



Afghan Independent Bar Association

Important Information on the Afghan Independent Bar Association (AIBA)

The Advocates' Law, which was passed by the Parliament in November 2007 provides for an independent, non-governmental, independent Afghan Bar Association to be established to lead and regulate all activities of advocates.

Following that directive, the first General Assembly of the Afghan Independent Bar Association (AIBA) was held in late July 2008. Over 450 defense attorneys from all over Afghanistan came to participate in a four day conference, during which time the leadership of the AIBA was elected and the By-Laws were debated and adopted. The AIBA officially opened in September 2008, and began issuing licenses for defense attorneys according to the Advocates' Law and the AIBA By-Laws in October 2008. Since that time, over 400 advocates from across the country have become members of the AIBA. These defense attorneys have been screened for eligible under the relevant requirements and have committed to practicing law in an ethical way, according to the AIBA Code of Conduct. The Code of Conduct was finally approved in January of 2009, and has now been published and is ready for distribution to all defense attorneys, across the justice sector and within the international community.

This fact sheet aims to explain what the establishment of the Afghan Independent Bar Association means for Afghanistan.

First we will look at what a bar association is and the benefits it can bring to the legal profession and the public in general. We will then look in more detail at the Advocates' Law and its implications for the Afghan legal profession.

1 What is a Bar Association and what benefits can it bring to the legal profession?

1.1 What is a Bar Association?

The term 'Bar Association' means a self-governing professional association of lawyers which represents the interests of lawyers, and also promotes their continuing legal education and training, regulates entry into the profession, upholds professional standards and ethics, protects the interests of the public, and advocates for the rule of law and the independence of lawyers.

Bar Associations exist all over the world in Islamic and non-Islamic jurisdictions. For example, Bar Associations exist in Iran, Pakistan, Turkey and Malaysia, and their powers and duties are set out in law and include a role in accrediting, disciplining and training

lawyers. [In fact, the Advocates' Law is based on similar laws from other Islamic jurisdictions.]

It should be emphasised that Bar Associations are not law offices or legal aid providers. They are not voluntary organizations. If someone wants to practice as an advocate they are obliged to have met its entry requirements and to be registered and licensed by the Bar Association. Once a member of the Bar Association, advocates will have to pay a membership fee and act in accordance with its code of conduct and professional ethics. If they do not, the Bar Association will have the power to investigate, and where appropriate, penalise them.

We will have a look at the Advocates' Law and the powers of the independent Afghan Bar Association in further detail later, however, let us first look at the benefits Bar Associations can bring to the legal profession.

1.2 *Bar Associations as advocates of the rule of law and human rights*

According to its national and international legal obligations, Afghanistan is required to uphold the rule of law. The Preamble of the Constitution of Afghanistan provides 'for the creation of a civil society ... based on the rule of law, social justice and protection of human rights'. The rule of law presumes an active, independent legal profession. An independent legal profession is essential to protect fundamental rights, in particular the right to a fair trial, and to act as a counterbalance to other institutions.

The independence of the legal profession means not only that lawyers should be free from undue interference, but also that advocates are personally independent when they represent clients and are not criticised as though they were responsible for a client's alleged wrong doing.¹ These rights and principles are enshrined in the Constitution and criminal code of Afghanistan. It is the AIBA's task to ensure that the rights and obligations of defense attorneys are upheld according to the laws of Afghanistan.

In order to protect the independence of lawyers, the UN Basic Principles on the Role of Lawyers provides that 'lawyers shall be entitled to form and join self-governing professional associations ... the executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference'.

As a body representative of the whole legal profession, Bar Associations can speak out as a single, powerful voice to protect the independence of advocates and promote their interests. For example, where an advocate is illegitimately being prevented from undertaking his or her professional duties freely, it will be the role of the Bar Association to protect his or her interests.

¹ [Further, an independent judiciary cannot exist without the support of an active, independent legal profession. Unless lawyers are able to pursue their work without fear of reprisals, judges will not be able to decide matters before them on the basis of facts and in accordance with the law. Without an independent legal profession, illegal actions by public authorities cannot be effectively challenged. This includes situations where the independence of the Judiciary are not respected by the Executive, for example where public authorities do not comply with court orders or decisions given by a judge.]

Further, adequate protection of fundamental human rights requires effective access to legal services provided by an independent legal profession. International standards require that Bar Associations cooperate with Governments to ensure that everyone has effective access to legal services and that lawyers are able to counsel and assist their clients in accordance with the law and recognised professional standards and ethics.²

In many other jurisdictions, Bar Associations take an active role in the protection of human rights and fundamental freedoms through involvement in legal aid or pro bono activities; the establishment of specialised sub-Committees dealing with, for example, women and children's rights; and public education initiatives.

1.3 *The role of Bar Associations in upholding professional standards and ethics*

Professional associations of advocates have a vital role to play in upholding professional standards and ethics of their members, in order to facilitate the highest levels of competence and to protect the public. These professional standards for advocates in Afghanistan are enshrined in the AIBA's Code of Conduct, which all AIBA members commit to uphold upon receiving their license. Acting outside of this ethical code can subject an AIBA attorney to reprimand by the AIBA's Monitoring Board, and in extreme cases, by taking away that advocates' license.

For example, where an advocate is acting simultaneously for two or more parties with conflicting interests, or where the advice provided is not in the best interests of the client and is motivated instead by personal greed of the advocate concerned, it is frequently the task of a Bar Association to uphold the code of ethics by investigating and, where appropriate, penalising that lawyer.

Such measures help to restore public confidence in the legal system by illustrating that no-one is above the law and that lawyers themselves must abide by established ethical standards and procedures.

1.4 *The role of Bar Associations in conducting legal education for the profession and for the public*

Bar Associations play an essential role in providing legal training for both experienced lawyers and graduates wishing to enter the profession. This may include ensuring that only advocates who are properly qualified, and therefore competent to practise, enter the profession. Therefore Bar Associations often administer a post-graduate training course or Bar Exam for graduates wishing to enter the profession.

Bar Associations also play an important role in educating their members on changes in the legal system and latest developments in the law. This ensures that the knowledge of lawyers is up to date and, as a result, that the law will be administered fairly and effectively. It is also important that Bar Associations educate the public with respect to basic legal rights and the latest developments in the law.

1.5 *The need for an independent Bar Association in Afghanistan*

² UN Basic Principles on the Role of Lawyers, paragraph 26.

The establishment of a Bar Association is an important step in establishing a free and fair legal system. Afghanistan needs a Bar Association that is independent, promotes the professional interests of advocates, promotes training and continuing legal education for the profession, provides information on legal matters for the public, upholds and maintains professional standards and ethics, regulates entry into the profession and is an advocate for the rule of law and human rights to which all Afghans are entitled. It will therefore protect the public, as well as the members of the legal profession. This will restore public confidence in the law and in the work of advocates.

2 The Advocates' Law and what it means for the Afghan legal profession

Before we explain the Advocates' Law in more detail, we should first get a clearer idea of how the passing of the Advocates' Law brought about the creation of the Bar Association.

The Advocates' Law was passed in November 2007 and came into force in March 2008. With great assistance from the MoJ, the AIBA By-Laws and Code of Conduct were drafted and circulated to lawyers across Afghanistan for their comments in preparation for the AIBA's first General Assembly. The General Assembly was held at the end of July 2008, and was attended by over 400 lawyers from across Afghanistan, officials from the Government of Afghanistan, representatives from the justice sector from the national and international community.

The General Assembly resulted in the successful election of the five members of the Executive Board (President, Vice Presidents (2), Treasurer, Executive Director), members of the Leadership Council and Monitoring Board. During the Assembly, the By-Laws were also finalized and adopted, although not enough time remained for the passing of the Code of Conduct. (The Code of Conduct was adopted by the Leadership Council in January 2009.) The Executive Board, Leadership Council and Monitoring Board have been meeting regularly since their election to further the principles put forth at the General Assembly.

In the first year of the Bar Association's existence, it will be the job of the first President and Executive Board, in collaboration with national and international stakeholders, to develop the procedures of the Bar Association. This will include, for example, the registration and licensing administration, accreditation procedures and disciplinary mechanisms. The Bar Association will be based in Kabul while it is developing procedures and organizational structure, and then will move into the provinces when its capacity has been developed.

2.1 *How will the Bar Association be independent?*

The Advocates' Law clearly states in Article 4 that the Bar Association shall be an independent, non-governmental organization. However, how will the Association be independent in practice?

First, in order to be independent, Bar Associations must be self-regulating and elect their own leadership. Article 4 of the Law clearly states that the Associations' organization, procedures, membership criteria, code of conduct and other affairs related to the

Association shall be regulated by its By-Laws. The Law provides that these By-Laws have to be approved by the Association's General Assembly. Further, the Association's leadership will also be elected by its own members. Therefore it will be the Association that decides on its own rules and procedures and who its leaders shall be.

Second, according to Articles 6 and 8 of the Law it will be the Association that sets out certification and licensing requirements for lawyers. The Registry will be moved from the Ministry of Justice to the Bar Association, so advocates will no longer need permission from the Ministry to become an advocate.

Third, Chapter Five of the Law provides that any complaint against an advocate shall be submitted to the Bar Association and that it shall be the Association that investigates, and where appropriate, penalises the lawyer in question. Therefore, it will be the Association that disciplines its members according to its own code of conduct.

2.2 Is it compulsory for me to hold a license from the Bar Association if I want to practice as an advocate?

Article 6 sets out the entry requirements to practice as an advocate. This includes passing the Bar Association's training course and certification requirements which will be set out in its By-Laws. This will ensure that only advocates who are properly qualified, and therefore competent to practice, enter the profession. This will help strengthen the legal profession and foster public confidence in it. Article 8 provides that the Association will issue a license to those who have met the entry requirements set out in the Law.

Therefore you will be obliged to have met the accreditation requirements of the Association and be registered and licensed if you want to practice law in Afghanistan.

Note that judges, prosecutors and government employees will not be allowed to practice law as an advocate and be members of the Association. However, if you have worked for three years as a judge, a prosecutor or a Ministry of Justice official, and wish to practice as an advocate, you will not have to sit the Association's training course.

2.3 Who are the members of the Association now that the certification requirements and registration procedures have been developed?

The AIBA is now able to offer licensing and registration to eligible applicants. These procedures have been fully developed to ensure high standards and transparency.

Current members of the Bar Association are those who have registered with the AIBA and received their licenses, as well as those whose registration has not yet expired with the MoJ. Therefore, it is important to register with the AIBA if you are a new lawyer or when your MoJ license is expiring.

For purposes of future General Assemblies, all lawyers currently registered with the AIBA will be eligible for attendance.

2.4 What are my rights and duties under the Law?

Article 10 guarantees basic rights for advocates, for example the right to represent and defend clients in court, to participate in all phases of detection, investigation and trial, to access information and examine documents and to access and communicate confidentially with his/her client in detention.

Article 13 sets out certain professional duties, for example the duty to maintain client confidentiality, to practice law with honesty and sincerity, to respect the orders of the court and not to act for two parties in the same case.

Article 13 [(17)] importantly provides that advocates must defend the Association's Code of Conduct and carry out other duties in accordance with the By-Laws.

These rights and duties will ensure that the advocate is capable of carrying out his or her duties in an independent and professional manner when defending his or her client. The Bar Association will play a vital role in upholding professional standards and ethics of its members in order to facilitate the highest levels of competence and to protect the public.

Article 13[(15)] requires that advocates must take 5% of cases in each year as criminal cases free of charge, upon confirmation of the Ministry of Justice. Amongst Bar Associations around the world, this requirement will be unique to the independent Afghan Bar Association and was a result of the consultation process. It demonstrates the commitment of the Afghan legal community to improve access to justice for those who cannot afford an advocate. The procedure for the implementation of this will be dealt with in the By-Laws.

2.5 Who will pay for the Association?

The Law provides that members of the Association will have to pay a license fee, as well as a membership and a specified percentage of their annual revenue which will be approved by the General Assembly. The Association will also be able to receive income from sales of publications and fees for research and training programmes.

It is important for the Association to be self-financing so that it may be truly independent. However, until the Association is able to finance itself, in its early years it will be reliant to a certain extent on donations and support from the international donor community, as well as financial support from the government. In order to safeguard its independence self-accounting provisions will be set out in the Association's By-Laws.