

Afghanistan, Poland, and Australia

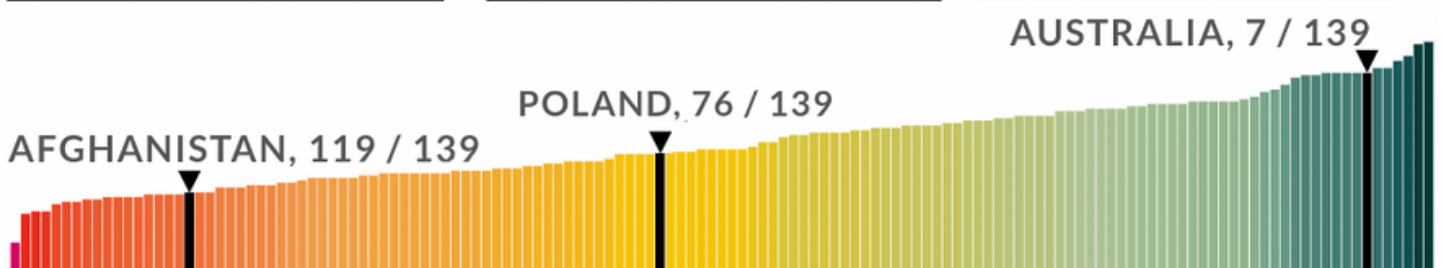
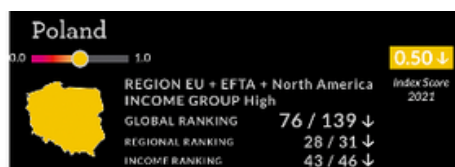
Comparison of Judicial Independence

Judicial independence is a fundamental principle of the rule of law. It requires judges who are independent of the government (and those in power) to decide matters after an impartial assessment of the facts and application of the law, without improper influences, direct or indirect, from any source. Mechanisms to ensure the Judiciary is independent are generally outlined in a country's constitution. They rely upon public confidence that citizens will be treated equally and fairly by the law, with disputes decided according to the law and absent from bias.

The **separation of powers** is a concept that divides powers between the 3 arms of government: the Executive, Legislature and Judiciary. This concept requires that each arm act as **checks** on each other's power. It also requires that **power is balanced** between the arms to prevent an excessive concentration of power in one body. An important check and balance on excessive concentration of power is an independent Judiciary.

This resource compares the health of judicial independence, the effectiveness of the constitution, and the overall strength of the rule of law in 3 different countries – Afghanistan, Poland, and Australia.

An indication of the health of the rule of law in each of these countries can first be done by looking at the **World Justice Project Rule of Law Index**: an independent body which compiles data on the rule of law in 139 countries worldwide. The diagrams below show each of our 3 country's global rank and index score in relation to one of the factors used by WJP, 'Factor 1.2 Government Powers are Effectively limited by the Judiciary' to consider whether the judiciary has the independence and the ability in practice to exercise effective checks and balances.



Global Rank according to World Justice Project, 2021
Factor 1.2 Government Powers are Effectively limited by the Judiciary

Afghanistan: Judicial Independence requires public confidence

Upon the collapse of the Taliban regime in 2001, the creation of Afghanistan's 2004 Constitution attempted to establish a system to reverse the deterioration of the country's legal system. Aspirations of the Constitution were great. It aimed to establish a system of separation of powers between the Executive, Legislature, and Judicial branches. In particular, as seen in the box to the right, the Constitution aimed to protect the independence of the Judiciary, such as by safeguarding the appointment of judges.

Yet, there has been a widening gap between the articles outlined in the Constitution, and the rules in practice for judicial independence in Afghanistan. In essence, **Afghanistan's Constitution has largely been ignored and the government has exercised control over the the judiciary.** Afghanistan exemplifies that whilst instituting a Constitution is important in ensuring those in power are accountable to the people, a Constitution is powerless if the people do not follow it.

The following points reveal the crumbling state of judicial independence and the rule of law in Afghanistan:

- Parliament modified the constitution to diminish the Supreme Court's jurisdiction to conduct judicial review and to act as a check and balance against other branches.
- The Executive is able to meddle with judicial proceedings and sentences given, even pardoning convicted sexual assault offenders.
- No public respect for, or public confidence in, judicial process.
- Judges are appointed upon political and ideological grounds, principally whether they align with the government's ideals. Therefore, top courts routinely make decisions in favour of the Government.
- Only Taliban-approved lawyers can work in Islamic courts.
- Failure to protect the physical safety of judges. As such, many female judges have been forced into hiding after death threats, following decisions made in cases such as sexual assault, forced them to leave the bench and, in some cases, even Afghanistan entirely.
- Quick criminal trials without due process or procedural safeguards that ensure a fair and just outcome.

Without an independent Judiciary, there is no legal process for individuals in Afghanistan to challenge the actions and decisions of those in Government.

KEY ELEMENTS OF AFGHANISTAN'S CONSTITUTION OF 2004

Chapter VII: The Judiciary

Article 116:

The judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan.

Article 118:

Supreme Court members shall have the following qualifications:

...

6. Shall not be a member of any political party during his term of duty.

Article 132:

Appointment, transfer, promotion, punishment and proposals for retirement of judges, carried out according to provisions of the laws, shall be within the authority of the Supreme Court.

Poland: Judicial Independence requires protection from changes to the Constitution

The Constitution of the Poland was approved in 1997 and includes a number of Articles safeguarding judicial independence. However, since Poland's Law and Justice Party rose to power in late 2015, **the independence of the judiciary has frequently been targeted through amendments by the Party to the Polish laws.** The declining state of judicial independence and impartiality in Poland has attracted legal action and funding sanctions by the European Union.

The decline of judicial independence in Poland is a result of several reforms instituted by the Law and Justice Party with the effect of evading checks on the party's power. Some of these reforms include changes to Poland's Constitutional Tribunal, which is the court vested with the power of judicial review. Poland exemplifies that when a Constitution can so easily be overridden, the independence of the Judiciary and the rule of law can come under attack.

Reforms that the party has instituted include:

- Lowering the retirement age of judges from 75 to 60. This enabled the government to replace 40% of the judges on Poland's Supreme Court with their own.
- Enabling judicial appointments to be determined by the National Council of the Judiciary whose members are appointed by the Sejm (the lower house of parliament). This effectively allows the government to control judicial appointments in Poland.
- Enacting what is popularly referred to as the 'muzzle law' which effectively silences judicial officers by threatening disciplinary sanctions. Sanctions include salary cuts or even outright dismissal. By silencing judges, the government ensures they cannot be held accountable for their judicial reforms.
- Refusing to publish judicial outcomes to the public.
- Failing to follow procedural safeguards and due process. This means that public confidence in the Judiciary to produce just and fair outcomes has inevitably decreased.

"Its a power grab by the government...it's not a violent power grab and this is important for the rule of law - it is not confessedly a legal program. These people don't believe in liberties, but, they are using the law."

- Professor Martins Krygier, Gordon Samuels Professor of Law and Social Theory and Co-Director of the Network for Interdisciplinary Studies at UNSW.

"[Poland's] ruling party seeks unconstrained power...it wants to control the judges. If your verdict is inconvenient, you will be punished. "

- Judges Under Pressure Documentary, Human Rights Watch Film Festival.

KEY ELEMENTS OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

Chapter VIII: Courts and Tribunals

Article 173:

the courts and tribunals shall constitute a separate power and shall be independent of other branches of power

Article 195 (1):

judges of the constitutional tribunal, in their exercise of office, shall be independent and subject only to the constitution



Australia: Judicial Independence with public confidence in accords with the Constitution

In Australia's Constitution, which came into effect on 1 January 1901, the Judiciary is independent from the Legislature and Executive. The High Court, the highest court in Australia, has original jurisdiction in constitutional matters, meaning their decisions are final. This is an important check and balance by the Judiciary on the Executive. For Australian States, judges are appointed by the Governor, having been selected by the Cabinet on the advice of the Attorney-General. For High Court judicial appointments, the Commonwealth Attorney-General is required to consult with the Attorney-Generals of the States.

There are a number of **checks and mechanisms in place to ensure judicial independence in Australia**. Some include:

- A Constitution which is followed by the public and those in power. Australia's Constitution is also difficult to change: requiring the people to vote through a referendum by answering 'yes' or 'no' to the proposed change. To succeed, a majority of voters must approve the changes.
- The inability of the Executive or Legislature to interfere with the tenure or remuneration of the Judiciary. This ensures that the other branches of government cannot merely dismiss a judge, or reduce a judge's pay, if they do not like a decision they have made.
- Judicial power to review government and administrative action.
- A High Court with the power to review the decisions of the lower courts.
- Competent judges who make decisions according to law and on the evidence, rather than on political, social, or financial factors and pressures.
- Accessibility of the courts to enable citizens to seek fair and just outcomes.
- Open proceedings to safeguard from the abuse of power and to inspire public confidence in the justice system.
- Public confidence and support that ensures court decisions are enforced.

With an independent Judiciary based upon the separation of powers - within the Constitution - and a supportive and informed community, Australian courts provide a check on the power of the Government and provide an avenue for citizens to be treated equally and fairly under the law.

"A society cannot be governed by the rule of law without an institutionalised arrangement for the independence of judiciary. Furthermore, democracy depends on the courts and forcing what the legislature intended, not what the executive wants"
- Hon JJ Spigelman AC, Former Chief Justice of NSW Supreme Court

Conclusion

This resource shows that judicial independence is not static but must always be guarded. When a government acts beyond their powers and the public do not support and protect an independent judiciary, this check on the exercise of power can be easily eroded.

Now It's Your Turn!

Activity 1: Fill in the table below to compare the 3 different countries using the information above. Draw a tick if the features below are characteristics of the country, or draw a cross if they are not. One has already been done for you.

Feature	Afghanistan	Poland	Australia
Presence of a Constitution			✓
Constitution is ignored or can easily be changed			
Government able to influence Judiciary's decisions via <ul style="list-style-type: none">• choosing judges• changing judges' pay• changing judges' tenure			
Judge's safely protected			
Open proceedings			
Public confidence in independent Judiciary			
Enforcement of court decisions			



Activity 2: Using the information above, consider how the rule of law in Afghanistan and Poland is impacted by considering the elements of the Rule of Law Wheel.

Rule of Law Element	Afghanistan	Poland
Presumption of Innocence		
Open, Independent, and Impartial Judiciary		
No retrospective laws should be made		
Laws are made in an open and transparent way by the people		
Government agencies to behave as model litigants		



Rule of Law Element	Afghanistan	Poland
Fair and prompt trials		
Separation of powers between Legislature, Executive and Judiciary		
People can only be punished in accordance with the law		
The law and its administration is subject to open and free criticism		
The law is known and accessible		