**Portfolio Review Document**

**To:** Chris Stone

**From:** Abdul Basir Faizi

**Date:** March 31, 2015

**Re:** Rule of Law Portfolio

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1. Introduction

Rule of law is a primary challenge in Afghanistan, ranking along with security and corruption with which it is closely linked as the issues of most concern to Afghans. As a result, the rule of law portfolio has been part of the work of Open Society Afghanistan (OSA) since its inception in 2008. In the last two budget cycles, we have spent $828,277 on grants and a great deal of effort on advocacy and coordination. We hope this document will adequately map the history and current context in which OSA is working and OSA’s ambitions, approaches, and lessons learned. We hope that it can inform a discussion that will be both broad and philosophical as well as detailed and informative. Finally, we hope that this document and corresponding review will assist us in gaining greater insight into our work so we can take advantage of recent changes in the landscape and previously unavailable paths.

* 1. Background

Fourteen years ago there was no rule of law in Afghanistan, instead there was the rule of Mullah Omar, the leader of the Taliban. During the reign of the Taliban, citizens had no role in the legislation process. There was no constitution, and Mullah Omar could override any law or regulation if he pleased. Unsurprisingly, considering that state of affairs, the collapse of the Taliban regime and establishment of democratic institutions, led to immense progress in the development of rule of law and the strengthening of the justice sector.

Over the last thirteen years, Afghanistan has adopted a new constitution and hired and trained thousands of judges, prosecutors, and police. There has been a plethora of new codes, laws, and regulations enacted and decreed. A great deal of infrastructure such as new courthouses and offices for prosecutors and the Ministry of Justice has been built in the majority of districts across Afghanistan, and civil society participation has increased dramatically with the creation of institutions such as the Afghanistan Independent Bar Association (AIBA) and legal aid and rule of law advocacy NGOs.

Finally, the number of law schools has grown exponentially. Before, there were only two state law schools in the country, but now, there are dozens of private and state law schools. This increase has resulted not only assisted in the hiring of better qualified civil servants, but has also increased the number of licensed private attorneys from 70 during the time of the Taliban to 2500 today.

* 1. Challenges

Of course, huge challenges remain. Insecurity and corruption continue to be ubiquitous and lead the public to distrust the formal judicial institutions. The public’s legal awareness is low and there is lack legal empowerment. Most people do not know how to use the law or the justice system to protect or promote their rights. For these reasons, people often use the informal and extra-judicial conflict resolution mechanisms. However, the informal system of conflict resolution is often abusive to vulnerable groups such women and children, perpetuates human rights abuses, and is generally corrosive to the rule of law.

The capacity of the justice sector is still very low. Some judges and prosecutors lack even nominal legal education. Some have never even attended higher education institutions and have only been educated in religious schools. Even those legal professionals who have received formal higher education in law and/or Sharia suffer from serious deficiencies of capacity, because the legal education system is antiquated and in dire need of reform. To address this lack of capacity, rule of law development initiatives have concentrated on short-term (and repetitive) legal trainings, but these efforts have proven themselves to be ineffective to bring about fundamental or enduring progress and have created skepticism and resentment among legal professionals.

The defense bar continues to be weak. The number of licensed attorneys has increased dramatically, but is inadequate to meet the needs of a population of over thirty million. The role of defense lawyers in criminal justice and attorneys in civil litigation continues to be misunderstood, not only by the general public but also by many professionals and scholars.

* 1. Opportunities

In the last year, with the election of a new government, a number of new avenues have presented themselves to accelerate rule of law development in Afghanistan. In the past, the leadership of the Supreme Court, the Attorney General’s Office, the Ministry of Justice, the Ministry of Higher Education, and the heads of Kabul University’s Law and Sharia Departments often served as obstacles to reform rather than viable partners. The National Unity Government has prioritized judicial reform and anti-corruption in ways that the previous administration had not. There appears to be much greater political will to tackle antiquated structures and a culture of impunity. In parallel, the civil society community in the rule of law sector has matured and developed after experiencing a period of turbulence and crisis.

1. The Rule of Law Landscape

OSA’s work on the rule of law has taken place in a complicated landscape of donors and implementers fueled by the massive development aid funds that flooded into Afghanistan over the last decade. While complicated, the landscape was mostly static because of funding cycles, lack of baseline data and the Karzai government’s relationship with the donor community and international organizations. However, the complexity often hid the lack of innovation and resulted in competition among donors, a failure of coordination, and duplication.

* 1. Training and Education

Vast sums were spent on training judicial professionals, printing and disseminating codes texts, and reconstructing the physical infrastructure of the justice system. Comparatively, little was done in terms of supporting legal education, legal aid, and community legal empowerment. There is no question that law enforcement and justice officials need better training, but even those who received training often failed to apply it appropriately, because an uneducated and defenseless population could not hold them accountable. As a result, the Attorney General’s Office became one of the most corrupt institutions in Afghanistan feared both by the public and within the government itself.

While there is a large number of overlapping training initiatives, the most important work on training is being done by the European Union’s Police Mission in Afghanistan (EUPOL) and the International Development Law Organization (IDLO). EUPOL is tasked with training the Afghan National Police (ANP), and in the last three years, their curriculum increased its emphasis on constitutional rights and criminal procedure, specifically, right to counsel and the role of defense lawyers. IDLO, through a large grant from the Bureau of International Narcotics and Law Enforcement (INL), provides relatively long-term trainings (six weeks) to prosecutors, judges, and some defense lawyers. While IDLO has at least tried to incorporate critical thinking, issue spotting, and analysis into its trainings, it has not been very successful, and with the passage of a new Criminal Procedure Code (CPC) last year, focus has shifted back to teaching the letter of the law.

In general, short-term training topics have remained static and are only helpful to the newest legal professionals. While there has been some improvement in the last two years, implementers continue to teach the same basic laws and rights to bored participants who attend the sessions to collect per diem or new copies of legal codes. This is the case for judges, prosecutors, and defense lawyers (who now receive much of their short term training from AIBA through grants by UNDP and GIZ). These trainings are also too little too late in the education process and fail to stem the tide of undereducated and badly skilled lawyers entering the Afghan justice system.

In the last year, Global Rights, an important organization in the field of legal education in Afghanistan ceased to exist. It appears that the Asia Foundation (TAF) has taken over the INL grant that Global Rights was managing. The original grant included the continuation of a supplemental legal course that had been taught by Global Rights trainers for many years at several universities and an internship program with legal aid organizations. While popular with the universities, it is unclear whether TAF will continue the work of Global Rights or chart a new direction.

As described below, OSA’s success in bringing real change to the legal education system in Afghanistan through the legal clinic programs in Herat and Nangarhar is the kind of success other donors have not had in this area. While not as massive an undertaking as what other donors have taken on, the clinics and their acceptance by the Ministry of Higher Education will continue to have an impact on the capacity of legal professionals for the foreseeable future. Because of this and other factors, even with its relatively small budget, OSA can serve as a leader in the field of legal education reform.

* 1. Legal Aid and Legal Empowerment

There have been a number of initiatives on legal aid in Afghanistan. Initially, donors supported NGOs to provide services in specific provinces. This meant that the Italians paid for legal aid in Herat, the Germans for Kunduz, the British for Helmand, etc. The government often regarded these NGOs as bounty hunters and expressed frustration that they had lost control of a sector that they perceived was their responsibility.

In 2007, IDLO partnered with the Ministry of Justice to commission paper on Models and Options. While this evaluation was the first to substantively involve the government, it failed to include the opinions and concerns of the civil society community that had been providing most of the legal aid in Afghanistan. Among its recommendations was the establishment of an Independent Legal Aid Board (ILAB).

In 2008, the European Commission began its Justice Sector Reform Project. Adam Smith International was contracted to implement this project and used the Model and Options paper as a template to draft the National Legal Aid Policy (NLAP). However, the government ignored ASI experts’ advice and reduced the independence of the ILAB while increasing its powers to a licensing body rather than a coordinating and monitoring body. Ultimately these efforts did little to actually improve the legal aid sector coordination and donors continued to fund NGOs to provide legal aid services in particular provinces (Australians in Uruzgan, Americans in Nangarhar, Parwan, Kunar etc.). However, the ILAB still exists and has received support from GIZ and the World Bank.

Concurrently, the World Bank began using the Afghanistan Reconstruction Trust Fund (ARTF) to assist the Ministry of Justice’s Legal Aid Department (LAD) but made only limited progress as it tried to tackle a variety of issues at both the ministry and the department itself. It helped the LAD expand its offices and hire more lawyers, but progress was extremely slow due to the lack of capacity of the MoJ and LAD. It also tried to deal with the issue of rampant in-absentia trials using an ill-fated pay-per-case system open to individual lawyers that the MoJ implemented disastrously. Following this, the World Bank gave up on pay-per-case systems, but continues to fund the LAD, which now has offices and lawyers in nearly every province. However, the problems of the LAD persist, with LAD lawyers self-reporting that more than 75% of their cases are in-absentia.

In 2011-12, the International Legal Foundation (ILF) convinced the World Bank to attempt a different model. ILF initially suggested a model in which the government would contract for legal aid cases with the Ministry of Justice, who would in turn use ARTF funds to reimburse ILF for its work. The government, and later the World Bank, countered that ultimately, ILF-Afghanistan would need to merge with the government for this deal to go through. ILF agreed, but again Ministry of Justice balked and while the World Bank tried to push the project through, the Ministry held firm and cancelled endeavor. In the last year, ILF has rebuilt its relationship with the Ministry and is once again in discussions with the World Bank to reattempt their plan.

In 2012-13, the ministry expressed an interest in a pay-per-case model open to all lawyers that it would administer. The World Bank, following its previous experience, and based on research into these systems, did not want to fund such a program. UNDP’s Justice and Human Rights in Afghanistan Unit (JHRA) decided to pilot this model. An MOU was signed in 2012 between the ministry, AIBA, and UNDP to create a Legal Aid Grant Facility (LAGF). However, unlike what the MoJ expected, UNDP determined that the AIBA should administer the LAGF. The World Bank, INL and many other donors have been extremely skeptical about the success of the project. The pilot project is currently ongoing in four provinces with varying progress.

Finally, IDLO recently engaged the legal aid community in an attempt to create a National Legal Aid Network. This effort is very new and little has been accomplished, but there is already resistance from the ILAB, which considers itself the rightful coordinator of legal aid.

There are a number of organizations that have been interested in developing paralegal services in Afghanistan, but usually focused on legal aid delivery for women. This includes UNWOMEN who support legal support centers run by Humanitarian Assistance for Women and Children of Afghanistan (HAWCA) in several provinces. Cordaid has also explored provision of legal services through paralegals to women, though it is unclear whether they will support any specific project. INL funds several organizations that run women’s shelters where paralegal services are provided, such as the Afghan Women Skills Development Center (AWSDC). While USIP supported JFOA in a pilot project to deliver access to justice to rural women using legal aid lawyers and paralegals, it stopped doing so last year because their data was inconclusive.

Generally, on legal aid and legal empowerment, OSA changed direction and focus two years ago because of the crowded donor field. However, the lack of progress in these fields by the larger donors shows that the problem is not resources but the dearth of innovative ideas, coordination, and expertise. These are areas that OSA could assist in to help Afghanistan make progress in this field.

1. Ambitions and Approaches

From the beginning, our ambition has been to empower and inform the general population on the rule of law and to promote the creation of a cadre of well-trained justice workers. We believed that these objectives are closely interrelated because greater awareness would drive up demand for better legal professionals, and higher capacity professionals will lead to greater awareness and empowerment. We hypothesized that awareness can be improved through informational campaigns led by NGOs and that empowerment can be achieved through the provision of legal aid. We further hypothesized that legal clinics would provide practical experience to students and that this would make them better professionals. We believed that once exposed to this type of practical training, educational authorities (and other partners and donors) would recognize its worth and embrace this approach.

In the last two years, advocacy initiatives on transitional justice and detainee treatment that had initially envisioned as part of the human rights portfolio were transferred to the rule of law portfolio. We believed that OSA could facilitate collaboration and coordinate rule of law focused civil society and that it would support our objective of creating a cadre of well-trained justice workers.

* 1. Strategy

Our strategies have reflected the above hypotheses with specific emphasis on assisting women. For the 2011-2012 strategy our priorities were presented in broad language:

* Increasing access to defense lawyers.
* Creating greater awareness among the population, particularly women.
* Supporting the institutionalization of the legal profession and better training in legal service delivery.

Our current strategic priorities are more specific:

* Promote a national cadre of paralegals – working with women and communities.
* Continue to support better-trained and educated legal professionals for more professional legal service delivery.
  1. Tools and Approaches
     1. Awareness and Empowerment

In the last two years, as a means of raising awareness and empowering the general population, OSA has worked with Da Qanoon Gushtunkay (DQG), Justice for All Organization (JFAO), Assistance to Defend Women Rights Organization (ADWRO), and Afghan Women Skills Development Center (AWSDC). The first two are primarily legal aid and legal advice providing organizations that are also very active in women’s rights. The latter two are primarily women’s rights organization, though they also provide legal aid and legal advice as part of their work. A great deal of the activities in these projects involved training of a variety of populations (local elders, school students, government workers, etc.) on constitutional rights and women’s legal issues. The constitutional rights covered in these trainings were the right to counsel, the right to silence, and the right to be free from arbitrary arrest and torture. Women’s issues involved topics such as forced marriages and inheritance rights. DQG also created and distributed a set of informational posters on these issues that were directed towards illiterate populations and were used in addition to the trainings to expand impact.

JFOA and AWSDC also trained some of literate and semiliterate community men and women on basic legal rights and judicial procedures to serve as volunteer paralegal providing basic legal advice or guidance to the women and marginalized in their communities. In an effort to create a more coordinated and structured effort in this area, OSA has been supporting JFOA since April 2014 to create a training manual for community paralegals. This manual for trainers will cover such topics such as basic rights of the accused, the types of cases that are appropriate for the formal justice system and those that are not, basic procedure, etc. Following the creation of a draft, JFOA will seek the input of other legal aid NGOs and AIBA.

Finally, OSA provides core support to JFOA, an organization that, in addition to the above, provides legal aid and legal advice in eight provinces. Much of JFOA’s work concentrates on advice for women facing family and personal status cases. In Kabul, the advice center is located inside the capital’s provincial government office complex, and lawyers primarily advise individuals on how to navigate the justice system. In the provinces, lawyers are much more likely to represent clients in court both for criminal and civil (family) cases.

* + 1. Education and Training for Legal Professionals

In 2007, Open Society’s Justice Initiative and OSA were the first to introduce legal clinics to Afghanistan. The clinics allow law and Sharia students to gain practical experience under the supervision of university professors and experienced lawyers. OSA has continued supporting clinical education since, and in the last two years, Universities in Herat and Nangarhar have been awarded $96,400 to maintain this program. However, both programs have been strongly encouraged to dramatically reduce their dependence on OSA and integrate the program into their regular budget or seek other sustainable funding sources. Indeed, the Ministry of Higher Education has agreed to incorporate clinical legal education in the formal curriculum of the law departments of all state universities.

OSA has a similarly long-standing relationship with AIBA. In 2008, OSA supported the International Bar Association in its efforts to facilitate the creation of an Afghan bar association, and pursuant to the 2007 Advocates Law, AIBA was established in 2008. It has since then become a pillar of civil society and a valuable resource in rule of law advocacy, and it covers nearly half of its core expense using revenue generated through membership fees.

In 2014, OSA began supporting AIBA’s internship program for young female lawyers. This program allows recently licensed female lawyers to intern with experienced women lawyers to gain practical skills. Following a short training course, interns spend a month accompanying experienced lawyers to courts, prosecution office and observe their interaction with clients and the judicial system. They then spend another three months based in the AIBA offices working on pro bono cases while being supervised by more experienced private attorneys.

* + 1. Advocacy and Coordination

OSA has been using working groups as vehicles for advocacy and coordination since its establishment. In essence, OSA serves as the secretariat of these working groups by chairing meetings, providing a neutral venue, keeping minutes, maintaining contacts, and by facilitating responsibility sharing. The rule of law program initially facilitated and coordinated the Rule of Law Working Group (RLWG). OSA’s human rights program facilitated the work of the Detention Working Group (DWG) and the Transitional Justice Coordination Group (TJCG). While at times successful in its advocacy goals, the RLWG was too general in its mission and slowly faded out of existence. However, following a shift of focus by the human rights program towards exclusively concentrating on women’s rights, responsibility for the DWG and the TJGC was transferred to the rule of law portfolio.

The DWG is made up of legal aid NGOs, AIBA, UNAMA’s Human Rights Unit, Afghanistan Independent Human Rights Commission, the ICRC, Human Rights Watch and other similar organizations. It was established in close collaboration with the Regional Policy Initiative (RPI) in 2009. Originally, the DWG focused on conflict detainees held by international forces and RPI facilitated advocacy not only within Afghanistan but also abroad. With the drawdown of international forces, the DWG has shifted its advocacy to cover conflict related detainees held by domestic forces as well as more general pre-trial detention issues.

The DWG has had a number of successes. Two years ago it played a role in convincing the Afghan government to forgo the creation of an administrative detention regime as it took over custody of conflict detainees from international forces. More recently the DWG met with President Ghani and made specific policy recommendations to address widespread use of torture by national security and law enforcement forces. Thanks to the specificity of the DWG’s recommendations, President Ghani showed remarkable interest and facilitated a meeting between the DWG and his National Security Counsel (NSC). When the government released its National Plan on Elimination of Torture, the DWG’s policy recommendations were specifically included. The NSC has asked for continued input from the DWG and pledged to include its members in future action plans and working committees on implementation of the National Plan.

The TJCG was established in 2009 and works to end impunity and make the war criminal accountable. It is made up of local organizations such as Afghanistan Human Rights and Democracy (AHRDO), Human Rights and Eradication of Violence Organization (HREVO), and, Afghanistan Independent Human Rights Commission, and Feminine Solidarity for Justice Organization (FSJO), and international organizations such as UNDP and HRW. The TJCG regularly authors press releases, holds press conferences, and meets with politicians to advocate against impunity. Last year, during the presidential campaign, the TJCG met with Ashraf Ghani and Abdullah Abdullah separately and gained their official commitment to accountability, work to end impunity, to protect human rights in the future and to address the war crimes of the past.

1. Surprises, Regrets, and Lessons Learned
   1. Surprises

Following five years of supporting legal clinics and trying to convince specific universities to include clinics in their curriculums, it was surprising that in 2013, the Higher Education Ministry decided to incorporate legal clinics in the formal curriculum of all law and political science and sharia law schools. The Ministry of Higher Education is to take the responsibility for financing the legal clinics. The government is already covering half the cost of the Herat University clinic, and it plans to cover the full cost soon. This decision was surprising because of how long and difficult the process of convincing the universities had seemed until, suddenly, this major milestone was reached and a decision was made for the whole country.

The decision came about because of our strategic engagement with the Herat University. In Herat, the administration had for years seen benefits of the clinic program and was eager to continue to the program. Our advice to them was that donor support was not a sustainable source of funding for the program, and that they should engage the Ministry of Higher Education. These administrators lobbied the Ministry of Higher Education and invited the Minister to visit the program, which led to them to incorporate the clinics into the national curriculum. In fact the Ministry allocated land on university grounds to build a specific office for the legal clinic. While we had advocated for this outcome, the speed with which it came about once the university committed to convince the ministry was unexpected.

We did not predict that the National Unity Government would put legal reform at the very top of its agenda. The new government has shown strong political will to bring legal reform and to hold law enforcement and judicial officials accountable. They have sought out the input of civil society experts on difficult positions and exposed themselves to criticism. Unlike the former government, the president himself and senior advisers have been very available to meet and discuss rule of law issues. Finally, this government has not abandoned the constructive commitments of their predecessors, but has instead decided to build on them. OSA has seized this opportunity and worked with its partners to engage the government productively. This has led to specific policy decisions and greater cooperation between civil society and the government on justice reform and such measures as the creation of the National Plan to Eliminate Torture.

Our prediction that donors would be able to begin spending greater resources on legal aid has not borne out. While donors such as the World Bank remain involved in the legal aid sector, they have not spent any additional funds as the elections and other political factors have made funding allocation difficult. Other donors such as INL have dramatically cut their funding on legal aid due to sustainability concerns. UNDP’s project on legal aid, which initially seemed quite large, turned out to have less than $300,000 for all of its elements. This has meant that caseload capacity of the legal aid sector has decreased greatly in the last two years and that OSA has not been able to assist in this important area.

* 1. Regrets

Nearly every one-off partnership in the field of rule of law has been somewhat of a disappointment. Such ad-hoc partnerships were a result of the call for proposals system. Without a long-term relationship it was challenging to monitor outcomes past the period of the grant. This made it difficult to measure the impact of these projects. In contrast, long-term investment in organizations has been much more gratifying, because it is evident when they have made improvements or progressed in the field, and the relationship allows for continuous monitoring, evaluation, and assessment.

There is also regret over support for short-term training of the general public on broad topics such as civil rights, women rights and children right. Gathering groups of people, no matter how large, into a room and teaching them about their rights is never as effective as mass media campaigns. In Afghanistan, there has been a great deal of success using radio to reach both urban and rural populations.

Following our experience with the Detention Working Group and the Transitional Justice Coordination Group, it became apparent that the Rule of Law Working Group had too broad of a work topic to energize its members. Without a specific goal, participation and membership ebbed until the working group no longer existed. Recently, UNAMA attempted to recreate the working group and similarly failed.

We worry that not enough groundwork was done before we funded JFAO to begin working on creating a cadre of paralegals. On the one hand, the project is ongoing and it is too early to judge how successful it will be. Assisting JFAO to become a better organization and the creation of a training manual for paralegals is not very controversial. On the other hand, a strategy to create a national cadre of paralegals is very ambitious, and it may have been wise to spend more time drawing on the resources within Open Society to analyze and evaluate how to create lasting consensus that such a strategy could work in Afghanistan. Our initial assumption was that we would create such consensus during the implementation of the strategy, but we have yet to do so. In preparation, we should have collected data on what different communities are willing to pay for in terms of legal services and what geographic regions would benefit from extremely low cost services. Finally, greater consultation with other donors to ensure that there will be resources to widen the reach of such a scheme should have occurred before this investment was made.

* 1. Successes

It is rare for the Ministry of Higher Education to make any real changes to the curriculum of law or Sharia departments. Even if they decide to do so, there is often a great deal of resistance by the faculties and administrations of universities to such changes. So, while it took some time, the Ministry’s decision to incorporate legal clinics into the national legal education scheme is a substantial and long lasting achievement. It also serves as an entry to discuss more dramatic changes to the legal education system in Afghanistan.

OSA’s core support to JFOA has helped an important legal aid provider become a much stronger organization. While the organization continues to struggle with regard to M&E and supervision, as a result of OSA support JFAO governance, management, and finance systems are remarkably improved.

Similarly, OSA’s support for AIBA has helped it become more financially independent over time and our internship program for young female lawyers, has helped AIBA explore new models of capacity building they had not considered before.

In collaboration with RPI, OSA’s work with the DWG has been very successful in tackling difficult issues surrounding detainee treatment in a country that is still in an ongoing conflict. The recent successes with the government of Afghanistan have been very encouraging and should be aggressively pursued.

The work of the TJCG has also been important in continuing to maintain a spotlight that is important to many Afghans. The commitment of the leadership of the National Unity Government to holding perpetrators accountable has allowed human rights organizations and victims’ families to demand accountability for war crimes.

* 1. Lessons Learned

The best, most cost effective tool to bring positive change is by using advocacy to influence policy and decision makers. Advocacy is very challenging work. It sometimes it takes a long time to see the result. Still, the financial resource required are generally lower and the impact can be substantial. However, advocacy topics should be specific and clear. Clearly, this lesson is not reflected in our strategy or our expenditures. Very little money has been spent on advocacy work. Of course, some concepts are so foreign that demonstration through pilots is necessary. However, it may be the case that a more cost effective approach would be to tackle issues that are well understood, but that require advocacy to get the ball rolling.

To promote a weak field or a new concept, there is a need to create cohesions among stakeholders and affected communities before starting to invest in it. While consensus may not be possible, greater cohesion will lead other donors to support the field or concept and reduce the risk of sudden collapse.

It is very important to have a long-term goal in mind and develop long-term partners to support our goal and strategy. Results take time to come about and even longer to be measurable.

Without awareness raising it is difficult to empower people to use the law and the legal system. However, short-term training on broad topics is not a good strategy to raise awareness of the public on their rights. Raising public legal awareness through media is a more sustainable strategy and easier to expand if proven successful.