variety of ways, especially when it comes to political influence by high-ranking bureaucrats or high-ranking judicial officials over judicial appointments and subsequent influence over judicial decision-making, undermining the independence of the judges.³³ For example, in 2007, the record of the Supreme Court showed that among the 1415 judges in the Afghan judiciary, only 44% of them were graduates from the faculty of Sharia, and 11.6% of them were graduates of law schools; notably, more than one-third (36.6%) of them did not have a university degree, and 7.7% of them graduated from other

29. In 2006, 74% of the respondents to the IWA's survey, "Afghan Perception of Corruption" perceived that corruption had increased in the last five years. See Yama Torabi & Lorenzo Delesgues, *Afghan Perceptions of Corruption: A Survey Across Thirteen Provinces*, INTEGRITY WATCH AFG. 2, 63 (2007), https://iwaweb.org/wp-content/uploads/2015/11/04-afghan_perception_of_corruption_2006.pdf. In 2010, the graph of this perception reduced, and about 50% of the respondents to the IWA's national survey, "Afghan Perceptions and Experiences of Corruption," labeled the judiciary and ministry of justice as the most corrupt institutions. See INTEGRITY WATCH AFG., NATIONAL CORRUPTION SURVEY 2010: AFGHAN PERCEPTIONS AND EXPERIENCES OF CORRUPTION 74 (2010), <https://iwaweb.org/wp-content/uploads/2016/12/Executive-NCS2016.pdf> [hereinafter IWA 2010 SURVEY]. In 2013, the corruption perception graph increased and 60% of Afghans—perhaps those who attended in the survey—viewed the judiciary as a corrupt institution and 65% admitted to paying bribes to judges. See *Report Shows Judiciary is Most Corrupt Institution in Afghanistan*, TOLO NEWS (July 11, 2013), <http://www.tolonews.com/afghanistan/report-shows-judiciary-most-corrupt-institution-afghanistan>. Interestingly, in 2016, once again the level of perception came down and around 55% of the people who dealt with the courts were asked for bribes. IWA 2016 SURVEY, *supra* note 4, at 33.

30. WJP RULE OF LAW INDEX 2016, *supra* note 2, at 47.

31. Compare with *id.* (finding responses of "[n]o corruption" receiving only 7%, while 93% of respondents believed that corruption exist in the branch).

32. *Id.*

33. Marie Chêne, U4: *Expert Answer: Tackling Judicial Corruption in Afghanistan*, U4 ANTI-CORRUPTION RES. CTR. 1, 2, <http://www.u4.no/publications/tackling-judicial-corruption-in-afghanistan/> (last visited Oct. 15, 2017).

faculties than Law and Sharia.³⁴ In another finding of September 2007, about 80% of Afghan judges were found unqualified.³⁵

In response to this finding, the Afghanistan Independent Human Rights Commission (AIHRC), began a project in 2011, to further examine the qualifications of judges and court staff in its observational report of the courts and judicial system—after a comprehensive assessment, the AIHRC recommended further professional training for court staff, especially for judges.³⁶ With continued concerns about judicial qualifications, in 2016 the government launched a Justice Sector Reform Plan in which new qualification requirements were set forth for prosecutors and judges, including refresher exams.³⁷

In addition, the historically acceptable practices of bribe and nepotism continue in Afghanistan.³⁸ These forms of judicial corruption also affect court proceedings, from requiring bribery fees to award “judicial access” and to speed up the process; judges and judicial officials are also extracting money from defendants for satisfactory decisions.³⁹ Corrupt practices in the Judiciary also perpetuate the strength of the parallel, an informal Judiciary ran by the Taliban.⁴⁰ People who do not trust the formal Judiciary or who cannot afford bribes have been known to go to the Taliban’s informal court “to resolve their legal cases swiftly and with a lack of red tape.”⁴¹

Public attitudes about judicial corruption are reinforced by personal experience in the courts. In interviews with Afghan litigants in 2013, Antonio De Lauri⁴² found that many in Kabul had lost their cases because

34. Levingston Armytage, *Justice in Afghanistan: Rebuilding Judicial Competence After the Generation of War*, 67 HEIDELBERG J. INT’L L. 185, 190 (2007).

35. Chêne, *supra* note 33, at 3.

36. *Judiciary: An Overview to the Report of Overseeing the Status and Functioning of Courts and Judicial System in Afghanistan*, AFG. INDEP. HUM. RIGHTS COMM’N (Sept. 14, 2011), <http://www.aihrc.org.af/home/article/939>.

37. TRANSPARENCY INT’L, FROM PROMISES TO ACTION: NAVIGATING AFGHANISTAN’S ANTI-CORRUPTION COMMITMENTS 3, 8 (Sept. 2016), https://www.transparency.org/whatwedo/publication/from_promises_to_action_navigating_afghanistans_anti_corruption_commitments.

38. IWA 2016 SURVEY, *supra* note 4, at 33, 38.

39. Parag R. Dharmavarapu, *Corruption and Graft in Post-Conflict Afghanistan*, 7 INQUIRIES J. 1, 3 (2015), <http://www.inquiriesjournal.com/articles/1057/corruption-and-graft-in-post-conflict-afghanistan>.

40. Hasib Danish Alikozai, *Corruption Encourages Parallel Judiciary in Afghanistan: Asia*, VOA (Jan. 12, 2016, 6:39 PM), <http://www.voanews.com/a/corruption-encourages-parallel-judiciary-afghanistan/3142316.html>.

41. *Id.*

42. Antonio DeLauri, ACADEMIA.EDU, <http://cmi-norway.academia.edu/AntonioDeLauri> (last visited Oct. 15, 2017). “Antonio De Lauri (PhD) is Senior Researcher at the Chr. Michelsen Institute . . .

the opposing party had bribed the judge.⁴³ IWA conducted a survey in 2016 in which 55% of respondents stated that the court had asked them for bribes.⁴⁴ In this same survey, Afghans reportedly gave around AFN2,323,608 (\$37,210) in bribes to courts, and AFN1,818,000 (\$30,300) in bribes to prosecutors.⁴⁵ In fact, 58% of Afghans believed in 2016 that “there [was] no other way” to receive judicial services than to bribe court officials.⁴⁶

Ironically, despite their perpetuations of corrupt practices, courts are charged with overseeing corruption cases for other agencies of government. In this way, they are directly responsible for ensuring that corruption is addressed through the courts. They set the tone for whether and how Afghanistan can heal the wounds of corruption—deciding what is corrupt and not corrupt.⁴⁷

III. PUBLIC TRIALS AND TRIAL BROADCASTING AS A WAY TO FIGHT CORRUPTION IN THE JUDICIARY

One of the main arguments that this paper makes is that the promotion and support of public trials and trial broadcasting could help curb and prevent corruption in the Judiciary in Afghanistan. This section provides some background on what these mechanisms are and the rationales for them.

A. Meanings and Purposes

When this paper refers to a “public trial” it means “an open court where people can witness . . . proceedings as long as they show reasonable behaviour.”⁴⁸ Openness of the justice is a common law policy that “proceedings ought to be open to the public, including the contents of court files and public viewing of trials.”⁴⁹ The Lord Chief Justice of England and

. . . Since 2005 he has been carrying out fieldwork in Afghanistan and lately in Pakistan, with a focus on legal reconstruction, judicial practice, human rights, war, humanitarian interventionism, forms of dependence and freedom.” *Id.*

43. Dharmavarapu, *supra* note 39.

44. IWA 2016 SURVEY, *supra* note 4, at 33.

45. *Id.* at 35.

46. *Id.* at 36.

47. See generally Dharmavarapu, *supra* note 39.

48. *What is PUBLIC TRIAL?*, L. DICTIONARY (2d ed.), <http://thelawdictionary.org/public-trial/> (last visited Oct. 14, 2017).

49. *Open Justice Definition*, DUHAIME’S L. DICTIONARY, <http://www.duhaime.org/LegalDictionary/O/OpenJustice.aspx> (last visited Oct. 15, 2017).

Wales, Harry Kenneth Woolf, explained that trial should be private only if it is necessary for the protection of:

- 1) national security;
- 2) confidentiality of information of the parties (including information about personal financial matters);
- 3) interests of children or any protected party; or
- 4) interests of judiciary.⁵⁰

The purpose of public trials is “the protection of innocence and the pursuit of truth.”⁵¹ It not only keeps the judges and lawyers honest and competent, but it also assures that society can rely on decent operations of the judiciary.⁵² A public trial is critically important for monitoring the legitimacy of convictions and public trials promote other checks on the judiciary, such as observance of procedural rules in the courts of appeal.⁵³ By enabling citizen oversight, public trials discourage the misinterpretation of the laws against defendants and reduce the likeliness of corruption in the judicial system.

The openness of justice also involves the reporting or broadcasting of court proceedings, because the media operates as a representative for the public to ensure that trials in the courts are in fact open and accessible by the people.⁵⁴ The term “trial broadcasting,” as used in this paper, refers to television and photographic coverage of the courtroom proceeding,⁵⁵ as well as other forms of media such as radio, newspaper, magazines, and even online media such as Twitter.⁵⁶ Trial broadcasting increases the possibility that people can access public trials, even when they cannot be physically present in the courts. By allowing media cameras and media representatives into the courtroom to record and/or broadcast trials and

50. *Id.*

51. Kristin Saetveit, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 STANFORD L. REV. 897, 899 (2016).

52. *Id.* at 902.

53. Zach Cronen, *Criminal Law: Behind Closed Doors: Expanding the Triviality Doctrine to International Closures—State v. Brown*, 40 WM. MITCHELL L. REV. 252, 254 (2013).

54. Cristina Carmody Tilley, *I Am A Camera: Scrutinizing the Assumption That Cameras in the Courtroom Furnish Public Value by Operating as A Proxy for the Public*, 16 U. PA. J. CONST. L. 697, 697 (2014).

55. Adriana C. Cervantes, *Will Twitter Be Following You in the Courtroom?: Why Reporters Should be Allowed to Broadcast During Courtroom Proceedings*, 33 HASTINGS COMM. & ENT. L.J. 133, 137 (2010).

56. *Id.* at 135, 137.

make those proceedings available to the public, “the achievement of the aim of . . . a fair trial” is guaranteed in any democratic society.⁵⁷

Notably, for trial broadcasting like this to happen, the Judiciary must also trust the way the media reacts to and reports on crimes and other problems that exist in society.⁵⁸ This article will address the issue of public trust more fully in later sections.

B. Rationale for Public Trials and Trial Broadcasting as Tools to Combat Corruption in Afghanistan

Greater transparency enhances public trust in the courts.⁵⁹ This influence undermines the independence of the judiciary⁶⁰ in interpretation and application of the laws. If the courts conduct proceedings openly, the chance for influence from the politicians and high-ranking judicial officials would undoubtedly be reduced.

Proponents of trial broadcasting point to various important benefits to society:

- 1) assuring the public’s right to know and access to information;
- 2) increasing public confidence in the fairness of the Judiciary;
- 3) observing and checking on any unfairness in the Judiciary;
- 4) discouraging false testimony;
- 5) encouraging attorneys and judges to be well-prepared for trial,⁶¹ and
- 6) having trial records for the future, records that can be used on appeal or by future litigants, if needed.

Televising trials has other benefits too: namely, educating the public with information about court procedures and the legal system, in general. Enabling people to see how the courts decide cases and apply the law to

57. Joshua D. Rosenzweig, *Public Access and the Right to a Fair Trial in China*, DUI HUA FOUND., http://duihua.org/wp/?page_id=2542#3fn (last visited Oct. 15, 2017) (internal citations omitted).

58. Wendy Pogorzelski & Thomas W. Brewer, *Cameras in Court: How Television News Media Use Courtroom Footage*, 91 JUDICATURE 124, 125 (2007).

59. Cervantes, *supra* note 55.

60. See TRANSPARENCY INT’L, *COMBATING CORRUPTION IN JUDICIAL SYSTEMS: ADVOCACY TOOLKIT 3*, 33–34 (2007), http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Judiciary_Advocacy_ToolKit.pdf [hereinafter TI Advocacy Toolkit].

61. See Roger K. Warren, *Public Trust and Procedural Justice*, CT. REV. 12, 12 (2000), <http://aja.ncsc.dni.us/courtrv/cr37/cr37-3/CR37-3Warren.pdf>.

resolve disputes and hold criminals accountable has the potential to improve public perception of courts and the government.⁶²

Many international and domestic laws support policies of public trial and trial broadcasting for similar reasons. For example, Transparency International (TI) posits arguments in favor of these mechanisms stating that they:

- 1) enhance judicial transparency;
- 2) promote fairness in judicial appointments;
- 3) promote decent judicial terms and conditions; and
- 4) increase judicial accountability and discipline.⁶³

In fact, enhancing judicial transparency is one of TI's most important missions.⁶⁴ This transparency includes access to information and transparency practices related to the internal operations and administrative aspects of the judiciary, including jurisdictional functions of the judiciary.⁶⁵ While these could have impact on the appointment of judges and judicial officials, public trials and trial broadcastings are much more influential on access to information and transparency practices related to the jurisdictional functions of the judiciary.

To curb the roots of irregularities in the court proceedings, enhancing the public trial and trial broadcasting (access to information) are among the recommended reforms by various institutions and researchers.⁶⁶ Because in public trial when the media is also present, the judges are more likely to carefully follow the rules protecting due process and describe reasons for their decisions, decreasing the likelihood that judges would be susceptible to taking bribes.

The public's right to "access to information" not only includes coverage of proceedings by the media, but it also includes: access to the laws, procedural regulations, code of conducts, ethics inside the courtroom or during proceedings, information about judge appointment criteria, judicial decisions and holdings, and reasons for those decisions and

62. Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655, 655 (1997).

63. TI Advocacy Toolkit, *supra* note 60, at 37–43.

64. *Mission, Vision and Values*, TRANSPARENCY INT'L, https://www.transparency.org/whoweare/organisation/mission_vision_and_values/ (last visited Oct. 15, 2017).

65. See Álvaro Herrero & Gaspar López, *Access to Information and Transparency in the Judiciary: A Guide to Good Practices from Latin America* 13 (World Bank Inst.: Governance Working Paper Series, Paper No. 80757, 2010), http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Transparency_Judiciary.pdf.

66. *Id.* at 35.

holdings.⁶⁷ In a democratic country, the judicial officials cannot be sided from the political and social contexts of the country. The judicial officials should effectively arrange for the public to have access to information related to their administrative operations and its jurisdictional work “under the right to freely access to public information.”⁶⁸

Despite all of these benefits, and while Afghanistan has open trials in theory, most of the trials in most of the courts are held out of the public eye.⁶⁹ Antonio De Lauri, explains that in the Afghan legal system today, “[a] corrupt official accepts money not to do his job or to do it wrongly, a good official accepts money to do what he is supposed to do anyway, but to do it for you and do it now.”⁷⁰ Furthermore, it is more common in Afghanistan that court proceedings “prevent the media and civil society from monitoring court activity and exposing judicial corruption.”⁷¹ Trial broadcasting is practically non-existent in all courts and provinces.⁷²

IV. INCREASING ACCOUNTABILITY IN THE JUDICIARY: LEARNING FROM THE EXPERIENCES OF OTHER NATIONS

A. Accountability in the United States Courts, Public Trials and Trial Broadcasting

As a leader among established democratic nations, the United States can provide a strong example to Afghanistan for how to develop a strategy for designing policies and procedures that would both encourage and facilitate public trial and trial broadcasting. The United States is also a logical place to start because of the relationship Afghanistan has with

67. *Id.* at 7, 19, 40.

68. *Id.*

69. In an informal inquiry, conducted by the members of civil society organizations in Nangarhar and Kandahar provinces, the respondent, defense lawyers revealed that because of various reasons, such as insecurity, lack of public interest, and imposing of restrictions over judges from the Supreme Court, most of the trials in those provinces hold with attending of only the litigants, and few clerks of the court. Some respondents even said that some judges invite the defense attorneys and prosecutors with litigants to decide in their offices. More and specific description about this will come later.

70. Antonio De Lauri, *Corruption, Legal Modernisation and Judicial Practice in Afghanistan*, 37 ASIAN STUD. REV. 527, 530 (2013).

71. *See Judicial Corruption Fuels Impunity, Corrodes Rule of Law, Says New Transparency International Report*, TRANSPARENCY INT’L (May 23, 2007), https://www.transparency.org/news/press_release/20070523_judicial_corruption_fuels_impunity_corrodes_rule_of_law_says_repor.

72. In Nangarhar and Kandahar provinces, the judges and defense attorneys said in an informal inquiry that the court allows media in some serious cases but this is very rare, with each court deciding five to seven cases in a week. More description will come later.

United States advisors and funding agencies, persons and entities that have formed strong relationships with members of the judicial system over the past sixteen years, and a strong role in supporting anti-corruption efforts in Afghanistan—especially through programs like the United States Agency for International Development (USAID).

1. Doctrinal Foundations for Public Trials and Trial Broadcasting in the United States

In the United States, the right to a public trial and trial broadcasting stem from the constitutional guarantees afforded by the First and Sixth Amendments: the First Amendment protects the right of freedom of speech,⁷³ and the Sixth Amendment protects the right of fair and public trial⁷⁴ of individuals. The concepts of open or public trial and trial broadcasting are closely related to these rights⁷⁵ that they require balancing of the two Amendments.

Trial broadcasting was first recognized as constitutional by the United States Supreme Court in 1981 in *Chandler v. Florida*, in which the Court held that “consistent with constitutional guarantees, a state could provide for radio, television and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the defendants.”⁷⁶ With *Chandler*, the Supreme Court reversed its previous decision in *Estes v. Texas*, which had prohibited cameras from the court proceedings.⁷⁷ Unlike

73. U.S. CONST. amend. I. The First Amendment of the United States Constitution reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” *Id.*

74. U.S. CONST. amend. VI. The Sixth Amendment of the United States Constitution reads,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. *Id.*

75. Jeanine Blackett Lutzenhiser, *An Open Courts Checklist: Clarifying Washington’s Public Trial and Public Access Jurisprudence*, 87 WASH. L. REV. 1203, 1206 (2012).

76. *Chandler v. Florida*, 449 U.S. 560 (1981).

77. *Id.* at 586 (J. Stewart, concurring).

in *Estes*, in *Chandler*, no one had presented empirical data that the broadcast of the court hearing had an adverse effect on the process.⁷⁸

In *Chandler*, the Court reasoned that, “[a]n absolute constitutional ban on broadcast coverage of trials cannot be justified . . . that, in some cases, conduct of the broadcasting process . . . may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter.”⁷⁹ The Court further explained that “*Estes* . . . did not announce a constitutional rule that all photographic [or broadcast coverage] of criminal trials is inherently a denial of due process.”⁸⁰ Ultimately in *Chandler*, the Court held that the Constitution does not prohibit a state from broadcasting trials, and that doing so does not inherently violate due process.⁸¹ As such, trial broadcasting remains a viable avenue for expressing the right to a fair and open trial.

Some do argue that trial broadcasting violates the Fourteenth Amendment right to due process.⁸² Opponents of the trial broadcasting point to the psychological impact of the camera in the courtroom—on everyone from judges, lawyers, witnesses and juries.⁸³ In *Estes*, Chief Justice Warren wrote that, “the evil of televised trials . . . lies not in the noise and appearance of the cameras, but in the trial participants’ awareness that they are being televised. To the extent that television has such an inevitable impact[,] it undercuts the reliability of the trial process.”⁸⁴ At the same time, it also could be said that the presence of cameras in the courtrooms ensures the due process right because it encourages judges and jurors to follow and interpret the law properly because their actions will be scrutinized by the public. In this way, it increases the accountability and transparency in the decision-making process, thereby protecting due process.

2. A History of Controversy in the United States

Historically, media coverage of criminal proceedings has been a hot issue among lawyers and courts in the United States. In 1946, the media coverage of the criminal proceedings in federal courts was prohibited under

78. *Id.* at 561.

79. *Id.*

80. *Id.* at 560.

81. *Chandler*, 449 U.S. at 583; Tilley, *supra* note 54, at 722–23.

82. Ralph E. Roberts, Jr., *An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings*, 51 SMU L. REV. 621, 623 (1998).

83. *Estes v. Texas*, 381 U.S. 532, 599 (1965).

84. *Id.* at 570.

the Federal Rule of Criminal Procedure 53.⁸⁵ This law explicitly stated that, “[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”⁸⁶

In 1972, in the Judicial Conference of the United States, the prohibition of media coverage was once again adopted more explicitly, and it expanded to the civil cases too.⁸⁷ These prohibitions included “broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto.”⁸⁸ These prohibitions also stated in the Code of Conduct for the United States Judges.⁸⁹ Following that, in 1988 the Supreme Court assigned an Ad Hoc Committee to observe the need of Cameras in the Courtrooms, and in its September 1990 session, the Conference adopted the Committee’s report which recommended a pilot program allowing media coverage of civil proceedings.⁹⁰

Following its 1994 refusal of the proposed amendment to the Federal Rules of Criminal Procedure Rule 53: Courtroom Photographing and Broadcasting Prohibited, about media coverage, the Conference, adopted rules and guidelines for media coverage in all courts in 1996, and once again in 2017.⁹¹ The current media coverage rule about court proceedings allows a judge to authorize “broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investit[ure], naturalization, or other ceremonial proceedings.”⁹² Moreover,

85. *History of Cameras in Courts*, U.S. CTS., <http://www.uscourts.gov/about-federalcourts/cameras-courts/history-cameras-courts> (last visited Oct. 15, 2017).

86. FED. R. CIV. P. 53.

87. *See generally History of Cameras in Courts*, *supra* note 85.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *History of Cameras in Courts*, *supra* note 85.

[a] judge may authorize such activities . . . during other proceedings, or recesses between such other proceedings, only: 1) for the presentation of evidence; 2) for the perpetuation of the record of the proceedings; 3) for security purposes; 4) for other purposes of judicial administration; 5) for the photographing, recording, or broadcasting of appellate arguments; or 6) in accordance with pilot programs approved by the Judicial Conference. When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will: 1) be consistent with the rights of the parties; 2) not unduly distract participants in the proceeding; and 3) not otherwise interfere with the administration of justice.⁹³

Currently, it is permitted to televise courtrooms' proceedings with the authorization of judges at both the federal and state levels. Per the Sunshine in the Courtroom Act of 2017, every presiding judge of appellate or trial court of the United States has the discretion to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides."⁹⁴ The presiding judges, or the panel of judges in both courts takes in to account the due process rights of the parties while permitting media coverage of the proceeding.⁹⁵

Notably, at the trial court level, a witness can request to "disguise" or "obscure" his or her voice and/or face; it is the obligation of the presiding judge to inform the witness of this right.⁹⁶ Furthermore, the presiding judge also can obscure the face and voice of an individual, if there is good cause that shows the media coverage threatens:

- 1) the safety of the individual;
 - 2) the security of the court;
 - 3) the integrity of future or ongoing law enforcement operations;
- or
- 4) the interest of justice⁹⁷

93. *Id.*

94. Sunshine in Courtroom Act, S. 643, 115th Cong. § 2 (b)(1)(2) (2017).

95. *Id.*

96. *Id.*

97. *Id.*

B. Public Trials and Trial Broadcasting in Kenya

As a developing country that has had some success in implementing laws that support public trials and trial broadcasting, Kenya provides a useful example for Afghanistan to learn from and develop such mechanisms. Like Afghanistan, Kenya also had a fundamental change to government in 2002, when a new government came to power.⁹⁸ Judicial reform was one of the promises by the new government. After a deep incisive investigation about the judiciary, among the key issues that needed reform were the issues of 1) performance management; 2) corruption, ethics and integrity; and 3) access to information and communication in the judiciary.⁹⁹ Reforms to the judiciary began in earnest after the new government came to power in 2007.¹⁰⁰

Furthermore, the new 2010 constitution created a new momentum for judicial reforms. Among the main transformational reforms were:

- a) transformation of the “[j]udiciary to be an independent but complementary partner with the other branches of government . . . ;
- b) [t]ransforming Court procedures, processes, organizational culture, and management to re-orientate them towards a culture of responsive, friendly, and effective service delivery . . . ; [and]
- c) [r]eordering the [j]udiciary’s [staff] and judicial [procedures]” to improve delivery of services; “improv[ing] the speed of justice; and improv[ing] access to justice”¹⁰¹

The wave of judicial reforms also led to a new eagerness for openness and transparency among judicial officials. The Kenyan judiciary developed a “case-tracking system that facilitated nationwide monitoring of delays and

98. See generally HUMAN RIGHTS WATCH, KENYA’S UNFINISHED DEMOCRACY: A HUMAN RIGHTS AGENDA FOR THE NEW GOVERNMENT 10 (2002), <https://www.hrw.org/reports/2002/kenya2/kenya1202.pdf>.

99. REPUBLIC OF KENYA, FINAL REPORT OF THE TASK FORCE ON JUDICIAL REFORMS 65, 73, 97 (2010), <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf>.

100. See *id.* at 4–5.

101. REPUBLIC OF KENYA: JUDICIARY, JUDICIARY TRANSFORMATION FRAMEWORK, 2012–2016 11 (2012), <http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Tranformation%20Framework-fv.pdf>.

workloads . . . [and] opened lines of communication for citizens to register complaints, suggest changes, and receive responses.”¹⁰²

1. Kenyan Law on Public Trials and Broadcasting of Courtroom Proceedings

Chapter 4, Article 50 of the Kenya Constitution provides for the right of a fair hearing.¹⁰³ The law states that this right includes a right to be heard by any court or tribunal and the hearing must be fair and public.¹⁰⁴ This provision is dealing with fair prosecuting of an accused person that contains creating such mechanisms to ensure that the proceeding of the court is fair to all persons.¹⁰⁵ Further the right to a fair trial is included as among the inalienable rights under the Constitution, and constitutionally it is among the fundamental rights that cannot be limited.¹⁰⁶

In practice, all Kenyan courts are, therefore, open to the public and the media; and this openness has led to greater levels of transparency in how courts operate and how disputes are adjudicated.¹⁰⁷ For recording the proceeding and storing the cases, the courts are facilitated with digital instruments to provide cases for the public “at a click of a button.”¹⁰⁸ It has also helped to restore and boost the confidence that ordinary members of the public have in the Judiciary.¹⁰⁹ The lack of confidence in the judiciary was a major contributor to the violence that rocked the country in 2007 and 2008.¹¹⁰ The judiciary also organizes open days where judges and magistrates get opportunities to interact with the public outside the confines

102. *Transforming the Courts: Judicial Sector Reforms in Kenya, 2011-2015*, INNOVATIONS FOR SUCCESSFUL SOCIETIES: PRINCETON UNIV., 1 (2015), https://successfultsocieties.princeton.edu/sites/successfultsocieties/files/MG_OGP_Kenya.pdf [hereinafter *Transforming the Courts*].

103. CONSTITUTION art. 50(1)–(2) (2010) (Kenya).

104. *Id.*

105. Waikwa Wanyoike, *Kenya: Access to Justice and the Constitution - Part 1*, ALLAFRICA (Mar. 14, 2015), <http://allafrica.com/stories/201503150184.html>.

106. CONSTITUTION art. 25 (2010) (Kenya).

107. See *Judiciary Scorecard*, INSIDE JUDICIARY, Mar. 2014, at 1, <http://www.judiciary.go.ke/portal/assets/files/NEWSLETTERS/EMAG%20E04%20March%202014.pdf>.

108. *Id.* at 5.

109. See Jay Loschky, *Less Than Half in Africa Confident in Their Judicial Systems*, GALLUP NEWS (Aug. 6, 2014), <http://www.gallup.com/poll/174509/less-half-africa-confident-judicialsystems.aspx>.

110. See KENYA NAT’L COMM’N ON HUMAN RIGHTS, REPORT OF THE COMMISSION OF INQUIRY INTO THE POST-ELECTION VIOLENCE (CIPEV) vii (2008), http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf.

of a courtroom; This is meant to help demystify the institution and to give it a human face.¹¹¹

A Kenyan judicial officer can, however, exclude members of the public and press in certain circumstances.¹¹² This case-by-case determination is made based on the peculiarity of a certain case or the sensitivity of witnesses or evidence to be tabled.¹¹³ Among the main cases that are often heard in-camera include cases involving sexual offences to minors especially during the time that a minor is testifying.¹¹⁴

Media access to Kenyan courts is highly liberalized.¹¹⁵ The only requirement is for the individual journalists to be duly accredited by their employer.¹¹⁶ The administrative wing of courts also provides authorization to the media representatives that are assigned to the different courts.¹¹⁷ This allows them to bring in equipment, to sit in court and listen to proceedings and to also relay the proceedings to their media stations uninhibited by any restriction.¹¹⁸ Authorized media representatives are also allowed to take photographs and record video and audio of the proceedings.¹¹⁹ In the recent past, during the hearing of cases of national importance, the courts allowed for proceedings to be relayed live to local television and radio stations.¹²⁰ This has played a great role in demystifying the administration of justice in the country.¹²¹

111. *Open Day at Githongo Law Courts*, JUDICIARY (Mar. 2, 2017), <http://www.judiciary.go.ke/portal/blog/post/open-day-at-githongo-law-courts>.

112. *See* Children Act (2001) Cap. 6 § 76(5) (Kenya) (discussing publication prohibitions, with regard to proceedings in Children's Court, whether it be by publication, report, law report or otherwise).

113. Interview with Francis Kairu, Lawyer, in Seattle, Washington (June 2017) [hereinafter Interview with Francis Kairu]. Francis has experience working with Transparency International of Kenya; he graduated from Sustainable International Development Program of Law School, University of Washington in June 2017. *Id.*

114. *Id.*; *see generally* Children Act (2001) Cap. 6 (Kenya).

115. Interview with Francis Kairu, *supra* note 113.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *The Presidential Election Petition: The Mwananchi Friendly Version*, KENYA L. (Apr. 25, 2013), <http://kenyalaw.org/kenyalawblog/the-presidential-election-petition-the-mwananchi-friendly-version-2/>.

121. Interview with Francis Kairu, *supra* note 113.

2. Challenges and Successes

In 2011, Justice Willie Mutunga, was appointed as Chief Justice; holding such position places the holder as the president of the Supreme Court and the leader of the entire Judiciary, the third arm of government in Kenya.¹²² He and his team initiated the Judiciary Transformation Framework and the 2011 Judicial Service Act, through which he applied critical reforms in the Judiciary.¹²³ One of significant reforms of Justice Mutunga was engaging civil society and the public in courts affairs.¹²⁴ The Judiciary has partnered with other stakeholders such as the civil society and the bar association to form court users' committees.¹²⁵ The committees bring together judicial staff and selected stakeholders to discuss ways of improving the administration of justice, and in the meantime, the committees are established for each county.¹²⁶ Court users' committees have been crucial in establishing a culture of accountability and transparency among judicial officers.¹²⁷ Within the court users' committees, any challenges with access to court, handling of cases, management of court files and other administrative issues can be discussed and solutions proposed in a constructive manner underpinned by a form of peer review and feedback.¹²⁸

Other reforms also included access to and expeditious delivery of justice; people-centeredness and public engagement; and stakeholder engagement in the Judiciary.¹²⁹ The Judiciary has established an Office of the Judicial Ombudsperson (Judiciary Ombudsperson).¹³⁰ "The Judiciary Ombudsperson is mandated to enforce administrative justice in the Judiciary by addressing mal-administration through effective complaint

122. CONSTITUTION art. 163(1)(a) (2010) (Kenya); *Transforming the Courts*, *supra* note 102.

123. THE JUDICIARY, STATE OF THE JUDICIARY AND THE ADMINISTRATION OF JUSTICE, ANNUAL REPORT, 2014–2015 3–4 (2014–2015) [hereinafter Annual Report].

124. *Id.* at 19.

125. Interview with Francis Kairu, *supra* note 113; *CJ Launches Milimani Criminal Division Court Users Committee*, JUDICIARY (Mar. 22, 2016), <http://www.judiciary.go.ke/portal/blog/post/cj-launches-milimani-criminal-division-court-users-committee> [hereinafter *CJ Launches*].

126. *CJ Launches*, *supra* note 125.

127. KNCHR, HUMAN RIGHTS BASELINE SURVEY REPORT 53 (2016), http://www.knchr.org/Portals/0/GeneralReports/KNCHR_Human-Rights-Baseline-Survey-Report_2016_FX-Print.pdf?ver=2016-0823-121839-380.

128. Interview with Francis Kairu, *supra* note 113.

129. JUDICIARY TRANSFORMATION FRAMEWORK, 2012–2016, *supra* note 101, at 13–15.

130. *Office of the Ombudsperson: About Us*, JUDICIARY, <http://www.judiciary.go.ke/portal/page/office-of-the-ombudsperson> (last visited Dec. 10, 2017).

handling structures. The office investigates any allegations of misconduct by judicial officers [or] staff.”¹³¹

Although levels of corruption within the Judiciary still have remained high, open bribery and malfeasance among judicial officers and staff has been eradicated almost completely.¹³² TI ranks the Judiciary third in likelihood encountering of bribery as among the top ten most corrupt sectors in the country.¹³³ Anticorruption experts, however, have concluded that in the sequencing of anticorruption reforms, curbing open blatant bribery and malfeasance is the first step towards addressing corruption and highlighting it as an evil deed.¹³⁴

Indicator/Year	2010	2011	2012	2013	2014
Average size of bribe (Ksh)	11,046	9230	5063	8390	7885
Average size of bribe (USD)	108	90	49	82	77

Figure 1: Average size of bribe—Kenya Judiciary 1 USD = 102.5 Ksh. Source: East African bribery index trends analysis. Transparency International Kenya, www.tikenya.org.

C. Promoting and Facilitating Public Trials and Trial Broadcasting in the Afghan Context

1. Legal Grounds for Public Trial and Trial Broadcasting in Afghanistan

a. Afghanistan Constitution

The current 2004 Constitution of Afghanistan clearly states that trials in Afghanistan’s court “shall be held openly,” and it is the constitutional right of Afghan citizens to attend in the public trials. Article 128 of the Constitution states the following:

131. *Id.*

132. See Annual Report, *supra* note 123, at 16–17.

133. TRANSPARENCY INT’L, THE EAST AFRICAN BRIBERY INDEX 2017 16 (2017), <http://www.ti kenya.org/wp-content/uploads/2017/09/East-African-Bribery-Index-EABI-2017-1-1.pdf>.

134. See George R.G. Clarke, *How Petty is Petty Corruption? Evidence from Firm Surveys in Africa*, (Munich Pers. RePEc Archive, Paper No. 15073, 2008), https://mpra.ub.uni-muenchen.de/15073/1/petty_corruption_Aug08_WPS.pdf.

In the courts in Afghanistan, trials shall be held openly and every individual shall have the right to attend in accordance with the law. In situations clarified by law, the court shall hold secret trials when it considers necessary, but pronouncement of its decision shall be open in all cases.¹³⁵

This provision of the Afghan Constitution is designed after the Universal Declaration of Human Rights (UDHR), and other international principles and norms about the Justice and Rule of Law.

However, secret trials are not necessarily prohibited by the Constitution. From the first clause of the Article 128, it seems that the publicity of trials is the principle, and it is not only for the criminal cases, but the terms (in the courts in Afghanistan) and (trials) mean that criminal, civil, and commercial trials should be public. Moreover, the clause also places the condition (in accordance with the law) that means attendees must obey the rules, and code of conduct of the court and must not violate them.¹³⁶

The Afghan Constitution does not say anything about trial broadcasting or recording the court proceeding. However, like the United States, it has foundational provisions for “right of freedom of speech”¹³⁷ and “right of access to information.”¹³⁸ Based on Article 50, the right of access to information is limited by the “violation of others’ rights,” and “national security.”¹³⁹ Some judges in Afghanistan’s courts justifies the prevention of the trial broadcasting and recording of a court proceeding as a violation of rights of the defendants,¹⁴⁰ but this author has not seen any interpretation of the provisions mentioned above for trial broadcasting.

b. The Afghanistan Statutes

The New Criminal Procedure Code (NCPC) of Afghanistan was adopted in 2014.¹⁴¹ NCPC comports with the Constitution regarding public trials for criminal cases. For example, Article 213 of the NCPC guarantees the right to public trials, in general, but it identifies exceptions for 1) moral

135. CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN ch.7, art. 128.

136. CRIM. PROC. CODE, ch. 8, art. 225 (Jan. 26, 2014) (Afg.) (explaining that if someone disturbs the courtroom’s order the judge can exclude him or her or impose a fine up to 5,000 AFN).

137. CONST. AFG. ch. 2, art. 34.

138. *Id.* art. 50.

139. *Id.*

140. Anatullahullah Hafiz, *Do Not Read Journalists!*, ROHI.AF (May 25, 2013), <http://rohi.af/fullstory.php?id=26447>.

141. CRIM. PROC. CODE (Afg.).

issues, 2) family issues, and 3) public security.¹⁴² Keeping in consideration the courtroom's space, the court can limit the number of attendees; moreover, the law excludes the armed and those who do not hold perfect legal competency from the courtroom attendance.¹⁴³ Chapter 8 of the NCPC is allocated to the regulations about the order of the courtroom¹⁴⁴ that is vital for public trials.

As stated in the Constitution, the NCPC also insists on the public announcement of court decisions under all circumstances.¹⁴⁵ The recording, photographing, and publishing of the courtrooms' proceedings, however, depends on the permission of the judges on the panel;¹⁴⁶ otherwise, broadcasting is prohibited. Moreover, the Penal Code also treats the publication of court's decision as a complimentary punishment.¹⁴⁷ The NCPC only allows the publication of decision, which concerns the innocence of the accused.¹⁴⁸

There is no specific procedure or pathway for the announcement of the schedule of open trials or invitation of the public or media representatives in the procedural laws, and as well as in the Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan. The NCPC only has provisions for inviting of family members of the person who is convicted of the death penalty one day prior to the date of his or her execution.¹⁴⁹

142. *Id.* art. 213. This article reads, "Trial is public, everyone can attend in it, unless the judge declares part of the proceeding or at all to be closed, because of moral issues, family secrets, protection of order or public peace." *Id.*

143. *Id.* arts. 214–15. Article 214 reads, "The president of the bench can take in account the space of the courtroom and limit the attendance in proceeding, and distribute visitor cards to the attendees." *Id.* art. 214. Article 215 reads, "From the proceeding, the reports of radio, television, [and] video recording and photographing; and its broadcasting are only permitted with the permission of judge [president] of the court." *Id.* art. 215.

144. *See generally id.* arts. 223–25.

145. *Id.* art. 234. Article 234 reads,

Although the case is investigated in a close proceeding, the announcement of the is announced public at any situation. The court can take such measurements that ensure the presence of the accused person during the announcement. In case of acceptance of the decision by the accused person, the measurements include the capturing and detaining of him. *Id.*

146. CRIM. PROC. CODE at art. 215. (Afg.).

147. PENAL CODE, ch. 3, art. 117 (Oct. 7, 1976) (Afg.).

148. CRIM. PROC. CODE at art. 215. (Afg.).

149. *Id.* art. 312.

Notwithstanding, the Regulation of Judicial Conduct for the Judges¹⁵⁰ of the Islamic Republic of Afghanistan also prevents the publication of the decision without the consent of the judges. However, in a comment, it accepts that it would be a better way for catching public trusts and educating public through the media.¹⁵¹ In addition, one could raise the questions that what is the purpose of the announcement of the decision publicly? What does the term (publicly) mean here? Does it really differ from the broadcasting of a decision through the television, radio, or in a newspaper?

c. What Happens in the Afghan Courts?

Afghanistan has substantial legal grounds for public trial; however, it does not have clear rules for recording and broadcasting court proceedings. The Supreme Court of Afghanistan only publishes the list of weekly decisions held in various provincial and district courts in its official journal, the Mezan (pair of scales). In a recently published number, the Mezan includes a list of seventy-five decisions of provincial appellate courts and of city trial courts.¹⁵² The list includes the titles of the courts, type of accusations, number of convictions, date of decisions, and type of punishments.¹⁵³ Interestingly, the number publishes a four-sentences report of two decisions, held at public trials in the trial court of Jalalabad city, Nangarhar province. The report does not include any picture from the proceedings, nor the names of convictions. It only has the names and titles of the judges who heard the cases. The report does not say anything about the number of attendees in the proceeding.¹⁵⁴

In an informal inquiry, attended twenty defense lawyers in Jalalabad city of Nangarhar province, most of them (twelve) described their clients' proceedings legally public but the majority of them (fifteen) illustrated that they have not seen public people to attend in those proceedings.¹⁵⁵ Those

150. REGULATION OF JUDICIAL CONDUCT FOR THE JUDGES OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (June 19, 2007), <http://www.deontologie-judiciaire.umontreal.ca/fr/magistrature/documents/REGULATIONOFJUDICIALCONDUCTFORTHEJUDGESOFTHEISLAMICREPUBLICOFAFGHANISTAN.pdf>.

151. *Id.* art. 12 cmt.

152. JARIDA-AL-MEZAN, DA STARI MAHKAME KARE SARGANDOYA KHPARAWANA [THE MEZAN JOURNAL, A PUBLICATION FOR SUPREME COURTS CONDUCTS], Serial No. 374, p.3 (May 10, 2017), <http://supremecourt.gov.af/Content/Media/Documents/%D8%AF%DB%8C%D8%B2%D8%A7%DB%8C%D9%86%DB%B3%DB%B7%DB%B4135201712757541553325325.pdf> (Afg.).

153. *Id.*

154. *Id.* at 2.

155. Interview with Mohammad Ibrahim Afghan, Member, Civil Soc'y Org., in Jalalabad, Afg. (Apr. 1, 2017).

attorneys attend, approximately, more than five proceedings in a week, but almost all of them revealed that they have not seen the media representatives in the court proceedings more than once a month.¹⁵⁶ The defense attorney explained that because of security concerns, the court does not allow the public to attend the proceedings. Three of them even said that because no one comes to the proceedings, most judges simply decide cases in their offices, not in the courtroom.¹⁵⁷

The same questionnaire was also sent to the judges of the Jalalabad city while majority of them refused to answer questions because (as they said) the Supreme Court does not allow them to share information or interview with the media or others.¹⁵⁸ Only three judges answered the questionnaire, and they requested anonymity. In their responses, they claimed that their proceedings are public, but they tried to justify that they cannot allow people to attend because of concerns about security.¹⁵⁹ About the media coverage, they accepted that at least once a month we allow the media to cover the proceeding, especially in some serious or major cases. The judges were also asked the meaning of Public Trial; they described that those trials in which public, media, witness, and experts attend are public trials.¹⁶⁰

The same questionnaire was also sent to Kandahar,¹⁶¹ a southern province of Afghanistan. A total of seventeen defense lawyers were asked in that province about the status of public trials and attendance of public and media in court hearings.¹⁶² About half of them (nine out of seventeen) consider the court proceedings public, but almost all of them do not see media to cover the court proceeding at least once a month.¹⁶³ The majority of the respondents (thirteen of them) said that they attend more than five hearings a month, and ten of the respondents said that they attend more than ten sessions in a month.¹⁶⁴ Like the Jalalabad's attorneys, the vast majority

156. *Id.*

157. *Id.*

158. Personally, I haven't seen such a law, or regulation but majority of the judges refrain from sharing information or interview with media and others with saying this.

159. Interview with Mohammad Ibrahim Afghan, *supra* note 155.

160. *Id.*

161. Interview with Atiqullah Daqiq, Student, Prosecution Off., in Kandahar, Afg. (Apr. 1, 2017).

162. *Id.*

163. *Id.*

164. *Id.*

in Kandahar too, marked the security concerns as reason that courts could not allow public to attend in hearings.¹⁶⁵

Haroun Rahimi,¹⁶⁶ an Afghan PhD researcher in the Law School of University of Washington has also described to this author what he observed while seeking information in Afghan courts for his research. Rahimi went to four provincial-commercial courts of Afghanistan to gather information through a survey, but the judges refused to share with him even some general information such as “the usual length of proceedings, and the number of cases [they receive] per year.”¹⁶⁷ Rahimi says that in every court, the judge referred to a letter from the Supreme Court that prohibits the judicial officials from sharing information about court proceedings without the formal approval from the Supreme Court. However, the problem was solved when Rahimi used his “personal connections,” and pulled “so many strings” to interview with judges, and obtain information from them in three different provinces, without the formal approval from the Supreme Court which is a long procedure and is time consuming.¹⁶⁸

V. INTERNATIONAL LEGAL INSTRUMENTS THAT ENCOURAGE PUBLIC TRIALS AND TRIAL BROADCASTING TO PROMOTE TRANSPARENCY IN THE JUDICIARY

Many countries are committed to establishing foundations of freedom, justice, and peace in their own territories, as well as in the world.¹⁶⁹ This commitment is reflected in their ratification of and membership in various international conventions and instruments. The UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the Bangalore Principles of Judicial Conducts of the United Nations (BPJCUN) are the foundations for justice and treatment with criminals. Justice does not need to only be done, but it needs to be observed by the people that it is done.¹⁷⁰ For this purpose, countries are committed to the public trials and trials broadcasting.

The “Right to a Fair Trial” is declared by the international community as a foundation for ensuring justice.¹⁷¹ The UDHRs regards it, for

165. *Id.*

166. Interview with Haroun Rahimi, Professor, Herat U., in Herat, Afg. (Apr. 1, 2017).

167. *Id.*

168. *Id.*

169. *The Right to A Fair Trial*, FAIR TRIALS, <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/> (last visited Dec. 10, 2017).

170. *Id.* See also *Open Justice*, FAIR TRIALS, <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/open-justice/>.

171. See generally *The Right to A Fair Trial*, *supra* note 169.

everyone, as a principle of human rights to be tried in an open trial before an independent and impartial court. It says, “[e]veryone 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 any criminal charge against him.”¹⁷² Countries are required to develop certain ways of doing this, unrelatedly of which legal system is following by them.¹⁷³

ICCPR, also supports public trial and trial broadcasting. ICCPR recognizes the “fair and public hearing” as a fundamental right of all persons.¹⁷⁴ However, it announces that the press can be excluded from the court for some exceptional reasons such as:

- 1) morals;
- 2) public order or national security;
- 3) when the interests of the private lives of the parties so requires; or
- 4) to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.¹⁷⁵

If other than these reasons, it could be assumed from ICCPR’s “fair and public hearing” that media can attend and broadcast the proceedings because it reads that, “[a]ny judgement rendered in criminal case or in a suit at law shall be made public”¹⁷⁶ The exceptions in banning publicity of the judgements that ICCPR sets are “interests of the juvenile persons,” and “concern [of] matrimonial disputes.”¹⁷⁷

The Bangalore Principles of Judicial Conduct (BPJC) adopted by the Judicial Group on Strengthening Judicial Integrity was supported by the U.N. at the Hague on November 25–26, 2002.¹⁷⁸ BPJC indirectly supports public trials and trial broadcasting when it articulates the importance of “fair trial,”¹⁷⁹ “reinforc[ing] public confidence in the judiciary,”¹⁸⁰

172. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 10 (Dec. 10, 1948).

173. *See generally id.*

174. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 14 (Dec. 16, 1966).

175. *Id.*

176. *Id.*

177. *Id.*

178. The Bangalore Principles of Judicial Conduct (2002) (adopted by the Judicial Group on Strengthening Judicial Integrity, Nepal on Nov. 25–26, 2002).

179. *Id.* at 3.

180. *Id.*

“maintain[ing] and enhanc[ing] the confidence of the public,”¹⁸¹ and “reaffirm[ing] the people’s faith in the integrity of the Judiciary”¹⁸² as core principles that should guide judicial conducts. These principles, as constraints on judicial conducts, aim to assure the public that processes for treatment with law-breakers are fair and certain and that governments cannot abuse their powers.¹⁸³

The right to a fair trial is not just to protect defendants, but its aim is to make trust in justice and government among the public.¹⁸⁴ Trial broadcasting is not separable from the right to a public trial, and it serves to deter criminal activity. Furthermore, trial broadcasting also plays a significant role in informing people about the crimes and the symptoms of criminals.¹⁸⁵ That is why the abovementioned international instruments, directly or indirectly, are in favor of fair and public trial to protect the rights of defendants, and make trust in courts. The “competency,” “independency,” and “impartiality” that ICCPR sets as conditions for the court, could be ensured when the proceeding of the court is fair and public, and the public has an eye over the proceeding through the lens of media.

A. *International Norms of Fair Justice and Due Process*

International law and policy is committed to promoting “fair trials” and “due process” in the judiciaries of the world,¹⁸⁶ commitments that, as this article has explained, are furthered by mechanisms like public trials and trial broadcasting. Moreover, these standards are indirectly supported by the certain international institutions that are fighting to establish rule of law and combating judicial corruption.

Fair trial refers to the trialing of a defendant by an authorized court, while enjoying all its constitutional rights. A fair trial does not only increase transparency in the judicial system, but it lacks errors in the process that could be causing egregious harm to the defendant,¹⁸⁷ most often, when the innocent defendant is convicted in misinterpretation of the laws. There is a common saying in the judicial profession that the escape

181. *Id.*

182. *Id.* at 4.

183. *See generally The Right to A Fair Trial, supra* note 169.

184. *Id.*

185. *Arguments for and Against Allowing Television Cameras into the Courtroom*, U. NEB.-LINCOLN, <https://www.unl.edu/eskridge/cj211cameras.html> (last visited Dec. 10, 2017).

186. Scott C. Pugh, *Checkbook Journalism, Free Speech and Fair Trials*, 143 U. PA. L. REV. 1739, 1741–42, 1758 n.99 (1995).

187. 21 TEX. JUR. 3D CRIM. LAW: RTS. OF THE ACCUSED *Courtroom Atmosphere* § 28, Westlaw (database updated Oct. 2017).

of ten guilty persons is not worse than the punishing of one innocent person.¹⁸⁸ Therefore, it is not easy to see whether the court (or generally the judicial system) provides a defendant with fair justice or not, but with coverage of public trials, the media could assure the fairness of trials, and prevent the misinterpretation of the laws.¹⁸⁹

Due process refers to the operation of the judicial system within the law (“legality”) and providing a fair procedure¹⁹⁰ for the prosecution of an accused person. It aims to interpret the laws properly for all litigants, and not to prejudice them consciously. American Judge Henry Friendly lists the points that remain highly influential on the legality procedure of a case-hearing. He enumerates them as follow:

- 1) An unbiased tribunal.
- 2) Notice of the proposed action and the grounds asserted for it.
- 3) Opportunity to present reasons why the proposed action should not be taken.
- 4) The right to present evidence, including the right to call witnesses.
- 5) The right to know opposing evidence.
- 6) The right to cross-examine adverse witnesses.
- 7) A decision based exclusively on the evidence presented.
- 8) Opportunity to be represented by counsel.
- 9) Requirement that the tribunal prepares a record of the evidence presented.
- 10) Requirement that the tribunal prepare[s] written findings of fact and reasons for its decisions.¹⁹¹

The public trial and trial broadcasting assures the application of all these procedural-points because these points could incentivize judges to follow the due process strictly and not to prejudice the interests of the litigants.

In addition, TI emphasizes the vital role of, “[c]ivil society, the private sector, [and] the media.”¹⁹² It believes in peoples’ influences on organizational behaviors with insisting that, “[w]e must expose judicial bias

188. Danny J. Boggs, *The Right to A Fair Trial*, 1998 U. CHI. LEGAL. F. 1, 5 (1998).

189. See Mark R. Stabile, *Free Press-Fair Trial: Can They Be Reconciled in A Highly Publicized Criminal Case?*, 79 GEO. L.J. 337, 337–38 (1990).

190. See *Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process (last visited Dec. 10, 2017).

191. *Id.*

192. *Judiciary: Solution*, TRANSPARENCY INT’L, <http://www.transparency.org/topic/detail/judiciary> (last visited Dec. 10, 2017).

and drive reforms to increase courtroom honesty.”¹⁹³ TI’s understanding of the ways for illuminating the judicial corruption, and enhancing the transparency and accountability in the judicial system are public trial and trial broadcasting. TI explicitly supports these two instruments for combating corruption.

Furthermore, the WJP defines the Rule of Law (RoL) in the context of:

- 1) accountability of the governmental officials;
- 2) publicity and clearness of the law;
- 3) fairness and efficient process of the enacting of the laws; and
- 4) the independence of the justice.¹⁹⁴

Without public trials and trial broadcasting, these goals for RoL projects cannot be easily achieved. When United States Supreme Court Justice Louis Brandeis said, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁹⁵ He meant that the only way for the fairness, accountability, discovering the truth, and preventing the prejudice to the public, is public trials and trial broadcasting.¹⁹⁶

Overall, many institutions that are involved in combating corruption, directly and indirectly, are in favor of public trial and trials broadcasting for increasing the accountability and preventing the misinterpretation of the laws.

B. International Codes About Free Media and Access to Information

“Freedom of expression,” “access to information,” and “respect for the truth and for the right of public to the truth” are important human-rights and professional-journalism principles that enshrined in the international instruments about the human rights and in the codes of conducts of journalists adopted by worldwide organization. The UDHR, the Universal Islamic Declaration of Human Rights, and the ICCPR support the mentioned principles about free media and access to information. The international organizations for supporting professional journalism, and their

193. *Id.*

194. *What is the Rule of Law?*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/what-rule-law> (last visited Dec. 10, 2017).

195. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

196. Sherilyn Streicker, *Criminal Trial Publicity*, NOLO, <http://www.nolo.com/legal-encyclopedia/criminal-trial-publicity.html#> (last visited Oct. 15, 2017).

code of conducts and ethics also provide support to the above-mentioned principles.

The UDHR in description of “the right of freedom of opinion and expression” reads that this right includes “to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹⁹⁷ Interestingly, the Universal Islamic Declaration of Human Rights not only regards the “search after truth” as a right, but it burdens as a duty over every Muslim.¹⁹⁸ The Islamic Declaration further states, “there shall be no bar on the dissemination of information” unless it “endanger[s] the security of the society or the state and is confined within the limits imposed by the [l]aw.”¹⁹⁹ The ICCPR repeats the language of UDHR, but it more precisely sets the limitation for enjoying this right as:

- 1) respect for the rights and reputation of others;
- 2) protection of national security and the public order; and
- 3) protection of public health and morals.²⁰⁰

The Society for Professional Journalism’s (SPJ)²⁰¹ Code of Ethic encourages journalists to seek and broadcast truthful information and burdens journalists to “[r]ecognize a special obligation to serve as watchdogs over public affairs and government.”²⁰² Based on the SPJ’s Code, the journalists should “[s]eek to ensure that the [public affairs are] conducted in the open, and that public records are open to all.”²⁰³ The Society offers a “comprehensive guide on accessing government records,” including access to the courts’ records and attending in court proceedings.²⁰⁴ “The campaign is called Open Doors and covers what

197. G.A. Res. 217 (III) A, *supra* note 172, at art. 19.

198. Islamic Council, Universal Islamic Declaration of Human Rights, at art. XII (Sept. 19, 1981).

199. *Id.*

200. G.A. Res. 2200A (XXI), *supra* note 174, at art. 19.

201. *About SPJ*, SOC’Y PROF. JOURNALISTS, <http://www.spj.org/aboutspj.asp> (last visited Dec. 10, 2017). The Society of Professional Journalists is a “broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior [in the United States of America]. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information . . .” *Id.*

202. *SPJ Code of Ethics*, SOC’Y PROF. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/pdf/spj-code-of-ethics.pdf>.

203. *Id.*

204. *Recognize A Special Obligation to Serve as Watchdogs Over Public Affairs and Government. Seek to Ensure that the Public’s Business if Conducted in the Open, and that Public Records are Open to All.*, SPJ NETWORK: BLOG, <https://blogs.spjnetwork.org/ethicscode/?p=148> (last visited Dec. 13, 2017).

people should know and do about accessing records that belong to the public.”²⁰⁵ The Open Doors declares to the journalists that courts files are open to the public and media and both media and public can attend in court proceedings, unless they are not declared close by the judge who preside the court.²⁰⁶

The International Federation of Journalists (IFJ) also has a Declaration of Principles on the Conducts of Journalists that encourages the journalists to “respect for [the] truth and for the right of the public to the truth”²⁰⁷ The Declaration motivates the journalists to “defend the principles of freedom in the honest collection and publication of news, and of the right of fair comment and criticism.”²⁰⁸

The Swiss Press Council also declared a declaration of the Duties and Rights of a Journalist in 2008.²⁰⁹ The duties part of the declaration sets rules for the journalists that should be bounded to, among others; here are two rules that directly support free media and access to information rights: 1) seeking the truth, “in the interests of the public’s right to know”; 2) “defend[ing] freedom of information, freedom of commentary and criticism”²¹⁰ Furthermore, the declaration recognizes “[f]ree access to all sources of information and the right to investigate without impediment anything that is in the public interest” as a right of journalist; and in exceptional circumstances, and with the clearly defined reasons, the public or private confidentiality can be invoked against the journalist.²¹¹ The same rights and duties were enshrined in the Declaration of Munich that was “approved at a meeting of representatives of the Journalists’ Unions of the six countries of the European Community in Munich, Germany, on November 23–24, 1971.”²¹² Apart from these codes, there are many others too that in different ways support the free media and access to information right, especially when it is in the interest of public.²¹³

205. *Id.*

206. *FOI and the Courts*, SOC’Y PROF. JOURNALISTS, <https://www.spj.org/opendoors2.asp> (last visited Dec. 13, 2017)

207. *IFJ Declaration of Principles on the Conduct of Journalists*, INT’L FED’N JOURNALISTS, <http://www.ifj.org/en/about-ifj/ifj-code-of-principles/> (last visited Dec. 10, 2017).

208. *Id.*

209. *The Declaration of the Duties and Rights of a Journalist*, SWISS PRESS COUNCIL FOUND. (2008), <https://presserat.ch/en/journalistenkodex/erklaerungen/>.

210. *Id.*

211. *Id.*

212. *Declaration of the Rights and Duties of Journalists*, ACCOUNTABLE JOURNALISM (Nov. 23–24, 1971), <https://accountablejournalism.org/ethics-codes/International-Declaration>.

213. *See Code of Ethics: International*, ACCOUNTABLE JOURNALISM, <https://accountablejournalism.org/ethics-codes/international> (last visited Dec. 11, 2017).

VI. PROPOSAL OF AMENDMENTS TO ENSURE PUBLIC TRIALS AND TRIAL BROADCASTING IN AFGHANISTAN

This section recommends specific steps that the Afghan government could take to combat judicial corruption through ensuring public access to trials and establishing and supporting programs that enable and promote trial broadcasting. As explained above, the Afghan Constitution guarantees a right to public trials, with some standard limitations for family issues, juvenile issues, or issues related to the national security; however, more steps are needed to ensure access to and oversight of courts.

A. Legislation to Clarify the Right to Public Trial

Like the United States' Sunshine in Courtroom Act of 2017, and like the Kenya's Judiciary Transformation Framework and the Judicial Service Act of 2011 in the time of Justice Willie Mutunga, Afghanistan Judiciary also could develop such a draft of act for enhanced transparency and accessibility to the courts. This act could be passed and ratified by the legislature to be legalized its implementation. Under this new act, public hearing should be mandatory in all cases, except in some special circumstances. For closing trials, the courts must show reasonable causes such as family issue, juvenile issue, or issue related to the national security to the public through their websites or public media. The new act should oblige on the courts to announce their schedules of public trials via local media, courts' websites, and official pages of social media. The courts even can send their monthly or weekly trial schedules to the schools, universities, mosques, and community leaders, and youths' organizations in their jurisdictional area.

The new legislation can also amend the provision of criminal code that considers the publication of courts' decisions as complimentary punishment. The bill should also better define and enlighten the international interpretation of "the right of public trial," "trial broadcasting," "the right of access to information," "due process," "the right of the protection of witness," and "protection of interests of the courts, and litigants." The bill should clearly introduce the constitutional discretions of the judges about conducting of the public trials, trial broadcasting, banning and permitting the media from the courtrooms. Under the "fair trial" standard, the bill should prevent the judges from excluding media and members of the public from attending hearings, as this is the practice of courts in Kenya.

Furthermore, the bill should require the courts to issue their written decisions, illustrating their legal reasoning and justification, and file them in their office. This obligation may require hiring new personals to courts, or force the judges and judicial officials to work hard and more. As the judges

receive the high amount of salary among the public officials, in some courts where the workload is not that much, I am quite sure if both judges and judicial official work from 8:00 AM through 4:00 PM in their offices, they can easily handle this task. In the sites, where the workload is much more on the courts, the new act should require the government for recruitment of new lawyers who are well familiar with computer technology to work towards computerizing the courts' decisions and prepare it for online availability. This is the courts practice in the United States.

When statutes are promulgated, their provisions are of two characteristics: permissive and obligatory.²¹⁴ The “right of public trial” under Afghan laws is not permissive—it is obligatory; nonetheless, most of the lawyers, especially judges, believe that it is just a permissive right. This paper recommends that the right of public trial should be taught as an obligatory provision, with the exceptions of certain cases where a public trial would violate others' privacy rights or the national interests. As public trial is interpreted as core principle of fair trial, and a constitutional right of citizens, Afghanistan also needs to interpret it as a core principle of its adjudication, and pave the way for its ensuring, without keeping in mind the conditions, and realities on the ground, as most judges and courts do this.

B. Media Access to the Courtroom

As part of promoting media access, the government should develop a manual to teach the media representatives the legal responsibilities of them toward the courts and litigant parties. Because understanding court proceeding requires some legal knowledge this paper also recommends that the Ministry of Information and Cultural with consultation of Supreme Court, Prosecution Office, the Afghanistan Independent Bar Association, and the Afghanistan Journalists Independent Association should develop such a manual to educate the Afghan journalists who report the courts' proceedings. The manual should teach the journalist the legal language of reporting, the legal terminology, and the proceeding procedure and the ethics of attending in a proceeding. As part of this manual, there should be instruction on how to take notes during proceedings, how to ask questions if needed, how to write a report, and how to publish that report.

Media plays a proxy role for the public in the courtrooms of United States and Kenya, except in some special cases; while in Afghan courts, the media are invited in rare cases. In the United States and Kenya, access to

214. *People v. Harner*, 213 Cal. App. 3d 1400, 1405 (1989). Permissive provisions only allow doing of an act, while obligatory provisions impose responsibility of doing of an act over the citizens. *Id.* For example, in human rights principals, the “right to live” is not a permissive right, but it is an obligatory right to every human being. The “right to travel,” in contrary, is a permissive provision, but we are not obliged to travel. *Id.*

the courtrooms, and their decisions, are interpreted under the people's access to information right, and freedom of expression. In Afghan courts, while not only most of the trial proceedings are closed, but most of the courts' documents and decisions are considering the secret documents. Even for educational, and academic purposes, the judges are not allowed to disclose such information. To ensure compliance, the paper recommends to the Supreme Court of Afghanistan to develop a comprehensive strategy for ensuring access to information right and freedom of expression of the public, enshrined in the constitution of Afghanistan.

C. Promoting the Involvement of Law & Sharia Faculty and Students

In addition, this article recommends that Law and Sharia professors and students should be formally encouraged to attend the courts' proceedings and do their research in courts procedures and decisions. The new bill should set foundation for the government to foster relationship between courts and Sharia and Law Schools, and as well with the Afghanistan Science Academy. The professors, and members of the Academy could also be rewarded with increases in rank for serving time observing courts—as a benefit of engaging and leading in this public service. They will also enjoy the possibility of easy access to the courts' decisions and documents for their research and writing. Similarly, students of those faculties could receive credits for attending court proceedings and recording and evaluating their observations. Furthermore, the students of Law and Sharia schools could serve a short term of their externship in the courts and help the judicial officials in writing their decisions.

This involvement would have the added benefit of bringing a more practical aspect to legal education, teaching students about the practical work that most currently do not learn until they leave law school. This would undoubtedly improve the profession overall, as students would learn how prosecutors develop lawsuits, how defense attorneys defend, and how judges reason. As the Supreme Court of the United States provides a number of internships for law school students to work in the Office of the Counselor to the Chief Justice, Office of the Curator, Public Information Office and Office of the Clerk, and as well as in the Appellate, and Trial Courts of the United States, the Afghan government also can think about such internship programs for their law and sharia schools' students.

D. Promoting Public Awareness About the Right to Public Trials

Civil society organizations (CSOs) can play a vital role in developing public awareness of their rights to attend court proceedings, and seek and support media coverage of those proceedings as an expression of their right

to access to information. This paper recommends a broad-reaching campaign to develop public awareness that attendance in court proceedings is a citizen's right. For this purpose, the government of Afghanistan can use two practical ways: first, the government can ask the donor agencies to initiate funds for civil society organizations to do a wide campaign about the necessity of public trial and trial broadcasting. The members of the civil society organization will work with local people to teach them about their right to attend in the trials of the court. This practice will pave the way for civil society engagement with courts, as it is in the Kenya. Second, the government of Afghanistan can ask the professors of the universities, the teachers of the schools, and the *Mulas* (religious scholars) of the mosques to inform the people about the necessity of the public trial and trial broadcasting. These influential figures can teach to people that how their attendance in the court proceedings, and broadcasting of the court proceedings can increase transparency and accountability in the courts; and decrease the level of corruption in a significant level. The engagement of the CSOs with courts is the most obvious cause of eradicating open corruption in Kenya.

VII. CONCLUSION

Over the past decade, Afghanistan has continued to be one of the most corrupt countries in the world. Corruption is widespread in all branches of the government, but judicial corruption has heavy impact on weakening the rule of law in the country. To increase accountability, and transparency in the Judiciary, public trial and trial broadcasting are the useful, and easy ways for combating corruption in the Judiciary. Openness and access to the courts' decisions are the practices in many countries to grab the public trust in Judiciary, and consequently in the government. Among others, the United States (as a developed country, and the most fund provider to Afghanistan) and Kenya (as a developing country) also follow the Openness and Access to Courts' Decision standards. These ways of increasing accountability are also supported by the international legal instruments. The Afghanistan Constitution also provides grounds for the public trial and access to information rights; however, the criminal procedure code and penal code of Afghanistan do not have clear provisions to oblige judges for conducting trials openly. In practice, in most of the proceedings, public do not attend and the courts also do not allow media to cover their hearings for the public. This article recommends that Afghanistan adopt legislation that clearly supports openness of proceedings and access to courts and their decisions through the media.

