Afghanistan Analysts Network

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Legal Aid in Afghanistan

Context, Challenges and the Future

EXECUTIVE SUMMARY

Despite the common impression that defence lawyers and legal aid are new concepts in Afghanistan, both have existed since the reign of Zahir Shah. The first right to defense counsel was included in the 1964 Constitution and the first statutory provision for legal aid was created in 1965. Similar laws governing defense lawyers and legal aid were passed in 1972, 1987, 1997 and 1999. In practice, defense lawyers have been a small profession and both they and the distribution of legal aid services have been heavily controlled by whichever government was in power.

The pre-existing familiarity with defense lawyers and legal aid likely contributed to the quick growth of these two areas in post-Taleban Afghanistan. In the ten years since the fall of the Taleban, the number of defense lawyers has jumped approximately thirty fold, while legal aid – which was essentially unavailable in 2001 – is now provided by about 300 lawyers across 34 provinces. Furthermore, defense lawyers have achieved modest but significant improvements in how the criminal justice system treats accused people.

Due to its rapid growth and also because the right to legal aid services was included in the 2004 Afghan Constitution, legal aid underwent foreign-led reform efforts. Those efforts, which began in earnest in 2007, have become an archetypal example of failed, foreign-led, top-down institution building. Foreign donors and advisors did not adequately consult all parties that would be affected by reforms. Instead, the assumption was that the field of legal aid was a 'blank slate' and that stakeholders – legal-aid-providing NGOs, the Ministry of Justice, the newly-created Legal Aid Board and foreign donors themselves – would implement reforms without resistance. In making this assumption, reformers failed to recognise that their policies disrupted the existing distribution of power within the legal aid community and awoke a struggle for control of legal aid between those who favour NGOs and those who believe the government ought to determine its distribution.

The Legal Aid Board – an institution conceived of by reformers and altered by the Ministry of Justice – has become a focal point of the struggle over who should control legal aid activities in Afghanistan. If the modest but genuine gains made by legal aid providers since 2001 are to continue, stakeholders – including donors – must answer fundamental questions about how to make legal aid sustainable both financially and politically.

1 INTRODUCTION

The growth of legal aid services in criminal cases across the country has been a bright spot in the otherwise bleak landscape of the last ten years of justice reform in Afghanistan. This growth, coupled with the introduction of a constitutional right to legal counsel for criminally accused indigent people made the field of legal aid a prime candidate for foreign-led reform efforts.

This report seeks to provide a historical, legal and political context to legal aid reforms that have taken place over the last five years and also critiques the top-down approaches that have been used in these reforms and that have led to significant controversy within the legal aid community.

1.1 Defining Legal Aid

'Legal aid', according to the definition in the current Afghan Legal Aid Regulation, relates to the defense of indigent persons at any stage of criminal prosecution, as well as to indigent children and women in civil cases.[1] This paper, however, focuses only on legal aid in criminal legal matters for three reasons: the constitutional obligation to provide free legal assistance to indigent persons applies only in criminal cases; this constitutional obligation has been used as the justification for international involvement in legal aid reforms; and most legal aid provided in Afghanistan relates to criminal cases. It is noteworthy, however, that a few organisations provide free legal assistance in civil and family matters either exclusively or in addition to criminal legal aid services.[2]

1.2 Methodology

This paper was researched and drafted between July and December 2011. Research consisted of a literature review, legal analysis and interviews.

The literature reviewed included academic papers, unpublished masters and Ph.D. theses, policy papers, research papers, project documents, and project reports relating to the rule of law, defence lawyers and legal aid in Afghanistan.

The legal analysis involved reviewing all potentially relevant laws of modern Afghanistan, beginning with Afghanistan's first constitution passed by King Amanullah Khan in 1923. Because there is no exhaustive collection of past and current Afghan laws – particularly one available to foreigners – any legal review risks missing a relevant law. However, the literature review shows that the first modern written reference to defence attorneys in Afghanistan appeared in the 1964 Constitution of King Mohammad Zahir Shah and that the first Afghan law regulating the profession of defence attorneys, entitled the *Law Concerning the Arrangement of Defendants' Affairs*, came into force on 29 January 1965 ('1965 Law').[3] All legal analysis in this paper is based on English translations of the original laws. Where English translations already existed they were used; however, in the course of research for this paper, three laws and two presidential decrees were translated into English.

Twenty-four people, foreign and Afghan, were interviewed for this paper, including Afghan legal aid providers, representatives of the Legal Aid Department in the Ministry of Justice, former and current foreign technical advisors and representatives of foreign donors that are involved in the field of legal aid. Recipients of legal aid services were not interviewed. Although the situation facing legal aid providers varies by province, legal aid reform initiatives have been concentrated in Kabul, where the largest NGO legal aid providers are based; therefore interviews were primarily held there. Interviews were conducted either in English or with Dari interpretation and, with one exception, were all conducted in person. Occasionally people were interviewed more than once or were asked follow-up questions via e-mail or phone. Most sources spoke on the record. However, in order to minimise the potential negative repercussions within Afghanistan's small legal aid community, names have been withheld where doing so does not detract from the analysis.

[1] *Legal Aid Regulation*, Official Gazette 950 (2 July 2008).
[2] The Norwegian Refugee Council provides free legal assistance strictly in civil cases; the Legal Aid Organization of Afghanistan provides free family law services to women in addition to criminal legal aid.
[3] *Law Concerning the Arrangement of Defendants' Affairs*, Official Gazette 19, No. 6 (24 January 1965).

2 The Historical Context: Defence Lawyers and Legal Aid, from Zahir Shah to the Taleban

2.1 Past Laws Regulating Defence Lawyers and Legal Aid

Afghanistan has a surprisingly rich history of defence lawyer and legal aid regulation dating back to the reign of Zahir Shah, putting the recent attempts of legal aid reform into perspective.

The Constitution of Zahir Shah, enacted on 1 October 1964 was the first of Afghanistan's constitutions to recognise the right of criminally accused persons to have 'defence counsel'.[4] Shortly afterward the 1965 Law was passed, setting the standard for the regulation of defence lawyers and the distribution of legal aid for more than 40 years.

The 1965 Law recognised defence lawyers as a distinct profession within the legal system; civil servants – including prosecutors, judges and regular government employees – were barred from being defence lawyers even if they were otherwise qualified (article 8). The 1965 Law created a Central Committee of Defence Attorneys based 'in the Ministry of Justice' which would have five members, four of them government-appointed civil servants and one a defence attorney personally selected by the Minister of Justice (article 4). The Central Committee of Defence Attorneys was in charge of disciplinary sanctions against defence lawyers when necessary (articles 42–46), though defence attorneys could appeal directly to the Minister of Justice if they disagreed with the outcome of a disciplinary ruling.

The 1965 Law also created Afghanistan's first statutory reference to legal aid. While the 1965 Law did not create any right to free legal assistance, it required the Ministry of Justice to budget funds for this purpose, while at the same time providing the ministry and the heavily government-controlled Central Committee of Defence Attorneys with the power to decide how to distribute this service. Article 11 stated:

> In the budget of the Ministry of Justice some money shall be allocated to support indigent clients.
>
> The Minister of Justice with the help of Central Committee is authorized to nominate defence attorneys for such parties.

Notably, this statutory access to legal aid did not distinguish between civil and criminal cases.

Zahir Shah promulgated a new law pertaining to defence advocates in 1972, shortly before his reign ended. The *Law for Organizing Affairs of Defence Attorneys* ('1972 Law') was similar to the 1965 Law in many ways but included a few changes. Defence advocates were given more seats on the Committee of Defence Attorneys and would be elected to membership by their peers, balancing the number of government members and defence advocates on the committee.[5] Also, the mechanism for accessing legal aid services shifted the seat of decision-making power from the Minister of Justice and the Central Committee under the 1965 Law to the presiding judge and prosecutor (*saranwal*), depending on whether the case was criminal or civil in nature. Article 10 stated:

> Should the accused or any litigant be financially unable to appoint a Defence attorney, the person shall have a Defence attorney appointed for him in the following manner:
>
> (a) The judge of the court adjudicating the case, in criminal suits on the petition of the person and the proposal of the Saranwal and in civil suits on the petition of the person, and its own judgement [*sic*] appoints a defence attorney for the destitute person from amongst the lawyers officially permitted to work as defence attorney [*sic*].
>
> . . .
>
> (c) The fees for the aforesaid attorney shall be paid from the State budget and its extent shall be fixed by regulation.[6]

The 1972 Law remained on the books through four successive regimes until it was officially repealed in February 1987 in the early stages of Dr Mohammad Najibullah's reign and replaced with the *Law of Defence Attorneys* ('1987 Law').[7]

The 1987 Law, in keeping with the two previous laws, prohibited civil servants from being licensed

[4] *Constitution of Afghanistan*, Official Gazette 12 (1 October 1964), article 26.

[5] *Law for Organizing Affairs of Defense Attorneys*, Official Gazette 206 (19 March1972).

[6] It is unclear whether such regulation was ever created.

[7] *Law of Defense Attorneys*, Official Gazette 627 (18 January 1987).

as defence attorneys (article 13(3)). The 1987 Law also created Afghanistan's first bar association – it had 'legal personality' (article 4(5)) and an executive elected by a general assembly of defence attorneys (article 7).

The bar association, however, lacked any real independence and, as such, closely resembled the defence attorney committees created under the 1965 Law and the 1972 Law. Members of the bar association were required to 'pay attention to […] guidance and methodic advice of the Ministry of Justice' (article 16(2)); its general assembly could be required to meet 'at the request of the Ministry of Justice' (article 6(3)); the Ministry of Justice retained responsibility for the 'general leadership of the Bar Association' (article 34(1)) and performed a long list of duties 'simultaneously with the general leadership of the Bar Association', including monitoring defence lawyers' compliance with the law (article 34(4)). Finally, any residual autonomy of the bar association was erased by article 35 which provided the minister with a veto power:

> If decisions of the general assembly or approvals of executive committee [*sic*] of the Bar Association are inconsistent with the enforced laws, the Ministry of Justice of the Democratic Republic of Afghanistan shall prevent their implementation and refer the issue to the general assembly or executive committee of the Bar Association for revision.

The 1987 Law still included access to legal aid but again altered who was empowered to provide it. Pursuant to article 23(1), courts could award legal aid only in criminal cases (as opposed to civil and criminal cases under the 1972 Law) but the executive committee of the bar association or the head of a regional bar association office could make legal aid available in criminal and civil cases. Ultimately, however, the Ministry of Justice retained its own leverage 'simultaneously with the general leadership of the Bar Association' to determine the 'procedures for provision of legal aid' (article 34(4.2)).

This law technically remained in force throughout the chaotic mujahidin era until, ten years later, on 22 December 1997, the Taleban passed the *Law of Defence Attorneys* ('1997 Law').[8] As before, civil servants – namely 'judges, prosecutors, government employees' were not eligible to be defence attorneys (article 7) and the Ministry of Justice retained ultimate control over the defence lawyer profession. The ministry was empowered to 'organize and lead affairs related to defence attorneys' (article 3) and was responsible for defence lawyer licensing (article 8(1)). A Central Association of Defence Attorneys, based 'in the Ministry of Justice,' as under both the 1965 and 1972 Laws, was an 11-member body consisting of civil servant appointees and five senior defence attorneys personally selected by the minister (article 18). This Central Association, amongst other tasks, was in charge of advocate discipline. There was no statutory provision for legal aid.

Almost a year after the 1997 Law came into force, on 6 November 1998, Mullah Omar published a decree decrying that the 1997 Law was 'not being implemented in the capital and provinces the way it is supposed to'.[9] On 30 July 1999, perhaps to reiterate its desire that the 1997 Law be followed, the Taleban passed a second law relating to defence attorneys that was almost identical to the 1997 Law.[10]

2.2 From Law to Reality: Defence Lawyering and Legal Aid Pre-2001

2.2.1 Estimating the Number of Defence Lawyers in Afghanistan Pre-2001

Although defence lawyers have been extensively regulated through the years, their numbers have tended to be relatively small if not precisely determinable.

A former deputy minister of justice, who also worked at various stages in his career as a judge, prosecutor and defence lawyer, stated that when he was a judge during the reign of Zahir Shah there were 'maybe not more than ten defence lawyers' in all of Kabul. By contrast, an author writing in 1980 estimated that during the regime of Daoud Khan, from 1973 until the Saur Revolution, there were 162 defence lawyers across the country, though concentrated in Kabul and Herat.[11]

Another defence lawyer, who, by his own estimate, has been working as a defence lawyer for 40 years, guessed that there were 300–400

[8] *Law of Defense Attorneys*, Official Gazette 784 (22 December 1997).

[9] Decree No. 154. It appears that this decree was never published in the Official Gazette.

[10] *Law on Organizing Affairs of the Defense Attorneys*, Official Gazette 786 (23 July 1999).

[11] M.G. Weinbaum, 'Legal Elites in Afghan Society', *International Journal of Middle East Studies* Vol. 12, No. 1 (Aug. 1980), pp 39–57, at p 40.

defence lawyers across the country during the communist years and 380–400 defence lawyers during the mujahidin era.[12]

The manner in which the ranks of defence lawyers grew during the communist and mujahidin eras suggests that defence lawyering has typically been viewed as an alternate legal profession when a government job was unavailable. The communist government, according to one source, forced out many of the state's legal professionals who had religious training; those forced out became defence lawyers, thereby increasing the numbers in the field.[13] According to the same source, the mujahidin government similarly forced out judges and prosecutors who they mistrusted and who had been appointed during the communist era, swelling the ranks of defence lawyers anew.[14]

While the number of defence lawyers during the Taleban regime is difficult to estimate, it likely dropped, even from the limited numbers of earlier years. One source estimated that there were about 100 defence lawyers; another estimated 200, again mostly based in Kabul. Nevertheless, one source who worked as a defence lawyer under the Taleban stated that the Taleban took the role of defence lawyers in the justice system seriously and that defence lawyers were allowed to be active during the Taleban because of a Hanafi principle that an advocate be made available for accused persons who do not understand the charges against them.

2.2.2 Distribution of Legal Aid Pre-2001

As is common in Afghanistan, law and practice were not synonymous when it came to defence lawyers and legal aid. One source described the reference to legal aid under the 1965 Law as 'more of a political move to show that Afghanistan was becoming a democracy' and said that, in reality, legal aid simply was not made available.[15]

Legal aid first became sporadically available during the communist era. However, it was not provided in accordance with the mechanisms set out by law but rather was dispensed by judges or others close to the government on the basis of personal relations or as a 'personal favour' to the accused; defence lawyers were 'rarely or maybe never paid' for providing the legal aid services requested by the government.[16]

Tellingly, the order for a defence lawyer to provide legal aid, according to one source, would come through the Ministry of Justice, regardless of what was stated in the law. While this source recalled that under the communists, the ministry preferred to use the telephone to order him to provide free legal assistance for a particular person, the mujahidin and Taleban governments would send the message via letter. Sometimes this defence lawyer would be paid by the state for his services, though 'the mujahidin never paid.'

Although there was no provision for legal aid under the Taleban laws, free legal assistance was occasionally made available under similar mechanisms; one defence lawyer guessed that he was required to represent someone for free one or two times during the Taleban era.

3 THE LAST TEN YEARS: DEFENCE LAWYERS AND LEGAL AID SINCE 2001

3.1 Increase of Defence Lawyers and Legal Aid Providers

From the fall of the Taleban in December 2001 until approximately late 2002, the already weak mechanisms by which legal aid had been provided under the Taleban completely collapsed. During this period, an accused person either had to pay a private defence lawyer or represent him or herself; it is also possible that accused persons had a family member act as an advocate. The number of defence lawyers was also limited. One defence lawyer stated that when he went to register at the Ministry of Justice in late 2002 or early 2003, only about 40 people were registered as defence lawyers, including some that he knew were deceased or no longer living in Afghanistan, though presumably there were also unregistered defence advocates available for hire.

Just five years later, in 2007, about 300 defence lawyers were registered with the Ministry of Justice.[17] Non-governmental organisations dedicated to providing legal aid, the first of which began operating in late 2002 and early 2003,

[12] Interview with source, 13 September 2011.
[13] Interview with source, 19 October 2011.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Gerry Fox, 'Models and Options for Legal Aid Delivery in Afghanistan,' (International Development Law Organization: 2007) p. 21.

employed about 190 of these 300 defence lawyers and had a presence in 18 provinces; and of the 190 legal aid lawyers, 161 worked in criminal law.[18]

Additionally, the Supreme Court had begun its own legal aid program, employing 19 lawyers to provide legal aid primarily in Kabul.[19]

As of early 2012, the Afghan Independent Bar Association (AIBA) – the self-regulating body for defence lawyers created in 2008 – counted 1,250 members, a mix of private lawyers, legal aid providers employed by NGOs, and those employed but not in practice.[20] There are now approximately 300 legal aid lawyers working in 34 provinces, of which 181 are employed by the five largest legal aid NGOs operating in Afghanistan (in 34 provinces);[21] 69 are employed by the state in the Legal Aid Department of the Ministry of Justice (in 16 provinces); and 32 are funded by the World Bank but work within the Legal Aid Department (in five provinces). The remaining legal aid advocates work for one of the numerous small, single-office legal aid NGOs. Currently, legal aid providers are concentrated in Kabul, with Herat and Balkh trailing in second and third place.

These numbers, of course, are subject to fluctuation based on the abundance or scarcity of project funding; both the Ministry of Justice and the World Bank have plans to expand the number of advocates in the Legal Aid Department in the near future.

While the absolute numbers of currently registered defence lawyers and legal aid lawyers are relatively small, the sustained growth over the last decade is impressive. About thirty times the number of registered defence lawyers exists today than there were a year after the Taleban. In the last five years alone there are four times as many registered defence advocates, the number of people exclusively providing legal aid services has increased by two-thirds, and legal aid is now available in almost twice the number of provinces. Compared to the pre-2001 numbers, the recent growth is even more impressive.

3.2 Elbowing Their Way In: Acceptance of Defence Lawyers in the Criminal Justice System

As the number of defence lawyers expanded after 2001, so too did the role they played in the criminal justice system, providing some measure of accountability for how police, prosecutors, and judges use the power of the state.

Initially, after the end of the Taleban regime, defence lawyers were *persona non grata* in the criminal justice system; they were not allowed to participate fully in investigations or at trial. One defence lawyer, who has been working with a legal aid NGO since 2004, said that she was not initially allowed to participate in the police or prosecutorial investigations. Because she and her colleagues were not informed of their clients' trial dates, 'we were always trying to figure out when our cases were going to trial' and the only way to do so was to stalk the halls of the Kabul courts to make sure their clients weren't in the court rooms. Occasionally, she said, she simply missed trials because she was not informed that they were taking place. If she managed to be present during a client's trial, the judge allowed her only to read her defence statement; she was not allowed to make any additional arguments as the trial unfolded.

Sometimes the defence lawyers could not even read out their prepared defence statements; they had to submit them in advance and were not allowed in the courtroom. One defence attorney stated that in these instances the prosecution read out the defence statements in court for him. Another recalled that 'prosecutors would be angry with defence lawyers who came to court.'

One defence lawyer who began practicing in 2004 stated that in the beginning he was just a 'paper lawyer' – someone who wrote defence statements for his clients responding to the prosecution's indictment but who never appeared in court or even spoke with his clients. 'It was customary,' he said:

> to give the defence statement to the accused's family or sometimes take it to court myself. I would hear about the outcome of the case later, usually from someone in the family, and only if it was being appealed by one side or the other.

[18] Fox, 'Models and Options', p 26 (see FN17). Of the 190 legal aid lawyers of that time, 29 worked for the Norwegian Refugee Council, which has only ever provided legal assistance in civil matters.
[19] Fox, 'Models and Options', p 5 (see FN17).
[20] This number does not include lawyers who are civil servants, such as judges or prosecutors in accordance with the Advocates Law.
[21] Legal Aid Organization of Afghanistan, International Legal Foundation Afghanistan, Da Qanoon Ghustonky, and Medica Mondiale Afghanistan.

It was only after he was hired by a legal aid NGO in 2006 and was given specific training on how to participate more fully in the criminal process that he became more active in his clients' defence. However, even after he began working with a legal aid NGO, he wasn't necessarily allowed to see the prosecution's file before trial.

Defence lawyers interviewed for this paper said that the situation improved day by day. One defence lawyer explained:

> In the beginning, it was not good to be confrontational, but rather to charm your way into the courts. The successful defence lawyers were respectful of the judges and worked slowly. There was no magic moment; it took hard work and the progress was slow. Things began to change for several reasons: people in the legal community started to attend workshops explaining how the law should be applied; defence lawyers working at NGOs made new legal arguments with the guidance of foreign technical advisors; and the international community put pressure on the justice institutions to change.[22]

One international advisor at a legal aid NGO also pointed out that the technical guidance provided by foreign advisors to NGO-employed legal aid providers has had a spill-over effect into the private defence lawyer community since many advocates previously employed by NGOs have moved on to open their own practices, taking and sharing the skills they learned with them.

Another defence attorney attributed the gradual changes to the fact that 'judges recognized the quality of our work' and because the Supreme Court sent letters to the lower courts specifying that trials could not take place without the presence of defence counsel.

Today, defence lawyers' participation in the criminal justice process is more accepted than it had been immediately post-Taleban. Participation in the investigatory stages is far more common now, according to defence counsel. Also, that defence counsel should be present at trial is in many provinces and courts no longer controversial. Sometimes judges themselves even ask for their presence or will foist clients on counsel at the last minute to make sure an accused is represented before a trial continues – a practice that more than one legal aid provider has complained about. Defence lawyers are also increasingly allowed to participate in trials beyond simply reading out their defence statements, though many complained that their arguments were not given the same consideration as those made by the police or prosecution.

The nature of the progress over the past ten years, as described above, is modest and varies by province, judge, court and investigating authority. For example, the National Directorate of Security (NDS) has resisted the progress that has been made elsewhere. The United Nations Assistance Mission to Afghanistan (UNAMA) recently reported that defence lawyers almost universally could not access clients held by NDS:

> Almost all defence lawyers and legal aid providers informed UNAMA they had limited access to NDS facilities as NDS officials prevented them from accessing detainees. NDS officials, in many cases confirmed they deliberately limit defence counsel access for fear that they will influence detainees and hinder NDS investigations.[23]

Unsurprisingly, the NDS also typically refuses to allow defence lawyers to participate in the initial investigation stages and does not provide disclosure prior to trial. Defence lawyers representing accused persons held by NDS, therefore, go into trial having seen only the indictment.

Despite the seemingly modest scope of changes over the last ten years, the progress made has been an important step in the direction towards ensuring national and international fair trial standards are respected. Furthermore, this hard-won progress demonstrates the slow pace of genuine, grass-roots reform in the rule of law sector.

3.3 The Current Legal Framework

Post-2001, three important developments occurred in the law affecting legal aid in Afghanistan.

First, on 3 January 2004, the current Afghan constitution ('2004 Constitution') was promulgated.[24] Among the many new rights included in the 2004 Constitution, article 31

[22] Interview with source, October 25, 2011.

[23] United Nations Assistance Mission in Afghanistan, 'Treatment of Conflict-Related Detainees in Afghan Custody' (October 2011), p 47.

[24] *The Constitution of Afghanistan*, Official Gazette 818 (3 January 2004).

articulates a right to state-appointed counsel in criminal matters:

> In criminal cases, the state shall appoint a defence attorney for the indigent.

Second, almost four years after the 2004 Constitution was introduced, and in keeping with past Afghan governments, the Karzai administration passed its own legislation relating to defence lawyers. The Advocates Law, which was published in the Official Gazette on 17 December 2007 and came into force three months later, repealed and replaced the 1999 Law that had until then been governing defence lawyers.[25]

The Advocates Law applies only to non-state advocates and as such retains the historical separation between defence lawyers and legal professionals employed by the state. It also specifies in article 3(1) that the state's obligation, in article 31 of the 2004 Constitution, to provide legal aid falls to the Ministry of Justice:

> Pursuant to Article 31 of the Constitution, the Ministry of Justice shall be obliged to appoint a legal aid provider for indigent persons at any stage of the prosecution.

The Advocates Law did, however, make one bold break from tradition and made defence lawyers a self-regulating profession governed by the Afghan Independent Bar Association. The AIBA, pursuant to the Advocates Law, is an independent, statutory body responsible for licensing, discipline, organisation, and general regulation of defence advocates and is governed by a general assembly of defence lawyers, which in turn elects its president and executive board. The Ministry of Justice does not retain any residual power under the Advocates Law to regulate or otherwise control defence attorneys.

In a decree appended to the Advocates Law, President Karzai transferred the Legal Aid Department that had been established in the Supreme Court to the Ministry of Justice, where it continues to be located.[26]

The third legal development was the introduction of the Legal Aid Regulation ('Regulation') on 2 July 2008.[27] Reflecting the reality of the legal aid system at the time it was passed, the Regulation endorses a mixed legal aid system comprising the Legal Aid Department (article 14), members of the AIBA, and 'accredited' NGOs and law clinics (article 15(1)). As such, while the Advocates Law applies only to defence advocates, the Regulation notionally governs all advocates who provide legal aid services in the mixed system, whether employed by the state (in the Legal Aid Department), or licensed by the AIBA, such as private lawyers and NGO-employed lawyers.

The Regulation also specifically included civil cases involving children and women within the category of cases meriting legal aid, despite the fact that the constitutional obligation extends only to criminal cases. In this manner the Regulation reflects the historical availability of legal aid in both civil and criminal matters.

The Regulation obliges 'police, prosecution institutions and courts' to introduce an indigent accused to a legal aid provider and those institutions can specifically request a legal aid provider to represent an indigent accused (article 6). Before qualifying for legal aid assistance, an accused person must fill out an indigence form attesting that he or she is unable to afford counsel (article 5(2)). In practice, while the Legal Aid Board has created an indigence form, each legal aid provider uses its own methods to determine whether a potential client should qualify for legal aid.

The Regulation also creates an institution called the Independent Board of Legal Aid ('Legal Aid Board' and 'Board'). The purpose of the Legal Aid Board is set out in article 19 of the Regulation:

> To organize the affairs and effectively regulate the legal aid provision [*sic*], and to coordinate the activities of legal aid providing authorities.

The Legal Aid Board is comprised of seven members (article 19(1)):

- an authorised representative of the Law and Political Science Faculty of Kabul University;
- an authorised representative of the Sharia Faculty of Kabul University;
- an authorised representative of the Ministry of Women's Affairs;

[25] *Advocates Law,* Official Gazette 934 (17 December 2007) article 44. Prior to the passage of the Advocates Law, President Karzai passed two decrees making small amendments to the 1999 Law in Gazette 822 (5 February 2004) and in Official Gazette 854 (9 June 2005).

[26] *Concerning the Enforcement of Advocates Law*, no. 111, dated 25 November 2007, was decreed by Hamid Karzai and published with the Advocates Law in Official Gazette 934 (17 December 2007).

[27] Official Gazette 950 (see FN1).

- an authorised representative of the Afghanistan Independent Human Rights Commission;
- an authorised representative of the Afghan Independent Bar Association;
- an elected representative of all NGO legal aid providers; and
- the Director of the Legal Aid Department in the Ministry of Justice.

Board members serve two-year terms, and they elect a chair from amongst themselves (article 19(2), (3)).

4 PROBLEMS WITH THE LEGAL AID REGULATION AND CONFLICTS IN THE LEGAL AID COMMUNITY

4.1 'Independent' Legal Aid Board Lacks Independence

The Regulation suffers from a number of problems that undermine its legitimacy and that have led to conflicts within the legal aid community.

The original idea for the Legal Aid Board, according to the foreign reformers involved in its creation, was that it would be the financial hub that paid all legal aid providers – private lawyers, NGO providers and the Legal Aid Department – thereby coordinating Afghanistan's mixed legal aid system. The Legal Aid Board, in turn, was to be funded initially through foreign donors with the government eventually taking on full financial responsibility. The key to the Board performing this role effectively was for it to be independent of government.

When the Legal Aid Board was inaugurated, the then-Minister of Justice, Sarwar Danish, vouched for the Board's independence, stating, 'The MoJ, other than providing assistance and support, will not interfere in the affairs of the Board.'[28] Yet, as created by the Regulation, it more resembles the government-heavy defence lawyer associations created under previous defence advocate laws than an independent body.

First, the Ministry of Justice retains control over how legal aid is governed. Article 3 of the Regulation stipulates:

> Ministry of Justice with cooperation of Independent Board of Legal Aid shall regulate affairs related to legal aid for indigent persons throughout the country.

Further diluting independence, the Regulation places the Secretariat of the Legal Aid Board in the Legal Aid Department of the Ministry of Justice, and gives the latter the power to regulate 'other administrative affairs of the Independent Board of Legal Aid' (article 23).

Its membership mimics the government-heavy defence lawyer associations of the past. Of the seven members of the Legal Aid Board, four are civil servants (the representatives for the Law and Political Science Faculty of Kabul University, Sharia Faculty of Kabul University, Ministry of Women's Affairs and Legal Aid Department in the Ministry of Justice) and only two are required to have any professional experience providing defence or legal aid services (NGO and AIBA representatives), though the current representative of the Sharia Faculty – Din Mohammad Gran – happens to be a former legal aid attorney.

That the Regulation allows NGOs only one representative on the seven-member Board was a matter of contention as soon as it came into force. NGO legal aid providers contend that because they were and continue to be the main providers of legal aid services across the country they should have greater representation on the Legal Aid Board and, by extension, greater control over how legal aid is regulated.

Representatives of NGO legal aid providers tried but failed to have the then-Minister of Justice personally amend the Regulation to increase the number of NGO representatives on the Legal Aid Board. NGO representatives then brought their request directly to the Legal Aid Board in a meeting in August 2010, which the Board declined. As the Legal Aid Board has begun to take decisions unpopular with NGOs (described below), issues of its composition – and, ultimately, its independence – have become a central grievance undermining its perceived legitimacy within this key constituency.

The Regulation also does not confer on the Legal Aid Board legal personality – that is, legal status such as enjoyed by individuals or corporations – as was originally intended.[29] This omission affects the Legal Aid Board's independence in two ways. First, the Board does not have the legal capacity to enter

[28] Independent Legal Aid Board, 'General Report of Independent Legal Aid Board 2008–2011,' 25 June 2011, p 9.

[29] For contrast, see article 38 of the *Advocates Law* (see FN25).

into contracts with potential donors and thereby gain financial independence from the Ministry of Justice. In both common law and civil law, only legal persons (individuals or corporations) can enter into and be bound by contract. Despite its lack of legal personality, in December 2010 the Legal Aid Board opened a bank account at Kabul Bank and in May 2011 signed a memorandum of understanding with Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), a German corporation that has implemented a number of rule of law programs in Afghanistan, to receive both funding and technical assistance. Second, the precise nature of the Legal Aid Board's relationship to the Ministry of Justice is now unclear, leaving it susceptible to government interference.

4.2 Scope of the Legal Aid Regulation May Be Invalid

The legality of the Regulation's scope – and in particular the Legal Aid Board's power to govern non-governmental legal aid providers – is questionable.

The Regulation was enacted pursuant to article 3 of the Advocates Law which states that 'procedures for the operation, organization, duties, authorities, and other affairs related to legal aid providers' would be set out in regulation. The Advocates Law then defines 'legal aid provider' narrowly, as criminal defence advocates 'appointed by the Ministry of Justice.' Therefore, according to the limits set out in the Advocates Law, the Regulation can only apply where the Ministry of Justice has 'appointed' legal aid counsel.

NGO legal aid providers and private advocates licensed by the AIBA are not in any broad interpretation 'appointed' by the Ministry of Justice: they do not receive any funding from the ministry and the ministry exercises no control over how they distribute their services.

Making the scope of the Regulation valid, now, would involve significant changes to the status quo.

One way would be to have all legal aid directly appointed through the Ministry of Justice (for example, through the Legal Aid Department). This option would entail scrapping the mixed system, eliminating the Legal Aid Board and disbanding all legal aid NGOs – all of which would also raise serious concerns about the actual and perceived independence of legal aid providers.

The only other option to make the current scope of the Regulation lawful – making the Legal Aid Board function as originally intended by foreign reformers – would involve similarly stark changes.

First, because article 3(1) of the Advocates Law specifically makes the Ministry of Justice responsible for discharging the government's constitutional legal aid obligation, the Legal Aid Board cannot simply take up this responsibility; the Ministry of Justice would have to delegate its authority to the Legal Aid Board.

Second, because the Legal Aid Board lacks legal personality, as described above, it cannot legally receive funds. Therefore, the Regulation would need to be amended to make the Legal Aid Board a statutory body able to enter into contracts to receive foreign donations or government transfers.

Third, to fall within the sense of the word 'appoint', the Legal Aid Board would actually have to fund all legal aid services or at least those services that it deigns to regulate – as originally envisioned by reformers.

These options are not presented as viable solutions, and indeed both are unadvisable, but rather to highlight the difficulty of making the Regulation's scope lawful and the degree to which the Regulation's drafting is problematic.

4.3 Duplicative Licensing Requirement

The Regulation empowers the Legal Aid Board to accredit and cancel licenses of 'legal aid providing NGOs' (article 20(2)) and also to issue and cancel 'licenses (credential) for legal aid providers' (article 20(6)) – the latter referring to individual private lawyers licensed by the AIBA (article 15(1.1)).

These licensing requirements create two legal contradictions. First, they unduly – and perhaps illegally – impinge on the authority of the *Law on Non-Governmental Organizations* ('Law on NGOs') that grants the High Evaluation Commission jurisdiction to determine which NGOs may register and operate in Afghanistan.[30]

Second, they contradict the Advocates Law, which entitles a defence lawyer to practice (including providing legal aid services) once he or she becomes licensed by the AIBA. For private lawyers providing pro bono services, as they are required on a yearly basis under the Advocates Law, or who

[30] *Law on Non-Governmental Organizations*, Official Gazette 857 (6 July 2006).

are provided with a foreign grant to provide legal aid services,[31] the Regulation appears to require an additional license though they are already authorised to practice by the AIBA. As the Legal Aid Board is currently interpreting this rule, advocates who are employed by a legal aid NGO need not seek their own licenses from the Legal Aid Board once the NGO has obtained its license.

As a general legal principle, a regulation cannot derogate from the law under which it is promulgated or contradict any other law. If the Advocates Law entitles someone to practice once licensed by the AIBA, or if the Law on NGOs allows an organisation to begin working once its registration is approved, a regulation cannot lawfully state otherwise. As a result, the licensing requirement under the Regulation is likely illegal.

For these reasons, the Legal Aid Board's licensing power has been a continuing source of controversy for NGOs. In the first year and a half of its existence the Legal Aid Board met to discuss the issue of licensing no fewer than five times. In August 2010 – at the same meeting in which they were denied greater representation on the Legal Aid Board – several NGOs asked the Board to amend the Regulation to eliminate its power to license NGO legal aid providers. They were unsuccessful in this bid as well, further entrenching their opposition to the Legal Aid Board and its legitimacy.

By December 2010, two years after it was inaugurated, the Legal Aid Board began enforcing its licensing power under the Regulation. The result was that eleven NGO legal aid providers reluctantly paid the fees and sought their licenses from the Legal Aid Board in early 2011.[32] Some NGOs, however, have refused to seek their licenses from the Legal Aid Board on principle, instigating a potential showdown over what sanction the Legal Aid Board might institute against them. The director of one NGO that has refused to get a license stated defiantly, 'Let them ban me from providing criminal legal aid. Who will represent the accused people in Kandahar then?'[33]

Members of the Legal Aid Board are divided on how to deal with the remaining NGOs who have refused to comply with the licensing requirement. The current chair, however, signalled that he will not shy away from conflict, stating that while he is trying to cajole the remaining NGOs into obtaining licenses, those who do not comply will simply be 'dissolved.'

As of the date of the writing of this report, the Legal Aid Board has not taken any steps to dissolve the holdout NGOs. However, the threats of dissolution exemplify the confrontational nature of the relationship that some NGOs have with the Legal Aid Board, and the problematic nature of the duplicative licensing power provided under the Regulation.

4.4 Duplicative Disciplinary Requirement

The Regulation also clashes with the Advocates Law on the question of advocate discipline.

Defence lawyers, as a self-governing profession, are to be disciplined by the AIBA through mechanisms set out in the Advocates Law. However, the Legal Aid Board is given the duty of 'monitoring and evaluating performances and activities' of all legal aid providers, whether employed by the Legal Aid Department or NGOs (article 20(8)), and 'hearing received complaints' (article 20 (10)). While article 26(2) of the Regulation appears to leave discipline of NGO legal aid providers to 'related authorities' once the Board has found a failure to 'perform their duties in proper ways,' any deference to the primacy of the Advocates Law is eliminated by article 27, which states:

> If authorities stated in paragraph (1) of article 15 of this regulation do not perform their given duties in accordance with provisions of this regulation, Independent Board of Legal Aid shall have the right to terminate their agreements before the determined time period is ended.

Termination of an NGO's 'agreement' with the Legal Aid Board is akin to de-licensing, the ultimate discipline any regulatory body can take.

[31] This prospect is not speculative. Under a new legal aid initiative, the World Bank will begin paying private lawyers $100 for each *in absentia* case they finalize. This project is estimated to cost $200,000.

[32] Herat Legal Clinic; International Legal Foundation – Afghanistan; Humanitarian Aid for Women and Children of Afghanistan; Khurasan Legal Services Organization; Da Qanoon Ghushtonky; American Women Support Afghanistan; Women Social Services; Legal Aid Organization of Afghanistan; Women for Afghan Women; Justice for All; Norwegian Refugee Council.

[33] There are in fact two other NGOs currently providing legal aid services in Kandahar.

Again, due to the legal ambiguities created by the Regulation's duplicative licensing regime, it is unclear whether an NGO whose Legal Aid Board license has been terminated is otherwise entitled to provide legal aid services. Therefore, the conflict that is currently underway regarding the Legal Aid Board's power to license NGO members may similarly arise if it attempts to use its disciplinary powers.

It is worth mentioning that, to date, the AIBA's disciplinary mechanisms have been weak and the AIBA may in fact have no desire or political leverage to institute a robust disciplinary system.[34] Indeed, in expanding its reach and legitimacy, the AIBA must balance the need to discipline its members against attracting unlicensed advocates to join the bar. Having an overly harsh discipline mechanism would perversely punish those who comply with the Advocates Law and join the AIBA while rewarding unlicensed advocates for refusing to join.

As a result, Rohulla Qarizada – the current president of the AIBA – indicated he has no issue with the Legal Aid Board assuming disciplinary authority over legal aid lawyers who are also AIBA members, despite the fact that such a move by the Board appears to derogate the AIBA's exhaustive jurisdiction under the Advocates Law to discipline its members. It remains to be seen whether those AIBA members who may be affected by this forfeit of jurisdiction will feel the same way.

4.5 Problematic Decisions of the Legal Aid Board

The discord within the legal aid community goes beyond the legal problems raised by the Regulation. Two particular decisions made by the Legal Aid Board in 2011 demonstrate how this foreign-created institution has become a source of conflict over how legal aid should be managed in Afghanistan.

4.5.1 The Seven Case Limit

In a meeting held on 5 March 2011 the Legal Aid Board decided to limit legal aid advocates to acting on a maximum of seven cases at one time. The rule is expressed as a maximum of seven cases each month but practically means at any one time.
In that meeting, and without any prior warning, Zareef Alam Stanekzai (the AIBA representative and its current vice president) proposed that all legal aid providers be allowed to handle only four cases at a time.[35] Four cases happened to be the case quota for advocates working in the Legal Aid Department, though Legal Aid Department advocates paid by the World Bank were required to carry six cases at one time. By contrast, the largest NGOs require their advocates – and have committed to their donors – to handle between 10 to 15 'active cases' at one time, though their advocates may also be carrying additional cases that are inactive, such as those where only the judgment is pending, but which are still technically open. Najibullah Azizi, the NGO representative on the Legal Aid Board, balked at the four case proposal and, though he was against the imposition of any case limitations, attempted to negotiate for 10 cases. The Legal Aid Board ended up splitting the difference and settled on seven cases.

Certain members of the Legal Aid Board, retroactively, claim that their decision to limit the number of cases an advocate can work on was based on detainee interviews conducted at the Kabul Juvenile Detention Centre and the men's and women's sections of the Kabul pre-trial detention centre. In fact, only the visit to the Juvenile Detention Centre was undertaken before the seven-case decision was made and estimates by Legal Aid Board members of the number of juveniles they interviewed during their visit vary from one each (i.e., seven juveniles) to 25 to 80. It is unclear how many of the detainees interviewed were unhappy with their legal aid advocates, what dissatisfied them about the services they received; and whether their complaints were reasonable. The interviews were conducted only in Kabul, and judges, prosecutors and NGO advocates themselves were not consulted at any time to obtain a complete picture of the issue. There was no written report produced from these visits.

Further complicating the issue, the Legal Aid Board has failed to define what constitutes a 'case.' If a suspect under police investigation consults a legal aid lawyer and the lawyer resolves the issue without charges being brought, does this count as a case? What if all the work has been completed and the advocate is simply waiting for a decision to be issued by the judge? Should the definition include appeals when the same lawyer worked on the case at first instance?

[34] For an excellent analysis of the discipline mechanisms in the AIBA, please refer to Rebecca Gang, '*Seeing like a Law Reformer: A Case Study of the Afghan Independent Bar Association*' (2010, unpublished L.L.M. thesis).

[35] Interview with source, September 7, 2011.

It is certain that the number of accused persons receiving legal representation will simply drop if the seven-case rule is enforced. A single case could take more than a year to finalise, given how common appeals to the provincial courts of appeal and the Supreme Court are and how backlogged some courts are. A lawyer who before might have taken on a few new clients each month to meet the case targets set out by NGOs may now potentially be stuck with essentially the same seven clients for a year or longer.

Members of the Legal Aid Board who favour this decision cite it as a victory of quality over quantity. Both the Board's chair and AIBA representative explained their personal opinions that NGO lawyers simply take on too many cases at once, they do so to compete for foreign funding, there is 'corruption' in NGOs and the quality of the legal representation provided is therefore weak.

Representatives of every NGO interviewed for this paper disagreed with the seven-case rule. They complained that any legitimately researched issues of the quality of the services they provided should be addressed not by limiting how much work legal aid lawyers can take on, but by increasing their professional abilities through capacity building opportunities. Some characterised the seven-case limit as 'unconstitutional' because it reduces the number of indigent accused receiving legal aid, or as a pander by the AIBA to private lawyers who constitute the majority of its members, pointing out that the rule does not apply to private lawyers.

The Director of the Legal Aid Department, Asadullah Wahdat, indicated that his department would comply with the rule – that is, increase his advocates' case loads from four to seven. However, most NGO providers admitted that they have no intention of obeying the seven-case limit or are using creative accounting to get around compliance, again setting up a showdown between the Legal Aid Board and legal aid providing NGOs.

4.5.2 The $300 Indigence Threshold

In October 2011 the Legal Aid Board issued a decision defining an 'indigent' person as someone earning less than $300 a month.[36] In other words, anyone earning more than $300 a month technically will not be eligible for legal aid services. The $300 threshold applies equally in all provinces.

The attempt to ensure that only those who are actually indigent receive legal aid services is welcomed. However, again it appears that the Legal Aid Board did not study or debate the relevant issues, but rather made an abrupt decision. While Mr Azizi, the NGO representative on the Legal Aid Board, declined to reveal how he had voted on this issue, his displeasure with this development is evident. He reported that he asked the members of the Legal Aid Board to study the issue before introducing a monetary cut-off but that the matter was decided anyway.

A number of questions remain: Why was $300 determined as the threshold? How many potential clients will be turned away as a result of this rule, particularly in Kabul where incomes and the cost of living tend to be higher? For those who are turned away, will there be private legal services available for hire, especially given the paucity of private counsel in the provinces?

Although it is too early to know how this decision will play out, it is likely to have the same divisive effect as the seven-case limit. Already NGO representatives have complained that they were not consulted about this decision, raising the issue of whether they will adhere to this new rule and what the consequences will be if they do not.

5 CREATING THE LEGAL AID REGULATION: TOP-DOWN REFORM

5.1 Deciding Reform Was Necessary

The problems with the Regulation and conflicts within the legal aid community were the result of top-down reform processes adopted by the institutions leading the reforms.

Top-down approaches to legal reform in Afghanistan are not new. As Michael Hartmann and Agnieszka Klonowiecka-Milart observe:

> Laws are drafted and implementation planned by foreigners as if in a vacuum, inevitably setting the new law on a collision course with the old law, the legal culture and Afghan legal circumstances, creating mounting confusion and resentment among the Afghan professionals who are expected to implement it.[37]

[36] Interview with source, October 25, 2011.

[37] Michael E. Hartmann and Agnieszka Klonowiecka-Milart, 'Lost in Translation: Legal Transplants without

These observations equally apply with regard to legal aid reform.

In May 2005, the Afghan Government published Justice for All – a 12-year development framework for the rule of law sector intended to be incorporated into the Afghanistan National Development Strategy (ANDS).[38] While the drafting of Justice for All included representatives from the Ministry of Justice, Attorney General's Office and Supreme Court, it also included international actors and was deeply influenced by foreign experts. Creation of a national legal aid system was identified as a mandatory part of the Justice for All framework due to Afghanistan's new constitutional obligation to provide free legal assistance to criminally accused indigent persons.

Little was done on the issue until 2007, as the eventual release of the ANDS in March 2008 drew near.[39] It is noteworthy that at this time a legal aid working group already existed, to which the major NGOs belonged and through which legal aid activities were discussed and coordinated. Furthermore, as noted above, in 2007 there were only 19 government-employed legal aid advocates. However, the intention of international players was to create a formal system that involved the government so that it might honour its constitutional legal aid obligation. Therefore, the Rule of Law Working Group, comprised of national and international actors, agreed that a study on the options for a national legal aid system be commissioned. The International Development Law Organization (IDLO) agreed to produce the study of legal aid models and make recommendations to the Ministry of Justice.[40]

5.2 Foreign Models and Options for Legal Aid Delivery in Afghanistan

The report produced by IDLO was entitled Models and Options for Legal Aid Delivery in Afghanistan ('Models and Options Paper') and released in November 2007. The foreign consultant IDLO hired to draft the report had no prior work experience or expertise relating to Afghanistan. Some sources interviewed for this paper said he spent three weeks in Afghanistan to study the issues, other say six weeks, before IDLO tabled his recommendations.

The idea that Afghanistan needed an 'independent legal aid commission' to regulate legal aid originated in the Models and Options Paper. In making this recommendation, the author cited one study entitled *State Indigent Defense Commissions*.[41] This study, published in 2006, analysed legal aid models in the United States and had no direct application to the political, financial or developmental realities of Afghanistan. The Models and Options Paper included no analysis of whether the creation of such a commission in Afghanistan would be politically, financially or technically feasible.

The Models and Options Paper was also the root of the Legal Aid Board's monitoring power that was eventually included in the Regulation, recommending that an independent legal aid commission should 'act as an oversight body by monitoring the quality of legal aid programs and the services provided' and asserting that 'next to independence, [it is] one of the most critical roles of a legal aid commission.'[42] Although the author of the paper had a draft of the Advocates Law and referred to it, at no point did he acknowledge that his recommendation would clash with the AIBA's disciplinary powers or offer any analysis of how this apparent duplication could be managed or justified.

Despite the significant impact the Models and Options Paper was intended to have, and indeed did have, the author either did not consult Afghan legal aid lawyers or rejected their views. All but

Consensus-Based Adaptation', in *The Rule of Law in Afghanistan: Missing in Inaction,* Whit Mason (ed), (Cambridge, Cambridge University Press 2011), p 273.

[38] Government of the Islamic Republic of Afghanistan, Ministry of Justice, 'Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan' (May 2005), p 2. The ANDS is a national development strategy covering three sectors: security; governance, rule of law, and human rights; and economic and social development. It was published in March 2008.

[39] Legal aid eventually became a part of the official 2009–2013 National Action Plan that was published as part of the ANDS. One of the objectives identified in the National Action Plan was to 'consider options and costs of various models for legal aid delivery, and draw up recommendations for a legal aid system.' For an excellent review of rule of law reform policies, see Matteo Tondini, *Statebuilding and Justice Reform: Post-Conflict Reconstruction in Afghanistan* (New York, Routledge 2010).

[40] The paper was financed by the Canadian International Development Agency.

[41] Spangenberg Group, 'State Indigent Defense Commissions' (2006).

[42] Fox, 'Models and Options', p 68 (see FN17).

one of the NGO legal aid providers interviewed vaguely remembered meeting the author but insisted he asked them only for 'metrics' – the number of lawyers they employed, provinces they operated in and cases they handled. They said the author never asked them what mechanisms they thought should or could be created to establish a coordinated national legal aid system, whether the creation of a legal aid board in Afghanistan would assist or hinder them in their work, or what powers a legal aid board should have.

One NGO legal aid provider, whose recollection differed from the others, recalled meeting with the Models and Options Paper author with representatives of the other NGOs to discuss the issue of creating a legal aid board, though this person also noted that all the NGO members present were against the idea and that their recommendations were ignored.

The author of the Models and Options Paper could not be located for comment.

5.3 From Options to Regulation

The top-down approach used in drafting the Models and Options Paper was repeated in the course of drafting the Regulation. Around the time the Models and Options Paper was being drafted, the European Commission began its Justice Sector Reform Project (JSR Project), a portion of which included work on legal aid reform. The JSR Project took place in two phases. Phase I lasted from 29 June 2007 to 28 November 2008 and had a budget of about €2.3 million; Phase II lasted from 15 September 2009 to 20 June 2011 and had a budget of €2.5 million.[43] Adam Smith International (ASI) was contracted to implement both phases of the JSR Project.

ASI technical advisors, under contract to the European Commission, were intimately involved from the earliest stages in the drafting of the Regulation. The Terms of Reference for Phase II of the JSR Project included as one of its purposes 'institutional development with the Ministry of Justice, the independent Legal Aid Board and the MOJ legal aid department to carry out policy and legislation design.'[44]

ASI advisors started by converting many of the recommendations from the Models and Options Paper into the Afghanistan National Legal Aid Policy which in turn would 'be enshrined in a Legal Aid Act which will provide a framework for the national legal aid scheme.'[45]

The National Legal Aid Policy, among other things, sought 'the establishment of an independent statutory legal aid body' that would 'coordinate and monitor the provision of legal aid services'[46] and recommended that advocates not already licensed under the Advocates Law could become licensed by the legal aid body, thereby expanding the class of persons who could provide legal aid services.[47]

The Ministry of Justice duly endorsed the National Legal Aid Policy and ASI advisors began adapting it into a draft statute.

Despite the fact that it had already endorsed the National Legal Aid Policy, the Ministry of Justice made two fundamental changes to the draft statute that both increased the Ministry's influence over the Legal Aid Board and increased the Board's power over NGOs. First, the ministry changed the Legal Aid Board from being an independent statutory body to what it is now – an association without legal personality embedded within the Ministry of Justice. ASI advisors were so dismayed by this change that as late as December 2010 – approximately two and a half years after the Regulation came into force – ASI still hoped the Ministry of Justice would scrap the Legal Aid Board and replace it with 'a statutory body independent from the Minister of Justice' by whatever means it could – in a Presidential Decree, an Act of Parliament or an amendment to the Regulation.[48]

Second, the Ministry of Justice mutated the concept of 'accreditation' from the original intention, merely an administrative procedure by which advocates not already licensed by the AIBA could provide legal aid services, into the current licensing power that has so aggrieved NGO legal aid providers and appears to duplicate the licensing powers of the AIBA.

The exact extent to which NGO legal aid providers were included in the drafting of the Regulation is unclear. Whatever version or combination of the

[43] Email correspondence with EU official, September 2011 and March 2012.
[44] European Commission, 'Justice Sector Reform Project II', Annex II: Terms of Reference (2008), p 3.
[45] National Legal Aid Policy, (2008), p 3.
[46] National Legal Aid Policy, pp 2, 6 (see FN45).
[47] National Legal Aid Policy, p 4 (see FN45).
[48] Adam Smith International, 'EU JSRP Legal Note on LAB Obstacles' (December 2010), p 3.

following accounts is correct, the consensus appears to be that the views of NGO stakeholder were not adequately reflected in the Regulation.

Several representatives of legal aid NGOs said that they had no idea a regulation was in the works and were shocked when the final Regulation was delivered to them, *fait accompli*. Another legal aid provider stated that NGOs were included in many meetings about the creation of the Legal Aid Board but that their opinions (especially regarding the Board's member composition) were not included in the final version. A former ASI advisor involved in the process said that 'all major NGOs' were told there would be a Legal Aid Board, a concept, she added, 'which most of them still don't understand,' but that NGOs were not included in the drafting stages of the Regulation at the behest of the project's client – the Ministry of Justice.[49]

6 THE STRUGGLE TO CONTROL LEGAL AID

Inherent in the top-down reform efforts described above was the assumption that Afghanistan was a 'blank slate' onto which legal aid reforms could simply be grafted.

In fact, despite the common claim that Afghanistan has never had a culture of defence lawyers or legal aid, this country's modern history suggests that neither of these concepts is new. Afghan laws and practices pre-dating 2001 created a distinct identity for defence lawyers as separate from government legal providers, an identity that continues to exist today. Similarly, legal aid was not a foreign concept to Afghanistan. This pre-existing culture of defence lawyers and legal aid likely played a key role in the early success in establishing and expanding the defence bar and the availability of legal aid across the country post-2001.

Assumptions of a 'blank slate' would not always have a benign effect. While assuming that their reforms were value-neutral, in fact, reformers fundamentally disrupted the power distribution within the legal aid community as it existed at the time, imposing new winners and losers and exposing a latent conflict over who should control legal aid. While reformers did not see the danger in imposing the Legal Aid Board in a top-down fashion, one NGO legal aid provider recounted how he warned a foreign advisor involved in setting up the Legal Aid Board: 'You will create something that you can't control.' The advisor in question does not recall having this conversation but didn't rule out the possibility that it had occurred.

The reforms made the government a 'winner' by creating the opportunity for it to regain some control over legal aid NGOs and the foreign resources they commanded. Although the Ministry of Justice originally agreed, under the National Legal Aid Policy, to make the Legal Aid Board an independent institution, it reneged on its promise during the drafting of the Regulation and kept enough influence for itself under the Regulation, as described in section 4.1 above, to be able to leverage it in the future should the need arise. Indeed, the Ministry of Justice likely excluded NGOs from the drafting of the Regulation precisely in order to maximise its gains from during the reform process.

Similarly, the reform process gave the government the opportunity to scale back some of the autonomy it had awarded to the AIBA, by creating duplicative licensing and disciplinary powers under the Regulation. According to Rebecca Gang, a former advisor to the AIBA, that the government seized on this opportunity is no surprise:

> Given Afghanistan's background condition of foreign aid as a malleable resource and the prevalence of hierarchical patron-client politics, it is not out of the realm of possibility that while officials in the MoJ accepted the IBA's [International Bar Association] offer to build a bar association independent of government interference, they did so with the belief that they had plenty of tools through which to regain control over its operation and distributive potential.[50]

As a result of the reforms, the government, through the Legal Aid Board, can now exercise at least some control over how NGOs operate and potentially which NGOs are funded in the future. This change is consistent with the government's view that it should control legal aid by being the sole, or at least main, legal aid provider, with NGOs playing a secondary role, if any. In this light, the Legal Aid Board's seven-case limit can be seen not simply as a general attempt to frustrate NGOs, but a calculated step to reduce their overall caseloads vis-à-vis the number of cases taken on by the government.

[49] The deputy minister of justice of that time refused repeated interview requests.

[50] Gang, *Seeing like a Law Reformer*, p 72 (see FN34).

This desire for government control over legal aid distribution no doubt has been shaped by the fact that historically the government has tightly controlled legal aid as a resource to be distributed as a favour, thereby forging or strengthening personal ties. Because legal aid and many other government services have been provided directly by the government in the past, there is a strong bias to continue to rely on familiar – and personal – distribution mechanisms. However, the 'pro-government' group is also influenced by a grievance held not only by the government but by many Afghans that they do not have sufficient control over aid money or NGOs in Afghanistan. Indeed, the government's lack of control over aid money was a key issue at the 2010 Kabul Conference.

On the flip side, while the government was the 'winner' in the reform process, NGOs were the 'losers.' Prior to legal aid reforms NGO legal aid providers were essentially accountable only to themselves and their donors. They controlled not only the vast majority of the aid resources dedicated to legal aid across the country but also decided where new resources would be allocated and paid their employees more than government advocates. The Regulation, however, reduced NGOs' autonomy and subjected them to the control of the Legal Aid Board and, ultimately, to the Afghan state.

For those who support NGOs, the government does not have the necessary credibility to provide any legal aid services. Pro-NGO stakeholders believe the Legal Aid Department in the Ministry of Justice must be disbanded and only non-government actors should provide legal aid. One NGO provider stated that, while in some countries a ministry-run legal aid department might function independently, in Afghanistan it could not. He asked rhetorically: 'Would a lawyer from the Legal Aid Department defend a person accused of killing a minister's son?'

7 HOW TO MOVE FORWARD?

Reform efforts have been undertaken without sufficient stakeholder consultation and without any understanding of the history or politics that would influence the course of events. Inevitably, these reform efforts have deeply divided the legal aid community in Afghanistan and exacerbated pre-existing problems the Afghan government has had relating to its lack of control over the use of aid money and direction of foreign-funded NGOs.

Given this situation, stakeholders – including foreign donors – must answer some fundamental questions before deciding how to proceed with legal aid in Afghanistan.

7.1 Sustainability in Legal Aid

'Sustainability' is often invoked as the justification for the various legal aid and funding policies that currently exist. However, 'sustainability' is rarely explicitly defined.

For many, 'sustainability' implicitly means the ability of the Afghan government to fulfil its constitutional obligation to indigent accused. Yet, that the government currently does not have the human or financial capacity to provide legal aid services nationally is evident.

By its latest count, the Legal Aid Department in the Ministry of Justice employs just 69 lawyers (not including the 32 funded by the World Bank). Despite having World Bank funding to hire defence lawyers in Kandahar, and though three NGOs already operate legal aid offices there, the Legal Aid Department could not attract a single qualified advocate there and had to scrap plans for that office.[51] Similarly, the Legal Aid Department could not fill posts in Paktya, though one NGO has been able to open an office there. The government seems to lack the authority to provide services in certain insecure areas, while some NGOs may be able to operate there.

According to a figure from ASI, the Ministry of Justice allocated about $78,000 for its legal aid services, amounting to 0.15 per cent of its budget for the Afghan calendar year 1390 (2011–12).[52] It is unclear whether there would be support within the Afghan population or the state's powerbrokers to increase the state's financial commitment to legal aid beyond this meagre amount.

Even if the state were to suddenly pay for all legal aid services, the vast majority of that funding would still come from foreign aid. According to the World Bank, in 2010–11, foreign aid accounted for approximately 90 per cent of Afghanistan's gross domestic product.[53] Post-2014, the amount of foreign aid is likely to drop and there is no clear

[51] Gang, *Seeing like a Law Reformer* (see FN34).
[52] Adam Smith International, 'Opportunities in Afghan Legal Aid' (April 2011) p 8. The amount allocated for the Afghan year 1390 is 3,841,999 Afghanis, according to a source formerly with ASI.
[53] World Bank, 'Transition in Afghanistan: Looking Beyond 2014' (21 November 2011) pp 6, 9.

plan for how the Afghan government will bridge the shortfall. Why, asked one NGO provider, would anyone support an expansion of the Afghan government into legal aid when the government already cannot finance itself?

Given these circumstances, it must be acknowledged that the Afghan government will be unable to honour its constitutional obligations by 2014, or any time soon after.

This does not mean that NGOs alone can provide a sustainable solution. With the expected decline of foreign aid post-2014, NGOs will also likely be providing fewer services in fewer provinces. Furthermore, even if foreign-funded NGOs provide all necessary legal aid across the country the issue of government responsibility to provide this service remains.

Inevitably, post-2014, less legal aid will be available both by the government and NGOs. Given this scenario, how else might sustainability be defined?

While a need for free legal services will continue, there is room in Afghanistan for an expansion of paid legal services and it is important that legal aid not choke off a viable private sector. At least two NGOs have begun or plan to take on private work to sustain their legal aid activities. Furthermore, Afghanistan has a history of being able to support a consistent, if small, defence advocate community.

In addition, the AIBA may be able to increase the number of pro bono cases its members take on. Article 13(15) of the Advocates Law requires all defence lawyers to 'defend at least three criminal cases in each year, free of charge, upon confirmation of the Ministry of Justice'. This requirement is not fully enforced and indeed there are no firm guidelines on how to implement it effectively. However, the AIBA has been working on the issue, for example, by employing a clerk to delegate some pro bono cases to its members. If the AIBA were to fully enforce the rule, based on the AIBA's current membership of 1,250 advocates, members could take on 3,570 pro bono cases annually.

Even still, the demand for legal aid services will not likely be met post-2014 and therefore the question of sustainability must be answered in terms other than in numbers of legal aid providers or cases completed. Ultimately, the question of legal aid in Afghanistan will be an Afghan one and after foreign aid and technical advice has run out, the one asset left will be the defence lawyers themselves. Investing in meaningful capacity development for those advocates who, like the early legal aid providers, will improve how the justice system treats accused persons will provide the best assurance that a strong solution – while perhaps elusive now – can be created by Afghans in the future.

7.2 The Future of the Legal Aid Board

Any decisions on how to improve Afghanistan's legal aid system will require a decision on what to do with the Legal Aid Board.

From one perspective, the Legal Aid Board is a relatively new institution that may still prove useful. The mixed system of legal aid in Afghanistan is a reality and ideally a reliable mechanism would coordinate it. In their 2010 pilot study, ASI and GTZ (the latter now called GIZ) concluded that the Legal Aid Board had failed to perform its intended role in part because it lacked financial support. GIZ now provides the Board with modest financial and technical support for its administrative functions; the State Department-funded Justice Sector Support Program (JSSP) also provides technical support. These projects may yet yield positive results.

From another perspective, in the three years since its creation, the Legal Aid Board has not produced anything that has inspired trust in how it will govern in the future. For two years after its inauguration on 3 December 2008, its meetings were rare, sparsely attended – sometimes failing to meet quorum – and did not result in any significant decisions.[54]

Indeed, the Legal Aid Board only began to meet more frequently in October 2010, when GIZ began paying Legal Aid Board members $50 each time they met, as part of a three month pilot project.[55] In May 2011, sitting fees for Board members were continued pursuant to the MoU between the Legal Aid Board and GIZ, though inexplicably increased to 7,000 Afghanis – about $145 – for each meeting, up to a maximum of €10,000 (about $13,000). No doubt these outsized sitting fees have contributed to the increasingly common expectation in Afghanistan that all public service or even simply attendance at skills-development seminars should be handsomely remunerated. Not surprisingly, the

[54] ASI, 'Opportunities in Afghan Legal Aid', p 3 (see FN52).
[55] This pilot project was funded by GTZ and implemented by ASI. It lasted from October to December 2010.

Legal Aid Board began meeting about twice a month. The last of this stipend was paid out at a Board meeting that took place on 7 February 2012 and it remains to be seen whether GIZ will continue to fund its sitting fee and, if it does not, whether the Board members will continue to meet.

Given that NGOs still provide the bulk of legal aid services across the country, the Legal Aid Board's lack of legitimacy in the eyes of this constituency must also be considered. Opinions from NGOs on what should be done with the Board range from disbanding it entirely to ensuring it has greater NGO representation to putting it under the auspices of the AIBA. However, without some change to how the Legal Aid Board operates, NGOs are unlikely to begin accepting its legitimacy or submitting to its control now or in the future.

Whatever the answer, what must be avoided is another top-down approach – however well intentioned. Though some actors may favour eliminating the Legal Aid Board altogether, once created, an institution cannot simply be discarded, not least because the Legal Aid Board has entrenched interests in its own preservation: for more than a year the Board members received generous stipends just for meeting, and given the international interest in legal aid both it and the Ministry of Justice are poised to receive more foreign funding as long as it exists. Even if its sitting fee were permanently eliminated and its members stopped meeting, the Legal Aid Board would still exist in law and could, in theory, be manipulated as a control mechanism over legal aid providers when politically useful. The only way to eliminate the Legal Aid Board or even change its membership structure would be to repeal or amend the Regulation – a process that might at the same time bring more opportunistic changes that aggravate the situation if stakeholders have not reached a consensus, in advance, on how to proceed.

7.3 The Scattershot Approach to Legal Aid Funding

Consistent with the divergent views on how legal aid should be regulated, donor coordination in this field has been weak.

First, despite the fact that the Legal Aid Board was intended to coordinate all donors, its existence was not necessarily widely known among donors until recently. A former chief of party of an organisation facilitating a multi-million dollar American grant to a legal-aid NGO stated that he had never even heard of the Legal Aid Board until January 2011 and still does not have a clear understanding of what its role is.

Second, donors have demonstrated with their dollars that they do not broadly support the Legal Aid Board. Even the European Commission, which propelled the Regulation and the Legal Aid Board into existence through almost four years of activity, ended its engagement with the Board in June 2011. Due to a policy shift, the European Union (which replaced the European Commission) channels all its funding to the Afghanistan Reconstruction Trust Fund (ARTF), managed by the World Bank, and no longer funds bilateral projects.

The funding the Legal Aid Board does receive barely covers its own administrative costs, let alone the costs of funding the hundreds of legal aid providers across the country. The only organisations now supporting the Legal Aid Board are, as mentioned above, GIZ (with German funds) and JSSP (with American funds). GIZ's support is modest, totalling approximately $115,000 from mid-2011 to mid-2012 to pay for staff, office space and expenses and, of course, the members' sitting fees. The State Department, which funds JSSP, refused to provide any financial information reflecting its support to the Legal Aid Board, though its work is limited to technical assistance.

The World Bank from the beginning refused to support initiatives relating to the Legal Aid Board and even turned down a specific request from the European Union in 2008 to fund the Board's secretariat.[56] Instead, the World Bank initially focused on the expansion of the Legal Aid Department within the Ministry of Justice as part of its Afghanistan Justice Sector Reform Project ('AJSR Project'). Phase I of the AJSR Project, which began on 15 July 2008 and was scheduled to close on 30 December 2011, was allocated $27.75 million out of the ARTF.[57] Of this, $2.15 million was allocated for legal aid activities, including salaries, infrastructure and administrative costs, focussing on the Legal Aid Department within the Ministry of Justice.[58] The 32 lawyers the World Bank has funded to work within the Legal Aid Department

[56] ASI, 'EU JSRP Legal Note', p 8 (see FN48).
[57] World Bank, 'Aide-Memoire Afghanistan Justice Sector Reform Project' (Mid-Term Review Mission 10–31 October 2009) p 2.
[58] World Bank, 'Justice Sector Reform Project', pp 12–13 (see FN57).

through Phase I of the AJSR Project are being paid $550 a month, plus $50 for phone cards and transportation, though the lawyers paid by the state receive $180 a month and no additional compensation for transportation or communication. According to Mr Wahdat, the head of the Legal Aid Department, this salary discrepancy has led to conflicts and jealousies among colleagues.

In an apparent about-face from its earlier reluctance to fund the Legal Aid Board, however, the World Bank has now invited the Board to apply for funding for Phase II of the AJSR Project, which is to begin in June 2012. Whether such funding will be awarded and the effect such funding will have on the legal aid community remains to be seen.

The World Bank also began funding a new project, valued at $1,621,000, through which the Ministry of Justice has subcontracted one of the national legal aid NGOS – the International Legal Foundation Afghanistan (ILF) – to provide legal services where ILF already has an established presence.[59] According to a World Bank representative, the end game of the subcontracting is that ILF will 'merge' with the Ministry of Justice after an integration period – a precedent that has deeply worried the NGO community. The World Bank has not undertaken any study of how this merger will affect the broader legal aid community or the viability of legal aid in the long term, both with respect to the independence and quality of services provided. Instead, the World Bank has commissioned a 'road map to the integration of ILF to the MOJ,' which presupposes that this merger both should and shall go forward.[60]

What is clear, however, is that no donor has yet trusted the Legal Aid Board with funding to fulfil its original purpose: distribution of legal aid funding to providers.

Most donors have preferred to fund NGOs directly. NGOs have not only provided the majority of legal aid services since the end of the Taleban, but have been and continue to be the largest recipient of aid in the legal aid community, through bilateral foreign assistance and programs sponsored through various international and intergovernmental organisations.

Considering the current scattershot approach to legal aid, it is apparent that the reform process started in 2007 has finally unravelled. It is a good time for stakeholders – including donors – to study the issue again and see what solutions they can generate and what compromises they can accept to take a more sustainable approach to legal aid – in the broad sense of that term.

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[59] Interview with source, 12 July 2011.
[60] Email from Lubomira Zimanova Beardsley, World Bank Task Team Leader, 6 December 2011.

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The Afghanistan Analysts Network (AAN) is a non-profit, independent policy research organisation. It aims to bring together the knowledge and experience of a large number of experts to inform policy and increase the understanding of Afghan realities.

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