

# CCBE contribution on the proposed European Convention on the Profession of Lawyer

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE works in close cooperation with the Council of Europe in a number of areas, notably through its membership of the Conference of International Non-Governmental Organisations, its observer status at the European Commission for the Efficiency of Justice (CEPEJ) and the Consultative Council of European Judges (CCJE), as well as at a number of committees and drafting groups related to the future of the Convention, migration, and freedom of expression.

The CCBE supports the work carried out by the Council of Europe on a European Convention on the profession of lawyer and welcomes the motion of 13 October 2016 signed by several members of the Parliamentary Assembly of the Council of Europe (PACE) inviting the Committee of Ministers to initiate work on the drafting of a European Convention on the profession of lawyer.

The CCBE considers that such an instrument is needed in order to respond to the attacks against the role of lawyers which have grown over the recent years, as highlighted in the motion for a resolution of 29 June 2017 tabled by several members of PACE on the principles and guarantees of advocates.

The present contribution sets out why a Convention is needed and the scope such an instrument should have.

## 1. Three key reasons why a Convention is needed

There are three central reasons why a Convention is needed:

First, lawyers play an essential role amongst professions as actors in the system of justice and so by their contribution to protecting the Rule of Law, ensuring access to justice for fellow citizens, and protecting fundamental rights and freedoms. For the same reason, the legal profession can come under considerable pressure from the executive and legislative powers, as well as sometimes the judiciary, and non-State actors. That is why a European Convention on the Profession of Lawyer is particularly needed.

Secondly, although there are various instruments exhorting the protection of the role of lawyers, notably including the [Recommendation No. R\(2000\)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer](#) (the Recommendation), the continuing attacks on the role of lawyers in the seventeen years since the Recommendation was adopted, which have accelerated recently show that the Recommendation has not been fully effective. Thus, only in the last 3 years, the CCBE itself has drawn attention to cases concerning attacks on lawyers or violations of lawyers' rights, for example see the main letters sent by the CCBE regarding the situation in Bosnia

Herzegovina<sup>1</sup>, Georgia<sup>2</sup> Moldova<sup>3</sup>, Ukraine<sup>4</sup>, Turkey<sup>5</sup> and Poland<sup>6</sup>. Binding obligations, rather than exhortations to best practice, are required to secure the protection of the independence of the legal profession and, through it, the Rule of Law.

Thirdly, although the European Convention on Human Rights (ECHR) protects various critical rights associated with the lawyers' role in maintaining the Rule of Law, and should continue to do so unamended, other rights, identified in the Recommendation, are outside the scope of the ECHR. They need a protection mechanism at European level too, albeit in a simpler, faster and more immediate form than the ECHR, which should not, of course be undermined.

It should also be noted that the proposed new Convention, like the Recommendation before it, will recognise obligations imposed on lawyers as well as their rights. This reflects the fact that the essential role of lawyers in the system of justice and the protection of the Rule of Law requires that members of the legal profession must maintain certain standards.

## 2. The Recommendation as the core of the scope of the Convention

The Recommendation is an excellent starting point for the proposed European Convention on the Profession of Lawyer. It is an international instrument which already commanded sufficient support in the Committee of Ministers of the Council of Europe in 2000 to be adopted as a Recommendation to the Governments of all Member States. Some of its provisions are effectively guaranteed at European level by the ECHR especially by Articles 6, 8 and 10: that should not change. Other provisions which serve to protect the Rule of Law have been shown by lawyers' experience over the intervening period to need reinforcement as binding obligations too, rather than merely a recommendation. The content of these rights has been further developed by the [CCBE Charter of Core Principles of the European legal profession of 24 November 2006](#), which should be reflected in the Convention.

The resulting Convention would be a further step towards the effective protection of the Rule of Law. Adopting a suitable enforcement procedure would serve to anchor the protection of these rights at a European level, just as the Convention will also reassert them in domestic law. The experience with the Recommendation shows that 'exhortation' is not enough. A rapid mechanism for enforcement at the European level is needed to supplement domestic compliance. Furthermore, this mechanism at the European level must not distract or detract from the protection under the ECHR and especially not duplicate or generate a problem for the ECtHR's examination of ECHR applications under Article 35(2)(b).

Furthermore, if the proposed Convention were an 'open' convention, open to ratification by non-Member States of the Council of Europe as well as members, the text could operate as a means to enlarge the territorial scope of the effective protection of the Rule of Law to other likeminded States. Progressively the range of the protection of the Rule of Law would be enlarged.

Therefore, the CCBE considers that the European Convention on the Profession of Lawyer should be closely modelled on the scope of the Recommendation. Those rights which are referred to in the Recommendation but which are already expressly covered by the terms of the ECHR as interpreted need not be repeated in the body of the Convention, but rather they could be referred to in the Preamble. The Convention could concentrate on giving concrete expression to the remaining rights in the Recommendation which contribute to the effective protection of the Rule of Law but which have not

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<sup>1</sup> Bosnia Herzegovina – violence against lawyers see [CCBE letter of March 2015](#), [CCBE Letter of February 2017](#), and [protection of the legal profession see CCBE letter of March 2017](#).

<sup>2</sup> Georgia - violence against lawyers/violations of rights of lawyers see [CCBE letter of May 2015](#); [CCBE letter of April 2017](#), right to a fair trial (see [CCBE letter of February 2017](#)).

<sup>3</sup> Moldova - see [CCBE letter of April 2015 \(representation in court proceedings\)](#), [CCBE letter of January 2017 \(violation of lawyers' rights\)](#).

<sup>4</sup> Ukraine - see [CCBE letter of March 2016 \(rights of audience\)](#), [April 2016 \(murder of lawyers\)](#), [CCBE letter of April 2016 \(violation of lawyers' rights\)](#), [CCBE letter of February 2017 \(administrative detention of lawyer\)](#), [CCBE letter of March 2017 \(murder of lawyers\)](#).

<sup>5</sup> [Joint statement by lawyers, judges and journalists on the ongoing crackdown on the rule of law in Turkey](#), 5 April 2017; [press release on the ongoing crackdown on the rule of law in Turkey](#), 12 December 2016; as well as several letters in support of arrested lawyers see CCBE website: <http://www.ccbe.eu/documents/defence-of-the-defenders/>

<sup>6</sup> Poland - [CCBE letter of July 2017 on adopted amendments to the Polish Act on the National Council of the Judiciary and the Act – Law on Common Courts Organisation](#)

previously been made into binding obligations. In addition, the Convention should include a rapid and practical enforcement machinery, allowing oversight of compliance with these additional rights at a European level.

There are three key issues that require particular attention when transposing the Recommendation into a binding Convention. These are:

- a. The scope and protection of professional privilege; and
- b. The scope of who is 'a lawyer' and so will benefit from the protection of the rights under the proposed Convention
- c. The role and protection of professional bodies (as distinct from associations) as referred to in Principle V of the Recommendation.

### **3. The proposed content of the Convention**

Accordingly, it is proposed that the European Convention on the Profession of Lawyer should be based mainly on the content of the Principles which are currently included in the Council of Europe Recommendation No. R(2000)21, see the following principles which are either directly quoting Principles of the Recommendation or further clarifying these:

#### **A. General principles on the freedom of exercise of the profession of lawyer (from principle I of the Recommendation)**

1. Professional secrecy, intrinsically linked with the exercise of the profession of lawyer, must be guaranteed.
2. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.
3. Decisions concerning the authorisation to practice as a lawyer or to accede to this profession should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority.
4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.
5. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship.

#### **B. Role and duty of lawyers (from Principle III of the Recommendation)**

1. Bar associations or other professional bodies should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly.
2. Professional secrecy should be respected by lawyers in accordance with international laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions.
3. The duties of lawyers towards their clients should include:
  - a. advising them on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs;
  - b. endeavouring to resolve a case amicably;
  - c. taking legal action to protect, respect and enforce the rights and interests of their clients;
  - d. avoiding conflicts of interest

4. Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic and international legal and other rules and professional standards. Any abstention by lawyers from their professional activities should avoid damage to the interests of clients or others who require their services.

**C. Professional bodies (from Principle V of the Recommendation)**

1. Bar associations or other professional bodies should be self-regulatory bodies, independent of the authorities and the public.
2. Membership in such a Bar association or professional body is compulsory.
3. Lawyers should be allowed and encouraged to form and join professional local, national and international bodies which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.
4. The role of Bar associations or other professional bodies in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.

**D. Access for all persons to lawyers (from Principle IV of the Recommendation)**

1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.
2. Governments of member States should, where appropriate, ensure effective legal assistance by lawyers to vulnerable persons, those in an economically weak position, and persons deprived of their liberty.
3. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from by public funds.

**E. Legal education, training and entry into the legal profession (from Principle II of the Recommendation)**

1. Legal education, entry into and continued exercise of the legal profession should not be denied on discriminatory grounds such as sex or sexual preference, race, colour, religion, political or other opinion, ethnic or social origin, membership of a national minority, property, birth or physical disability.
2. All necessary measures should be taken in order to ensure a high standard of legal training and integrity as a prerequisite for entry into the profession and to provide for the continuing education of lawyers.

**F. Disciplinary proceedings (from Principle VI of the Recommendation)**

1. Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other professional bodies or by legislation, appropriate measures should be taken, including disciplinary proceedings.
2. Bar associations or other professional bodies should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.
3. Disciplinary proceedings should be conducted with full respect of the principles and rules laid down in the European Convention on Human Rights, and the CCBE recommendations on disciplinary process for the legal profession (2007), including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.
4. The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.

As these principles are based on the 'Principles' in the Recommendation, their terms will have to be converted to impose obligations on the State authorities.

#### **4. Avoiding duplication: rights already protected by the ECHR need not be duplicated in the new Convention**

The Recommendation is more comprehensive than the Convention need be, because certain of the rights in the Recommendation are already protected by the binding provisions of the ECHR. These rights do not need to be duplicated, but equally the Convention should not ignore them.

The CCBE therefore considers that the following Principles set out in the Recommendation need not be transposed into the Convention. Instead, these Principles and their existing binding character under the ECHR as interpreted by the European Court of Human Rights should be expressly reiterated and underlined in the Preamble to the Convention.

In addition, certain of the Principles in the Recommendation reflect obligations on national and local bar associations which it would not necessarily be appropriate to translate into obligations on the State authorities. These exclusions are also noted below.

##### **Principles in the Recommendation to be included in the Preamble:**

- Principle I, paras:
  - 3 reflected already in ECHR Articles 9, 10, 11 and Protocol 4, Article 2,
  - 5 reflected already in ECHR Articles 6(3)(a) to (c),
  - 7 reflected already in ECHR Articles 6(1) and 6(3)(b) and (c), and
  - 8 reflected already in ECHR Articles 6(1), 6(3)(c) and 14.
- Principle V, paras:
  - 4 reflected already in ECHR Article 6(1) as far as it is appropriate to place an obligation on the State to supervise the activities of bar associations and other professional bodies;
  - 5 since the substantive rights at issue are protected in ECHR Articles 5, 6, 8, 10 and Article 1 of Protocol No 1 which is as far as it is appropriate to place an obligation on the State to supervise the activities of bar associations and other professional lawyers' associations.

#### **5. Binding obligations need an enforcement machinery**

The limited success of the Recommendation in ensuring the effective protection of lawyers' rights reveals the need for binding commitments. Apart from the obligations which are protected through the ECHR, additional and binding provisions are needed to protect lawyers performing their duty to represent their clients effectively and independently, to protect their rights, and to uphold the Rule of Law which the European Convention on the Profession of Lawyer should contain.

Given that the standards in question are neither controversial nor complex, the Convention should include a rapid, public and simple follow up mechanism, relying on publicity and promptly pinpointing pinch points. The Convention should draw on existing institutional structures in the Council of Europe. This approach would be cost effective and speedy, both in setting up and maintaining the protection system which the limitations of the effectiveness of the Recommendation show to be necessary.

#### **6. The European enforcement machinery: prompt, simple and responsive**

The protection machinery of the ECHR is exemplary, but unsuited to duplication. Considerations of cost and speed argue for a faster and more politically orientated response, coupled with a regular system of national reporting to a standing committee of experts which would become a repository of best practice as well as a mechanism for systematic and regular scrutiny.

Accordingly, two complementary strands are proposed for the European enforcement machinery:

- First, the use of petitions to PACE raising unresolved national issues, where the protection required by the new Convention is apparently lacking and

- Secondly an annual reporting system to a committee of experts appointed by the Committee of Ministers to track national responses to critical issues.

This twin enforcement machinery is intended to be simple, public and rapid. It would expressly avoid duplication with the European Court of Human Rights, because it would deal with the core Rule of Law rights for lawyers which are not included in the ECHR. In that respect, it would be complementary to the existing ECHR protection.

This twin enforcement approach would exploit the basic structure of the existing petition system to PACE under Rule 67 of its Rules of Procedure, which is public and rapid; its speed would be enhanced by the regular existing pattern of PACE's meetings, without imposing additional complexity or cost. In the light of the importance of the rights at stake, it would be appropriate to envisage a designated Committee to consider the petitions concerning restrictions on lawyers which were affecting the rights protected by the new Convention and their impact on the Rule of Law.

These are issues which are well suited to the 'disinfectant effect' of publicity. If rights underpinning the Rule of Law are being restricted at a national level a rapid and public means of exposing these problems is a potentially effective means of enforcement. Furthermore, the unique environment of PACE, with its composition of national parliamentarians, should enable a rapid response to petitions so that the underlying concerns could be addressed both by publicity at the European level and at their national source. In addition, a PACE Committee would be able to keep criticisms under review, while rejecting complaints which did not merit further scrutiny at the European level, in accordance with pre-established criteria.

Unresolved petitions would be referred to the committee of experts for consideration together with the examination of annual national reports. In this way, the enforcement machinery would respect the subsidiary role for the protection of the Rule of Law rights for lawyers at the European level by emphasising the national resolution of petitions where possible. The primary protection of these Rule of Law rights depends upon their protection through domestic law, but the role both of petitions to PACE and of the measured scrutiny of annual reports by a committee of experts appointed by the Committee of Ministers would provide a safety valve and appropriate public scrutiny.

This approach would also identify areas of national practice which could benefit from input from other parts of the Council of Europe in providing expertise on best practice derived from the experience of other Member States. Thus, a European Convention on the Profession of Lawyer, coupled with this form of European enforcement mechanism, would be capable of contributing through shared experience to remedying shortcomings in the effective implementation of the Rule of Law at national level.

## **7. Conclusions**

It is submitted that there is a compelling case for a European Convention on the Profession of Lawyer to establish binding obligations in respect of those of the rights envisaged by the Recommendation which are not already reflected in the ECHR.

The inadequacy of the Recommendation lies not in its content, but in its lack of binding rules, which has led to a disappointing pattern of national failure to comply with the principles which the Recommendation set out.

The response which is needed is to convert those aspirations in the Recommendation into concrete obligations, coupled with a practical, rapid and public means of exposing deficiencies in national practice. This can be achieved by including those aspects of the Recommendation in a Convention with binding force, coupled with a twin track mechanism for their enforcement.

The enforcement mechanism needs to be rapid, simple and effective. Its two components are, first a petition system to a Committee of PACE, whose regular meetings and political engagement offer a potential means to resolve national problems at a European level. This ad hoc approach would be complemented by an annual reporting system to a committee of experts appointed by the Committee of Ministers of the Council of Europe which would receive and evaluate reports on State practice. The expertise and experience derived from the national reporting system would provide over time a collective pattern of best practice which could be deployed to resolve repetitive problems should they arise.

Finally, the proposal that the new Convention should be open to ratification by non-member States of the Council of Europe provides the opportunity for extending good practice in these vital areas of protecting the Rule of Law to other States, on the Mediterranean littoral and beyond.

A European Convention on the Profession of Lawyers is a long overdue project justifying the full support of the CCBE and endorsement by the Legal Affairs and Human Rights Committee of PACE, by the PACE and indeed by the Committee of Ministers of the Council of Europe.