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Legislative Analysis

March 9, 2024

Title of the Document

[Supreme Court Letter No. 631-632/360-361](#) in Response to Appellate Court of Nangarhar Province's Query

Introduction

Summary of the Legislative Document: The Supreme Court of the De Facto Authority (DFA) has issued a directive to the Appellate Court of Nangarhar Province concerning advocates (defense attorneys) in certain legal cases. This directive responds to concerns raised by the Appellate Court regarding advocate licensure, fee regulation, and the necessity of advocates in public rights cases. The Appellate Court questioned the quality of legal representation, the financial burden on clients, and potential corruption involving advocates. Although it appears to be an exchange between one provincial court and the Supreme Court, given Afghanistan's centralized legal system, this directive is expected to be enforced nationwide, affecting defense attorneys and clients across the country.

This analysis explores the Supreme Court's response to the queries and concerns raised, examining the reasoning behind the directive and its broader implications. The directive has also raised international concerns about fair trial standards. This analysis seeks to inform readers about these potential impacts on defense attorneys and the administration of justice in Afghanistan.

Legal Basis for the Document: The document does not explicitly specify the legal basis or reference other applicable procedures or regulations, such as the 2022 Advocates Mobilization Procedure. However, the directive is rooted in the Supreme Court of the DFA's authority, which oversees judicial conduct and responds to queries from courts throughout Afghanistan.

Scope of the Document: This directive applies to all advocates practicing within the jurisdiction of the Nangarhar Province appellate court, with implications for broader

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implementation across Afghanistan. It targets the licensure and conduct of advocates, particularly focusing on public rights cases.

Key Terminologies and Definitions

The document does not provide definitions for key terminologies. However, drawing from other relevant legislative documents, such as the "[Advocates Mobilization Procedure](#)," the following key terms and definitions may help enhance understanding and provide clarity and context for this legislative analysis:

- **Adversarial Court System:** An adversarial court system is a legal framework where the parties involved present their own evidence and arguments to a neutral judge or jury, who then decides the case. The judge acts as a referee, ensuring fair procedures and ruling on the admissibility of evidence. This system is common in common law countries like the United States and the United Kingdom.
- **Advocate Stage Program:** A training program conducted by the Ministry of Justice to prepare individuals for practicing law.
- **Advocate:** A person who has obtained a license to practice law and is entitled to file a lawsuit, defend, and represent the rights of clients before a court of law and other authorities.
- **Ariza (Petition):** In Afghanistan, an "Ariza" refers to a formal written petition or application submitted to a legal or governmental authority to secure one's rights or address grievances. This term is used in various contexts, including civil, commercial, and administrative matters.
- **Ariza Writer:** An ariza writer is a professional who assists individuals in drafting and submitting these formal petitions. They play a crucial role in helping people articulate their requests and grievances accurately and effectively. Due to the complexities of legal and administrative language, many individuals rely on Ariza writers for their expertise and guidance in navigating the petition process.
- **Commission-Based Intermediary:** A "commission-based intermediary" refers to individuals who act as go-betweens to facilitate various bureaucratic

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processes in exchange for a fee. In Afghanistan, these intermediaries assist clients with tasks such as obtaining passports, visas, and business licenses.

- **Directorate of Advocates:** A division within the Ministry of Justice created after the dissolution and merging of the Afghan Independent Bar Association (AIBA). It is responsible for overseeing the activities of advocates, maintaining a database, issuing licenses to advocates, and monitoring compliance with procedural requirements.
- **Forensic Confession:** A confession made in a judicial setting, considered a critical piece of evidence in Islamic jurisprudence.
- **High Commission of Advocates:** A body established to implement the provisions of the procedure and address the problems of advocates, including representatives from various governmental departments and two advocates selected by the relevant union.
- **Indictment:** In criminal cases, an indictment is a formal written accusation that a person has committed a crime. It is issued by a prosecutor after a preliminary investigation determines sufficient evidence exists to charge the individual. In Afghanistan, this process ensures that individuals are formally charged based on adequate evidence before proceeding to trial.
- **Individual Rights Cases:** Also known as Haq al-Abd (Rights of Individuals), these cases involve personal disputes or offenses against individuals, such as bodily harm, property damage, and personal injury. In cases like murder, the victim's family has the right to seek retribution (qisas), accept financial compensation (diyah), or forgive the offender.
- **Inquisitorial Court System:** An inquisitorial court system is a legal framework where the judge actively investigates the case, gathers evidence, and questions witnesses. This system is common in many civil law countries. In the context of Sharia law, the system is more inquisitorial, with judges playing an active role in investigating facts, questioning witnesses, and gathering evidence.

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- **Judicial Impartiality:** The principle that judges must remain neutral and not favor any party in legal proceedings.
- **Legal Aid:** Assistance provided to individuals who cannot afford legal representation, which may be subsidized by the government or provided by non-profit organizations.
- **License to Practice:** An official document issued by the Ministry of Justice to an applicant, allowing them to practice law in accordance with the provisions of this procedure.
- **Pro Bono:** Legal work undertaken voluntarily and without payment, often to provide legal aid to those who cannot afford it.
- **Public Rights Cases:** Also known as Haq al-Allah (Rights of God or divine right), these cases involve offenses against the community or state and relate to obligations owed directly to God. They include crimes like theft, adultery, and apostasy, which are subject to fixed punishments (hudud) prescribed by Islamic law.

Historical Context: Changes in Afghanistan's Legal Profession Post-August 2021

Before analyzing the recent Supreme Court directive, it is essential to understand the recent changes in Afghanistan's legal and judicial landscape since the DFA took over in August 2021. These changes have significantly impacted defense attorneys and the broader legal profession. Some of the key developments include:

- **Dissolution of the Afghanistan Independent Bar Association (AIBA):** The AIBA was dissolved, and its functions were merged with the Ministry of Justice, leading to the revocation of licenses for approximately 2,500 lawyers.
- **New Licensing and Testing Requirements:** All advocates must undergo testing to demonstrate their ability to prepare valid indictments according to legal and Sharia terms.

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- **Restrictions on Women Lawyers:** No new licenses have been issued to female lawyers, effectively barring them from practicing law.
- **Clarification of Legal Procedures:** Various decrees and rulings have clarified numerous matters, including the role and participation of defense lawyers in court sessions and the appointment of court representatives. Please see the references at the end of this analysis.

Description and Analysis

- **Licensing and Testing:** The Supreme Court mandates that the Ministry of Justice should not issue licenses to advocates until they have been tested for their ability to prepare valid indictments. Existing licensed advocates are also required to undergo testing, with those failing the test having their licenses revoked.
- **Fee Regulation:** Advocates who charge more than the fees determined by the approved procedure will have their licenses revoked. Additionally, fees for petition writers must be set by the concerned authority, and violations of these fee structures will also result in license revocation.
- **Public Rights Cases:** The directive states that there is no need for advocates in cases involving public rights, as the court itself will hear the statements of the accused and issue decisions accordingly.
- **Judicial Impartiality:** Judges are reminded to remain impartial and not to give preference to advocates over other parties in legal cases. Advocates are expected to follow court procedures without demanding special treatment.

Impacts

Potential Positive Impacts:

- **Enhanced Advocate Competency:** By testing advocates for their legal skills, the quality of legal representation may improve, leading to more valid and reliable indictments.
- **Fee Regulation:** Setting and enforcing fee limits could protect clients from financial exploitation and ensure fair access to legal services.

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Potential Negative Impacts:

- **Access to Justice:** Restricting advocates in public rights cases could hinder the accused's right to a fair defense, impacting their access to justice. For instance, without professional legal representation, accused individuals may lack the knowledge to effectively challenge evidence or navigate complex legal procedures, leading to unfair convictions.
- **Impoverished Clients:** Some clients may struggle to represent themselves effectively without legal assistance, potentially leading to unjust outcomes. For example, a defendant without legal expertise may be unable to adequately defend against charges, resulting in harsher penalties or wrongful convictions, particularly for those who cannot afford private legal counsel.
- **Judicial Overload:** Judges taking on a more active role in questioning and investigating the accused, especially in the absence of defense lawyers, could lead to an increased workload, potentially affecting their impartiality and the quality of justice delivered. This dual responsibility might create conflicts of interest, as judges must ensure both the fairness of the trial and the thoroughness of the investigation, potentially compromising due process.
- **Fee Insufficiency:** Restricting advocates' fees to the amount mentioned by the Ministry of Justice (MOJ) doesn't cover advocates' administrative and living expenses. For example, if the MOJ sets low fee caps that do not account for the cost of office space, staff salaries, and other operational expenses, advocates may be unable to sustain their practice, leading to a decline in the availability of qualified legal professionals. This financial strain could deter talented individuals from entering the legal profession, further limiting access to quality legal representation.

Concerns

- **Complexity in Compliance and Interpretation:** The directive's requirements for testing and fee regulation might lead to administrative burdens and challenges in implementation. Advocates and petition writers may face

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difficulties in adhering to new standards, leading to potential disruptions in legal services.

- **Absence of Procedural Clarity:** The directive lacks detailed provisions on the testing process, criteria for fee setting, and mechanisms for appealing license revocations. This could result in inconsistent enforcement and a lack of transparency.
- **Insufficient Stakeholder Engagement:** The development and issuance of the directive appear to have overlooked input from legal professionals, advocacy groups, and community representatives. Additionally, it is unclear whether the allegations submitted to the Supreme Court were fact-checked or if any feedback was sought from those impacted by this mandate, or if there was any coordination with the Ministry of Justice.
- **Unclear Alignment with Existing Regulations:** The directive from the Supreme Court does not explicitly reference the "Advocates Mobilization Procedure" of 2022, which regulates the affairs of defense attorneys and outlines specific grounds for revoking a license. Article 18 of this procedure specifies the grounds for license revocation, such as repeated violations, failure to comply with professional standards, and misconduct. The Supreme Court's directive appears to expand the circumstances for revocation, including fee violations, without clear reference to this established procedure. This lack of explicit alignment with existing regulations may lead to inconsistent enforcement and professional instability for advocates.

Recommendations

- **Enhanced Clarification:** Providing detailed guidelines for the testing process, fee structures, and compliance measures would help ensure consistent application and understanding among advocates and court officials.
- **Consideration for Advocate Roles:** Acknowledging the essential role of advocates in ensuring fair trials and the right to defense is crucial. Even in public rights cases, limited or supervised involvement of defense attorneys could contribute to more balanced and just outcomes.

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- **Stakeholder Engagement in Decision-Making:** Engaging legal professionals, community representatives, and advocacy groups in the decision-making process would lead to more informed and equitable directives. Collaboration could align the directive's objectives with ground realities and promote shared goals for judicial integrity and fairness.
- **Framework for Dispute Resolution and Appeals:** Establishing clear and accessible procedures for dispute resolution and appeals within the directive would provide avenues for redress and ensure just and transparent decision-making.

Conclusion

The Supreme Court directive aims to enhance the quality and integrity of legal representation by advocates in Afghanistan. However, it raises concerns about access to justice and procedural fairness. Addressing these concerns through detailed guidelines, stakeholder engagement, and recognition of advocates' essential roles can mitigate potential negative impacts and promote a more balanced and effective judicial system.

References:

To provide a comprehensive understanding of the regulatory environment for defense attorneys in Afghanistan, readers can refer to the following additional documents, which cover related rules, regulations, and legislative procedures. For Additional Context on Related Legislation, please Refer to the Following Resource on the [ARLO](#) Website:

1. "[Supreme Court Circular No. 9](#)"
 - **Date:** September 16, 2023
 - **Summary:** This circular outlines the conditions under which defense lawyers are permitted to participate in court hearings. It specifies that defense lawyers can only attend hearings if they are either the claimant or have been appointed by the claimant or if they are the original defendant or have been appointed by the defendant. This measure aims to ensure procedural correctness in court sessions.
2. "[Supreme Court Circular No. 56](#)"

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- **Date:** June 13, 2023
 - **Summary:** This circular addresses the appointment of court-appointed representatives and the procedure for their selection. It includes guidelines based on the opinions of the Central Dar al-Ifta and the Supreme Court regarding the jurisdiction of judges in appointing representatives. The document emphasizes adherence to the Hanafi school of thought in the current judicial practices.
3. **"Advocates Mobilization Procedure"**
- **Date:** March 27, 2022
 - **Summary:** This comprehensive procedure governs the registration, issuance, and renewal of licenses for advocates in Afghanistan. It details the rights and duties of advocates, the establishment of the High Commission of Advocates, and the monitoring of advocates' activities. It also includes provisions for legal aid, requiring advocates to defend three criminal cases per year for free, as introduced by the Ministry of Justice.
- **"Supreme Court Circular No. 7 Regarding Power of Attorney"**
 - **Date:** August 23, 2022
 - **Summary:** This circular addresses the validity and Sharia compliance of powers of attorney prepared by delegating judicial authority to ambassadors or consuls outside of Afghanistan. It emphasizes the requirement for acknowledgment by the defendant or testimony by witnesses to ensure Sharia compliance.
 - **"Law on Duties and Authorities of the General Directorate of Monitoring and Follow-up of Decrees and Orders"**
 - **Date:** May 22, 2023
 - **Summary:** This law establishes the framework for the General Directorate of Monitoring and Follow-up, tasked with ensuring the implementation of decrees, orders, and legislative documents. It outlines the Directorate's

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responsibilities, including oversight of civil and military institutions, monitoring of prisons, and the prevention of administrative corruption.

Secondary Sources:

ARLO's [Legislative Analysis page](#) offers detailed evaluations and insights to help you understand recent legislative developments in Afghanistan in depth. Visit the ARLO website to explore these comprehensive reviews, each delving into the implications, challenges, and recommendations pertinent to Afghanistan's legal and regulatory environment. The website also provides a wealth of other resources to help you understand the historical and current structure of Afghanistan's legal system, including Islamic law concepts that shape and influence its workings.

For example:

- **Asās al-Quzāt:** Asās al-Quzāt, or “The Basis for Judges,” is a significant 19th-century work on Islamic jurisprudence published by the royal press in Kabul, Afghanistan. It provides a comprehensive guide for judges applying Islamic law, focusing on the principles of the Hanafi school of thought. The book emphasizes judicial conduct, ethics, and the decision-making process, ensuring judges are knowledgeable in Islamic jurisprudence and uphold high ethical standards. It remains a valuable resource for understanding how Islamic legal traditions have historically influenced Afghanistan's judicial system. [Read more.](#)
- **The Majallah (Al-Majallah Al Ahkam Al Adaliyyah):** The Majallah is an essential legal document from the Ottoman Empire based on the Hanafi school of Islamic jurisprudence. It includes detailed provisions on judicial conduct, ethics, and decision-making, as well as the qualities required in a judge. It also covers arbitration and judicial procedures, providing a structured framework for fair and impartial justice. Majallah's principles continue to influence contemporary Afghan legal practices, especially in maintaining judicial standards. [Read more.](#)

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