

3.5: The Afghan Advocate

Summary

This chapter reviews the rights and duties of a defense attorney pursuant to the Advocates' Law and the Afghanistan Independent Bar Association Code of Conduct. This chapter provides an overview of the right to counsel and the legal aid system. This chapter also addresses some of the major challenges facing defense attorneys.

Introduction

The Constitution guarantees every individual the right to counsel.¹ Defense attorneys are governed by several laws including the Advocates' Law², the Interim Criminal Procedure Code (ICPC)³, the Legal Aid Regulation,⁴ as well as the Afghanistan Independent Bar Association (AIBA) Code of Conduct.⁵ This chapter examines the rights and duties of an Afghan advocate under the law, the right to counsel, the legal aid system, and the major challenges facing advocates including the shortage of legal aid providers, the lack of public awareness of legal rights, and the failure of the police, prosecutors and courts to adhere to the procedural notifications safeguarding the right to counsel. On February 23, 2014, a new Criminal Procedure Code (CPC) was signed into law. A copy of the CPC was not available at the time of this writing. The new CPC may result in changes to the role of an Afghan Prosecutor.

The Advocates' Law

The Advocates' Law sets forth the governing criteria for all attorneys other than prosecutors and judges in Afghanistan.⁶ Pursuant to the Advocates' Law, advocates have the following rights and duties:

¹ 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission) (hereinafter Constitution), Art. 31:

http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf

² Advocates' Law, Official Gazette No. 934 (Dec. 17, 2007)(hereinafter Advocates' Law):

http://www.aiba.af/pdf/advocates_by-laws.pdf

³ Interim Criminal Procedure Code, Official Gazette No. 820, published 2004/02/25 (1382/12/06 A.P.)(hereinafter ICPC). Available on the Afghan Attorney General's Office website: <http://ago.gov.af/en/documents>; or <http://www.asianlii.org/af/legis/laws/icc175/>. A new CPC was signed into law on February 23, 2014.

⁴ Legal Aid Regulation, Official Gazette No. 950 (2008), provided by the Department of State Bureau of International Narcotics and Law Enforcement Affairs, Justice Sector Support Program (DOS-INL/JSSP).

⁵ Afghanistan Independent Bar Association (AIBA) By-Laws, Annex 1: Code of Conduct (hereinafter Code of Conduct): http://www.aiba.af/index.php?option=com_content&view=article&id=103&Itemid=69

⁶ See Advocates' Law, *supra* note 2, Art. 6. See also Chapter 3.1: Legal Education and Training in Afghanistan for a discussion of the criteria for Advocates.

Article 10: Rights of Advocates⁷

Any person, who holds a license to practice, has the following rights:

- (1) To represent and defend, in accordance with this Law, the rights of his/her client before a court and other authority, in both criminal and civil cases.
- (2) To participate in all phases of detection, investigation and trial, by assisting and responding on the behalf of his/her client.
- (3) To obtain information regarding the detection, investigation and trial processes of his/her client and the results.
- (4) To examine documents related to his/her client's civil and criminal lawsuits.
- (5) To visit, interview, correspond and communicate with a client who is being held under custody, detention or in prison, in a secure and confidential environment.
- (6) To provide legal advice to legal and physical persons.
- (7) To be paid a fee by his/her client for the counseling and any other legal services provided in accordance with the internal guidelines of the Association and by mutual agreement.
- (8) To open a law office.
- (9) To exercise other rights provided for in legislative documents.

Article 13 Duties of Advocates⁸

Advocates shall have the following duties:

- (1) To maintain client confidentiality.
- (2) To practice law with honesty and sincerity, respecting the dignity of all individuals.
- (3) To respect the orders of a court and/or other authorities.
- (4) To attend court hearings on behalf of his/her client.
- (5) To refrain from providing any kind of legal assistance to competing parties in the case.
- (6) To keep the client's documents and return them once the case is concluded.
- (7) To provide the client with a receipt when issuing and receiving any document from the client.
- (8) To refrain from disseminating information that would harm other advocates.
- (9) To refrain from any action that would cause an undue delay in the investigation and implementation of a court's order.
- (10) To refrain from lending or transferring the name and title of his/her law office to others.
- (11) To inform the competent authorities about any change in the location of his/her office.

⁷ Advocates' Law, *supra* note 2, Art. 10.

⁸ *Ibid*, Art. 13.

- (12) To renew his/her license.
- (13) To pay income taxes in accordance with the law.
- (14) To give reports on their annual income to the Association.
- (15) To defend at least three criminal cases in each year, free of charge, upon confirmation of the Ministry of Justice.
- (16) To defend the code of conduct as provided for in the Association's By-Laws.
- (17) To carry out other duties in accordance with the By-Laws of the Association.

The Advocates' Law also establishes the AIBA "to regulate and lead all activities of advocates" including the authority to issue licenses to qualifying individuals.⁹

Afghanistan Independent Bar Association

The AIBA was established in the fall of 2008 pursuant to the Advocates' Law.¹⁰ The AIBA is "an independent, non-governmental and nonpolitical organization which functions as the representative body for advocates."¹¹ The AIBA is responsible for licensing qualifying individuals as advocates and regulating the activities of all advocates including compliance with a Code of Conduct.¹² The Code of Conduct provides advocates with ethical and professional guidelines.¹³ The Code regulates the relationships between advocates and their clients, the courts, and other advocates. The Code of Conduct requires advocates "to perform his/her duties and provide advice in an independent way."¹⁴ Advocates are obligated to "observe the standards of honesty, integrity and fairness amongst fellow advocates."¹⁵ The Code prohibits receiving goods other than fees for service;¹⁶ prohibits discrimination based on "ethnic or tribal group, nationality, religion, political opinion, gender, property or economic status;"¹⁷ and prohibits the misuse of an advocate's position to gain unlawful privileges.¹⁸ The Code of Conduct obligates an advocate "to respect the best interest of his/her client based on the interests of justice, observance of the rule of law and ethical standards;"¹⁹ to preserve confidentiality;²⁰ and to "preserve the honour of the profession."²¹

⁹ Ibid, Articles 4(1) and 8(1); AIBA By-Laws, Art. 30:

http://www.aiba.af/index.php?option=com_content&view=article&id=102&Itemid=68. Article 6 of the Advocates' Law set forth the necessary requirements to be an advocate. See Chapter 3.1 for a discussion of the legal education and training requirements for Advocates.

¹⁰ Advocates' Law, *supra* note 2, Art. 4; AIBA By-Laws, *supra* note 9, Art. 1

¹¹ AIBA By-Laws, *supra* note 9, Art. 3.

¹² Ibid, Art. 38 and Code of Conduct, *supra* note 5; see also Advocates' Law, *supra* note 2, Articles 4(1) and 8(1).

¹³ Advocates' Law, *supra* note 2, Art. 4; see also Code of Conduct, *supra* note 5.

¹⁴ Code of Conduct, *supra* note 5, Art. 3.

¹⁵ Ibid, Art. 4.

¹⁶ Ibid, Art. 6

¹⁷ Ibid, Art. 9

¹⁸ Ibid, Art. 21

¹⁹ Ibid, Art. 10

The Code of Conduct is enforced through an internal disciplinary mechanism.²² The Monitoring Board is responsible for adjudicating complaints.²³ The disciplinary mechanism establishes a process for investigation, adjudication and appeal. Any discipline imposed by the Monitoring Board, Leadership Council, or Executive Board can be appealed to the courts.²⁴

The Right to Counsel

The right to counsel is guaranteed by the Constitution of Afghanistan along with a mandate to the government to provide free counsel to the poor:²⁵

Upon arrest, or to prove truth, every individual can appoint a defense attorney. Immediately upon arrest, the accused shall have the right to be informed of the nature of the accusation, and appear before the court within the time limit specified by law. In criminal cases, the state shall appoint a defense attorney for the indigent. Confidentiality of conversations, correspondence, and communications between the accused and their attorney shall be secure from any kind of violation. The duties and powers of defense attorneys shall be regulated by law.

The right to counsel is reiterated in Article 16 of the Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (Law on Courts), which provides “Every person shall be entitled to a defense attorney in all stages of criminal or civil proceedings immediately after his arrest to remove accusation charged against him or prove his rights. In criminal cases, defense attorneys shall be appointed for indigent persons according to the law.”²⁶ The appointment of free legal counsel is provided in the Interim Criminal Procedure Code (ICPC):²⁷

The suspect or the accused financially unable to appoint a defense attorney is entitled to have a free defense attorney appointed for him or her in the following manner:

²⁰ Ibid, Art. 11.

²¹ Ibid, Art. 25.

²² See AIBA By-Laws, *supra* note 9, Chapter 7.

²³ Ibid, Art. 14.

²⁴ Ibid, Art. 40.

²⁵ Constitution, *supra* note 1, Art. 31.

²⁶ Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan, Official Gazette No. 1109, 19 June 2013 (1392/4/9)(hereinafter Law on Courts), Art. 16 (translation provided by UNAMA).

²⁷ ICPC, *supra* note 3, Art. 19. In juvenile cases, the Juvenile Court is required to appoint defense counsel if the parents or legal representatives cannot afford an attorney as well as an interpreter if needed. The juvenile does not have to petition for counsel. The court has to act *ex officio* and is obliged to appoint counsel on its own initiative. See Juvenile Code, Official Gazette No. 846, published 2005/03/23 (1384/01/03 A.P.), Art. 22. Available on Afghanistan Legal Document Exchange Center (ALDEC): <http://afghantranslation.checchiconsulting.com/>

- a. The investigating *Saranwal* [prosecutor] or the Court adjudicating the case, on the petition of the person, appoints a defense attorney for the destitute person from amongst the lawyers officially permitted to work as defense attorney.
- b. The person for whom an attorney has been appointed reserves the right not to accept the appointed defense attorney and to defend himself in person.
- c. The fees of the aforesaid attorney shall be paid from the State budget and its extent shall be fixed by regulation.

The right to defense counsel is guaranteed “upon arrest.”²⁸ The police, prosecutor, and the court are all obligated to inform a suspect/accused at the time of arrest of his/her right to counsel.²⁹ Defense counsel has the right to be present at all stages of the case including interrogations, searches, line-ups, expert examinations and trial.³⁰ The police and the investigating prosecutor are required to notify the suspect and his counsel of any activities to be conducted in which they have a right to be present.³¹ Defense counsel is also entitled to examine the investigative documents and evidence prior to the trial.³² If the defendant and/or his/her counsel were not present during the investigative phase when witness testimonies or expert examinations were taken the evidence is devalued to “clues.”³³

The records of the testimonies of the witnesses as well as of the expert exams, collected during the investigative phase, can have the value of evidence as basis for the decision only if it results that the accused and/or his defense counsel were present during the operations and were in a position to raise questions and make objections.

Otherwise the related deeds have the sole value of clues.

The ICPC requires the court to provide the accused and his/her counsel notice at least five days prior to the trial.³⁴ The notice must contain the name of the accused, the alleged crime along with the factual circumstances and relevant legal provisions.³⁵ The accused and his/her counsel have the right to be present during all hearings and throughout the trial.³⁶ The two exceptions are if the accused disrupts the proceedings or if the accused is a minor and the trial could cause mental harm.³⁷ During the proceedings, if there are additional crimes or aggravating

²⁸ Constitution, *supra* note 1, Art. 31; Law on Courts, *supra* note 26, Art. 16.

²⁹ ICPC, *supra* note 3, Art. 5(7).

³⁰ *Ibid*, Articles 5, 38, and 40.

³¹ *Ibid*.

³² *Ibid*, Articles 38, 40 and 43.

³³ *Ibid*, Art. 55.

³⁴ *Ibid*, Art. 42.

³⁵ *Ibid*.

³⁶ *Ibid*, Art. 52(3).

³⁷ *See ibid*, Art. 52(4).

circumstances not included in the indictment or if the definition of the crime is different from the indictment, the court must provide the defense adequate time to prepare.³⁸ The Constitution also guarantees the right to translation of court documents and evidence and interpretation during the proceedings.³⁹

Legal Aid System

In keeping with the Constitutional guarantee of the right to counsel, the Advocates' Law states that "the Ministry of Justice shall be obligated to appoint a legal aid provider for indigent persons at any stage of the prosecution."⁴⁰ The ICPC requires the appointment of free defense counsel to be from "lawyers officially permitted to work as defense attorneys."⁴¹ Under the Legal Aid Regulation, legal aid can be provided by: 1) the State through the Ministry of Justice (MOJ) Legal Aid Department; 2) non-governmental organizations (NGOs) accredited as legal aid providers; 3) legal clinics; and 4) registered advocates.⁴²

MOJ Legal Aid Department

The structure and purpose of the MOJ Legal Aid Department is discussed in Chapter 2.1. In sum, the MOJ Legal Department is headquartered in Kabul with 17 legal aid offices in the provincial capitals of Badakshan, Baghlan, Balkh, Farah, Faryab, Ghazni, Herat, Jawzjan, Kandahar, Khost, Kunduz, Logar, Nangarhar, Paktia, Paktika, Parwan, and Wardak.⁴³ The MOJ Legal Aid Department provides services to indigent citizens in criminal cases and to indigent women and children in civil cases.⁴⁴

The Legal Aid Regulation requires legal aid providers to obtain a license according to the provisions of the Advocates' Law.⁴⁵ Some MOJ legal aid providers do not appear to meet those qualifications. Following the completion of Priority Reform and Restructuring (PRR) and Pay and Grading Reform (P&G), the MOJ categorized its legal aid providers as Grade four employees.⁴⁶ According to the Terms of Reference for Grade four employees, they are not required to have a bachelor's degree in Law or *Shari'a*, nor is there a requirement to be a

³⁸ See *ibid*, Articles 56 and 57.

³⁹ Constitution, *supra* note 1, Art. 135.

⁴⁰ Advocates' Law, *supra* note 2, Art. 3.

⁴¹ ICPC, *supra* note 3, Art. 19.

⁴² Legal Aid Regulation, *supra* note 4, Articles 14 and 15.

⁴³ See DOS INL/JSSP: *Assessment of the Legal Aid Department*, April 25, 2011, p. 11.

⁴⁴ Legal Aid Regulation, *supra* note 4, Articles 4 and 29.

⁴⁵ *Ibid*, Art. 16.

⁴⁶ *Assessment of the Legal Aid Department*, *supra* note 43, p. 11. Grades three (3) through six (6) are hired through the MOJ Human Resources Department and not the Civil Service Commission. For a short description of PRR/P&G see "Major Challenges" in Chapter 3.4: The Afghan Prosecutor.

licensed member of the AIBA.⁴⁷ As of February 2014, however, the majority of legal aid providers hold a bachelor's degree in either Law (53%) or *Shari'a* (36%).⁴⁸

In addition to the legal aid providers hired directly by the MOJ, the Afghanistan Justice Sector Delivery Project (JSDP) administered by the World Bank, supports 31 legal aid consultants within the MOJ Legal Aid Department in eight provinces: Baghlan, Balkh, Bamyan, Herat, Kabul, Kunduz, Nangarhar, and Paktia.⁴⁹ World Bank supported legal aid consultants are processed through the Afghanistan Reconstruction Development Services (ARDS) and are hired as term contractors.⁵⁰ The disparity in pay between MOJ direct hire legal aid providers and World Bank supported legal aid consultants is significant. The starting salary for a Grade four MOJ legal aid provider is US \$220 per month.⁵¹ The starting salary for a World Bank legal aid consultant is USD \$520 per month.⁵²

NGO Legal Aid Providers

The Legal Aid Regulation permits accredited NGOs to provide legal aid.⁵³ In February 2014, there were over 1,700 national NGOs registered with the NGO Department of the Afghanistan Ministry of Economy.⁵⁴ The majority of NGOs work in health, education, and agriculture. There are only a few working on justice, human rights, and legal issues.

Before NGOs began to open legal aid offices in Afghanistan in 2003, the role of defence lawyers within the justice system was limited. The few lawyers there played a largely passive role, mitigating their clients' sentences and pleading for mercy, but rarely fighting to prove their clients' innocence. ... Instead of defending a client in court, lawyers would have the accused, or their family, explain the case to them and then write a defence statement on their behalf, without any hope that it would persuade the judge or affect the verdict. In addition, defence lawyers were not used to interviewing clients or witnesses, nor

⁴⁷ *Assessment of the Legal Aid Department*, *supra* note 43, p. 10 and Annex 5: Terms of Reference for Grade 4 Legal Aid Provider. Terms of Reference qualifications include "Have at least post baccalaureate diploma; Have at least one year work experience in the relevant field; Be able to implement the policies and strategies of the related office; Have ability and competence; and Have good behavior and reputation."

⁴⁸ Information provided by DOS INL/JSSP. The MOJ Legal Aid Department *tashkil* is 104. Of the 92 filled positions, 49 hold a bachelor's degree in Law and Political Science; 33 hold a bachelor's degree in *Shari'a* law; seven have a high school diploma; and three are graduates from a madrassa.

⁴⁹ Information provided by DOS INL/JSSP. The World Bank's previous Justice Sector Reform Project (JSRP 2008-2011), supported 32 legal aid consultants. See *Assessment of Legal Aid Department*, *supra* note 43, Annex 1.3.

⁵⁰ *Assessment of Legal Aid Department*, *supra* note 43, p. 11.

⁵¹ *Ibid*, p. 10.

⁵² *Ibid*, p. 11.

⁵³ Legal Aid Regulation, *supra* note 4, Art. 15.

⁵⁴ Ministry of Economy, NGO Dept., list of active NGOs: <http://moec.gov.af/en/page/1209/8720>. There are at least two national NGO coordination bodies – The Agency Coordinating Body for Afghan Relief (ACBAR): <http://www.acbar.org/> and the Afghan NGO Coordination Bureau (ANCB): <http://www.ancb.org/index.php>.

would they ever visit a crime scene. Rarely would defence lawyers even attend a trial.

Adding to the problem, Afghanistan’s justice system was ill-prepared to accommodate the evolving role of defence lawyers. As judges were unaccustomed to lawyers appearing in their courts, they had difficulty understanding their role and responsibilities. Defence lawyers were routinely denied access to their clients in jail. In many instances, they were also deterred from presenting a defence in court.⁵⁵

The understanding of the role of a defense attorney has improved, but challenges still remain.⁵⁶ As of February 2014, there are 23 legal aid organizations, listed below, registered with the Independent Legal Aid Board. Three of the larger programs are profiled below.

1	Justice for All Organization	JFAO
2	Human Assistance for Women and Children Afghanistan	HAWCA
3	Women Activities and Social Services Association	WASSA
4	Social Development and Legal Rights- Afghanistan	SDLR
5	International Legal Foundation- Afghanistan	ILF-A
6	Afghanistan Development Cooperation Organization	ADCO
7	Law Faculty Legal Clinic- Kabul University	NA
8	Sharia Faculty Legal Clinic- Kabul University	NA
9	Law Faculty Legal Clinic- Herat University	NA
10	Norwegian Refugee Council	NRC
11	Women for Afghan Women	WAW
12	Medica Afghanistan	NA
13	Herat Women Social Council	NA
14	Khorasan Legal Services Organization	KLISO
15	Law Faculty Legal Clinic- Nangarhar University	NA
16	Center for Conflict and Peace Studies	CAPS
17	Law Faculty Legal Clinic- Alberoni University	NA
18	Law Faculty Legal Clinic- Balkh University	NA

⁵⁵ International Review of the Red Cross: *The right to counsel as a safeguard of justice in Afghanistan: the contribution of the International Legal Foundation*, by Jennifer Smith, Natalie Rea, and Shabir Ahmad Kamawal, Vol. 93, No. 881, March 2011 (hereinafter *The Right to Counsel as a Safeguard of Justice*), pp. 7-8:

<http://www.icrc.org/eng/assets/files/review/2010/irrc-880-smith-rea-kamawal.pdf>

⁵⁶Ibid.

19	Legal Aid Organization of Afghanistan	LAOA
20	Da Qanoon Ghush-tonky	DQG
21	Bu Ali Rehabilitation and Aid Network	BARAN
22	ASHIYANA	NA
23	Justice for All	NA

International Legal Foundation-Afghanistan

The International Legal Foundation (ILF) “is an international nongovernmental organization that assists post-conflict and transitional countries in establishing public defender systems.”⁵⁷ In 2007, the International Fellows program ended⁵⁸ and ILF-Afghanistan has since developed a fully functioning management system decreasing its reliance on ILF’s New York Head Quarters.⁵⁹

ILF-Afghanistan has established a country-wide public defender office with 73 lawyers in 13 offices throughout Afghanistan.⁶⁰ ILF-Afghanistan provides “systematic representation to all indigent Afghans accused of crimes.”⁶¹ In addition to providing direct legal aid services, ILF-Afghanistan is active in developing the justice sector of Afghanistan by providing “training and leadership” to the defense bar and the MOJ legal aid staff as well as providing advice to the MOJ and legislative bodies on issues related to criminal law/legal aid and by establishing the first legal aid clinic at Herat University.⁶²

Justice for All Organization

The Justice for All Organization (JFAO) “works to strengthen the rule of law and expand access to justice for indigent women in Afghanistan. JFAO also trains women about their constitutional and social rights, preparing them for leadership roles within Afghanistan’s legal and political sectors.”⁶³ JFAO has offices staffed with local trainers in seven provinces.⁶⁴

JFAO’s primary project has been providing legal aid services at the Kabul Legal Advice Bureau in partnership with Global Rights, an NGO that received a 3-year grant from INL in 2011 to increase access to legal aid and legal education.⁶⁵ Modeling itself after the success of the Kabul

⁵⁷ The International Legal Foundation (ILF) Home page (accessed January 29, 2014): <http://theilf.org/>.

⁵⁸ ILF About Us Program Approach: <http://theilf.org/about-the-ilf/ilf-approach/>

⁵⁹ ILF Our Team Afghanistan: <http://theilf.org/ilf-team/afghanistan/>

⁶⁰ ILF Our Programs ILF-Afghanistan (accessed January 29, 2014): <http://theilf.org/our-programs/ilf-afghanistan>.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Justice For All Organization (JFAO) (accessed February 23, 2014): <http://www.jfao.org/>.

⁶⁴ Takhar (4 trainers), Balkh (5 trainers), Baghlan (2 trainers), Kunduz (2 trainers), Herat (5 trainers), Kabul (4 Trainers), and Badakhshan. JFAO (accessed February 23, 2014): <http://www.jfao.org/who/>.

⁶⁵ Ibid.

Legal Advice Bureau, JFAO also opened a field office in Kunduz with the support of a grant from the Open Society Institute (OSI) of Afghanistan.⁶⁶

In addition to direct legal aid services, JFAO has partnered with GTZ to provide trainings for students and parents “on children’s rights based on Afghanistan’s domestic laws – encompassing *shari’a* law and the civil code, and international conventions.”⁶⁷ JFAO is hoping to expand the program to schools nationwide.⁶⁸ JFAO also received a grant from the U.S. Embassy to conduct a public awareness campaign entitled “Increasing Women’s Awareness of their Fundamental Human and Political Rights Project.”⁶⁹ Pursuant to the grant, JFAO will “hold trainings, classes, workshops and radio roundtable discussions for women and girls.”⁷⁰ JFAO has produced legal awareness training material, which is available in Dari on its website.⁷¹

Legal Aid Organization of Afghanistan

The Legal Aid Organization of Afghanistan’s (LAOA) mission is to “promote access to justice and strengthen the rule of law in Afghanistan. Since its establishment in 2006, the organization has pursued these objectives through the provision of legal aid to indigent Afghans, by training the legal community and by conducting research and advocacy to improve the Afghan legal system.”⁷² LAOA has 60 practicing lawyers in 26 provinces and the Justice Center in Parwan.⁷³ LAOA provides legal aid services in the areas of criminal defense, family law, and some areas of civil law.⁷⁴ In addition to providing direct legal aid services, LAOA provides training and awareness workshops as well as comparative research on international and Afghan law.⁷⁵ The organization has conducted 40 legal trainings in 14 provinces with almost 3,000 participants and has produced four training manuals: 1) Paralegal; 2) Defense Advocacy Skills; 3) Juvenile Rights; and 4) Civil Rights.⁷⁶ The manuals are not available online.

⁶⁶ JFAO: <http://www.ifao.org/2010/12/03/ifao-receives-grant-from-open-society-afghanistan/>

⁶⁷ JFAO: <http://www.ifao.org/do/>

⁶⁸ Ibid.

⁶⁹ JFAO: <http://www.ifao.org/2011/03/01/ifao-receives-embassy-funding-for-legal-awareness-project/>

⁷⁰ Ibid.

⁷¹ JFAO Resources: <http://www.ifao.org/resources/>

⁷² Legal Aid Organization of Afghanistan (LAOA), (accessed February 23, 2014): <http://www.laoa.af/>.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Statistics are from LAOA’s website accessed in November 2011. Since that time the website has been upgraded and the training statistics are no longer listed. The LAOA’s Monthly Quantitative Report for January 2014 also does not provide training statistics.

University Legal Clinics

The Legal Aid Regulation also permits legal clinics to provide legal aid.⁷⁷ The development of legal clinics in Afghanistan is relatively new. The United States Agency for International Development (USAID) Rule of Law Stabilization Program- Formal (RLS-Formal) supports legal clinics operating in Al Biruni, Balkh, Herat, Kabul (two clinics), and Nangarhar Universities.⁷⁸

USAID RLS-F is working with the Ministry of Higher Education to have the clinical programs included in the approved curriculum for Law and *Shari'a* Faculties.⁷⁹ In November 2014, RLS-F supported a National Legal Clinic Conference in Kabul for participants from Law and *Shari'a* Faculties as well as clinic donors.⁸⁰ The participants agreed to develop “a uniform syllabus for legal clinics across the country.”⁸¹ Moreover, the “participants presented their upcoming activities, agreed to criteria for admitting students, and discussed mechanisms to coordinate donor assistance.”⁸²

Registered Advocates

The Legal Aid Regulation permits registered advocates to provide legal aid.⁸³ As discussed earlier, AIBA is responsible for licensing advocates.⁸⁴ The AIBA is required to maintain a roster “of practicing advocates including the address of the advocate as well as the date of issue of his/her license.”⁸⁵ The advocates’ addresses, however, do not always match where the advocates actually practices making it difficult to find defense attorneys in specific locations.⁸⁶ The AIBA previously reported that it was in the process of implementing a database designed by the United Nations Office on Drugs and Crime (UNODC) that “will centralize the collection of comprehensive data on licensed defense attorneys in Afghanistan. Collected data will include demographic, educational, employment, and licensing information on each registered advocate.”⁸⁷ At the time of this writing, however, the database was not available.

⁷⁷ Legal Aid Regulation, *supra* note 4, Art. 15.

⁷⁸ See USAID Afghanistan, Press Release, Afghanistan Universities Inaugurate Legal Clinics Programs, 17 October 2012: <http://www.usaid.gov/afghanistan/news-information/press-releases/afghanistan-universities-inaugurate-legal-clinic>.

⁷⁹ *Ibid.* See Chapter 3.1: Legal Education and Training in Afghanistan for a discussion of unifying the Law and *Shari'a* faculties’ core curriculum.

⁸⁰ USAID Afghanistan, Rule of Law Stabilization – Formal Component, Monthly Report, November 1 – November 31, 2013, p. 10. PDF link available from “legal education Afghanistan” search on USAID Afghanistan website: <http://www.usaid.gov/afghanistan>.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Legal Aid Regulation, *supra* note 4, Art. 15.

⁸⁴ Advocates’ Law, *supra* note 2, Articles 4(1) and 8(1); AIBA By-Laws, *supra* note 9, Art. 30.

⁸⁵ Advocates’ Law, *supra* note 2, Art. 8(2).

⁸⁶ See DOS INL/JSSP: *Assessment of the Afghanistan Independent Bar Association*, May 16, 2011, p. 12.

⁸⁷ See Afghanistan Independent Bar Association (AIBA): <http://www.aiba.af/#>. At the time of this writing, the link regarding the AIBA Database, originally accessed in June 2012 (http://www.aiba.af/index.php?option=com_content&view=article&id=107&Itemid=78), was no longer a working link, but connected back to the AIBA home page.

As of February 2014, the AIBA comprises 2,139 registered advocates.⁸⁸ According to the Advocates' Law and the AIBA By-Laws, these members are obligated to provide *pro bono* representation in three criminal cases every year.⁸⁹ An assessment in 2011, however, determined that most members do not provide free representation in criminal cases.⁹⁰ The AIBA does not currently have consistent procedures to monitor member fulfillment of the *pro bono* requirement and does not have procedures for reporting verification of this requirement to the MOJ.⁹¹ At the last General Assembly in October 2011, members proposed amending the Advocates' Law to remove the *pro bono* requirement.

Challenges

One of the major challenges facing advocates is the shortage of legal aid providers. As discussed above, the majority of AIBA members do not provide the required *pro bono* legal aid services and the MOJ Legal Aid Department is understaffed and unable to meet the needs of the country. To better understand the shortage across the country, the chart below provides the number of MOJ legal aid providers by province compared to the provincial population and prison population as of May 2011:⁹²

Province	Population	Number of Prisoners	Number of MOJ Legal Aid Providers	Vacant positions
Kabul	2,425,000	5940	20	1 legal aid provider
Herat	176,200	2601	9	
Nangarhar	1,342,000	1258	6	
Badakhshan	81,900	505	3	1 legal aid provider
Kunduz	7,700	443	5	1 manager
Balkh	1,124,000	753	8	
Kandahar	91,200	723	2	1 manager and 1 legal aid provider
Paktia	515,000	220	2	1 manager and 1 legal aid provider
Parwan	492,000	328	3	1 manager
Ghazni	1,081,000	267	4	
Baglan	742,000	500	3	1 legal aid provider
Kapisa	358,000	168	4	
Takhar	83,000	565	3	1 legal aid

⁸⁸ Information provided by DOS INL/JSSP.

⁸⁹ See Advocates' Law, *supra* note 2, Art. 13(15); see also AIBA By-Laws, *supra* note 9, Art. 32 (5).

⁹⁰ See *Assessment of the AIBA*, *supra* note 86, p. 13.

⁹¹ See *Ibid.*

⁹² *Ibid.*, p. 9.

				provider
Jawzjan	43,000	713	4	
Faryab	834,000	519	4	
Farah	93,000	389	1	1 manager and 2 legal aid providers

Another major challenge facing advocates includes the lack of public awareness of legal rights and the failure of the police, prosecutors, and courts to adhere to the procedural notifications safeguarding the right to counsel. Defense attorneys are appointed upon petition of the accused/suspect/defendant.⁹³ The public, for the most part, is unaware of their legal right to counsel and often do not petition for an advocate. As discussed above, the law provides several notification provisions requiring the police, prosecutors, and the courts to inform an individual of their right to counsel.⁹⁴ These provisions are often ignored. In January 2009, the United Nations Assistance Mission in Afghanistan (UNAMA) reported, “Coupled with the presumption of guilt, [the] lack of familiarity with the function and purpose of defense counsels appears to create hostility toward the right to defense counsel by the police, prosecutors and Courts, as demonstrated by the consistent failure to inform detainees of their rights to defense counsel and limitations placed on defense attorney’s [sic] access to investigation, proceedings, and documents.”⁹⁵ In June 2010, one MOJ official stated:⁹⁶

In most cases, court sessions aren’t held. Instead, a group of judges sit together in a room. There is no defence lawyer there. There is no prosecutor there. The defendant is rarely allowed to participate. If the family members of the accused are there, they are barred from speaking. When we ask these judges why they are conducting court this way they say: “We called the prosecutor. We called the defence lawyer. But we couldn’t reach them.” Or they say, “The prosecutor has done his job and we know what our job is so we don’t need him there” The problem is that our judges and prosecutors believe they personally are the highest authority in the land, not the law, and they abuse the law as a result of this thinking.

⁹³ ICPC, *supra* note 3, Art. 19. *See infra*, The Right to Counsel.

⁹⁴ *See infra*, The Right to Counsel.

⁹⁵ *See* United Nations Assistance Mission in Afghanistan (UNAMA), *Arbitrary Detention in Afghanistan: A Call For Action*, Volume I: Overview and Recommendations, 2009, p. 16: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=49d07f272>

⁹⁶ *See* International Crisis Group, *Reforming Afghanistan’s Broken Judiciary*, Asia Report No 195, November 17, 2010, p. 17: <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afghanistans%20Broken%20Judiciary.ashx>

While the understanding and acceptance of the role of the defense attorney is slowly improving, many police, prosecutors, and courts continue to impede the right to counsel in Afghanistan.⁹⁷

Other major challenges facing advocates that have been touched upon in this chapter and in Chapter 3.1 include the need for legal education and training, the discrepancy in issuing licenses to individuals that do not meet the criteria established in the law, allowing non-advocates to provide legal aid, and the disparity in pay between State legal aid providers and legal aid consultants. Lastly, insecurity and the inability to safely travel to detention facilities and courts negatively impact the ability of advocates to work in Afghanistan.

⁹⁷ See DOS INL/JSSP Assessment of Defense Capabilities: Balkh, Herat, Kabul, Kunduz and Nanagarhar, November 24, 2010; see also, *The Right to Counsel as a Safeguard of Justice*, supra note 55, p. 8.

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