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Stakeholder Submission to the Special Rapporteur on the Independence of Judges and Lawyers on the role, composition and functions of bar associations

October 2018

A report of the International Bar Association's Human Rights Institute

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The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. Through its global membership of individual lawyers, law firms, bar associations and law societies it influences the development of international law reform and shapes the future of the legal profession throughout the world.

The IBA's Human Rights Institute (IBAHRI), an autonomous and financially independent entity, works to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and legal profession worldwide.

Summary

In response to the call for information issued by the Special Rapporteur on the Independence of Judges and Lawyers (the 'Special Rapporteur'), the IBAHRI has provided the following information on the role, composition and functions of bar associations, with a view to informing the next report of the Special Rapporteur.

The existence of independent bar associations is crucial for the independence of the legal profession as their role is, inter alia, to: offer a strong governing structure and leadership; ensure accountability of the profession; promote the welfare of lawyers; protect and promote the role of the legal profession and protect its individual members; and ensure access to the profession for those who are suitably qualified.

The IBAHRI submission also highlights that bar associations serve as key mechanisms for the promotion of the rule of law, human rights and access to justice, as this is a fundamental function of the legal profession.

A bar association can only serve the independence of the legal profession if it is itself established by law as, and in practice is, independent and self-governing and enjoys financial sustainability. The premise that a bar association should be self-regulated and independent is established at international and regional levels and was reaffirmed in a number of national authoritative cases.

At the same time, the United Nations Basic Principles on the Role of Lawyers (the 'Basic Principles') provide, in several provisions, for cooperation between Bars and the government. Both have an obligation to work together to promote access to justice and human rights for the public,¹ as well as education and training for the profession.² In working together, Bars should exercise caution and ensure the right balance is reached so as not to compromise independence.³ As such, independence is always an issue of balance.

The Special Rapporteur interpreted Principles 24 and 25 of the Basic Principles as putting on the authorities 'the duty to support the establishment and work of professional associations of lawyers without interfering in these processes'.⁴ 'Although lawyers associations should not be State-controlled,

1 Basic Principle, Principle 3.

2 Basic Principle, Principle 9.

3 Nusrat Chagtai, *Benchmarking Bar Associations* (IBA 2016), 33.

4 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy' (2009) UN Doc A/64/181, para 21.

they should enjoy an official status in order to be able to carry out their work with the necessary impact'.⁵

The Special Rapporteur particularly emphasised that 'the central role in the establishment, the work and appointment of executive bodies of the legal profession need to remain with the lawyers'.⁶

It follows that:

- bars should never be in a position in which their existence depends on the whim of the state;
- the selection process for members of the executive must be democratic, ensuring the Bar's independence, as required by Principle 24;
- elections should take place regularly and the number of times members can be appointed should be limited;
- the executive body of a Bar must be free from interference – particularly from the state – to fulfil its role in upholding the rule of law. This prohibits the existence of a regulatory framework that is predominantly or exclusively made up of government-appointed members;
- the executive body must be representative of its membership, particularly in the case of federal states;
- the membership of the executive body must be pluralistic and not dependent on one political party;
- no measure can be taken that undermines the financial sustainability of the Bar; and
- all attacks on members of the Bar should be independently and promptly investigated and the perpetrators prosecuted.

Furthermore, a bar association is generally deemed to be independent when it is mostly free from external influence and can withstand pressure from external sources on matters such as the regulation of the profession, disbarment proceedings and the right of lawyers to join the association.⁷ One key factor of independence is that a Bar is able to set standards for professional practice. Controlling the standards of entry into, and exclusion from, the profession is a means to achieve this. There must be comprehensible, clear and transparent rules on admission to the Bar and disbarment. The admission and disciplinary bodies of the Bar must be able to discharge their functions independently with minimal executive interference.

The fact that there is external involvement in the regulatory scheme (eg, in the form of governmental regulation) does not necessarily threaten the independence of the profession, provided this does not have an impact on the ability of lawyers to carry out their professional duties in accordance with the rule of law.⁸ In assessing independence, one should thus examine both the legal and regulatory provisions in place and the actual impact they have on the ability of lawyers to carry out their duties

5 *Ibid*, para 23.

6 Para 26.

7 IBA, *The Independence of the Legal Profession. Threats to the bastion of a free and democratic society. A report by the IBA's Presidential Task Force on the Independence of the Legal Profession* (IBA 2016), 8.

8 *Ibid*, 9.

in an independent and impartial manner. In each instance, the balance between independence, integrity, confidentiality and the public interest has to be struck.

Bar associations shall therefore be established by law as independent and self-governing associations with the following priority functions:

- They shall regulate and discipline lawyers, including ensuring compliance with professional ethical standards. Regulation of the legal profession is essential to ensuring accountability.
- They shall serve as an impartial adviser to the government and state institutions where necessary, while ensuring they are apolitical at all times.⁹ An effective Bar must not only support individual lawyers, but must also provide a strong representative voice against broader action, particularly by governments or state institutions that affect the profession's ability to uphold the rule of law. Hence, bar associations must be able to represent the legal profession as a whole against threats to the proper administration of justice. Each Bar can represent the interests of the profession through advocacy in the form of press statements, written representations to professional bodies or *amicus* briefs in litigation.¹⁰
- They shall partner with the state in upholding and promoting the rule of law, including the independence of the judiciary and human rights. As well as acting as a check on state power, Bars shall work with the state to ensure that the rule of law and human rights are respected at all times. Activities include participating in, initiating or supporting legal reforms; undertaking advocacy in support of the rule of law; and formulating rule of law and human rights projects. Bars must prioritise their important function of providing assistance to the public.¹¹ This may be done through pro bono legal work, but can also be achieved through public interest cases, civic education projects and working with other organisations to provide access to justice to the public.¹²

The IBAHRI submission, along with the conclusions of the 2016 IBA Presidential Task Force on the Independence of the Legal Profession,¹³ exemplifies the following main threats to the independence of the Bar:

- legislative attempts by government to restrict the rights of lawyers to join independent non-governmental organisations (NGOs);
- legislative attempts by government to restrict the structure, aim and scope of permissible activities by NGOs or strip away the power of the profession to regulate itself (terrorism, the situation of refugees and asylum seekers, climate change, economic challenges, money laundering and corruption are examples of circumstances that influence the legislator);
- the existence of a regulatory framework that is predominantly or exclusively made up of government-appointed members; and

9 See n 3, 154.

10 *Ibid*, 92.

11 *Ibid*, 50.

12 *Ibid*.

13 Seen n 7.

- abusive application of the law not coherent with legislation mainly due to lack of independence of or within the judiciary, lack of competent institutions, lack of integrity and corruption.

In addition, interference in bar associations' functions often originates from a cumulative use of:¹⁴

- vague regulations on admission to the legal profession;
- vague regulations on disciplinary proceedings and disbarment;
- the lack of publicly available information on the process of disbarment and disciplinary proceedings;
- the lack of publicly available disciplinary orders;
- arbitrary disbarments or targeted disciplinary proceedings;
- negative political, societal and even media propaganda in times of war, terror and emergency;
- frequent public attacks against the executive of the Bars;
- negative public opinion of the legal profession, and a general tendency by the public to associate lawyers with their clients, corruption, dishonesty and greed; and
- lack of effective communication and collaboration between the media and legal profession, which could lead to misinformation about the role of lawyers in society, and consequently inaccurate reporting.

Information source

This report presents information compiled from IBA documentation,¹⁵ especially *Benchmarking Bar Associations* by Nusrat Chagtai, as well as updated information kindly sent by the Mexican Bar Association (Barra Mexicana, Colegio de Abogados, AC), the Columbian Chamber of Legal Services (Cámara de Servicios Legales of Colombia), the Flemish Bar Association (Orde van Vlaamse Balies), the German Bar Association (Deutscher Anwaltverein, DAV), the Law Society of British Columbia, the Law Association of Zambia, the Law Society of Northern Ireland, the Law Society of South Africa, the Lithuanian Bar Association, the Geneva Order of Advocates (Ordre des Avocats de Genève) and the Swedish Bar Association. The information received is available in the annex.

14 *Ibid.*

15 See n 3 and n 7. IBA, *Directory of Regulators of the Legal Profession* (2016). IBA and New Perimeter, *Understanding Bar Associations and their role and responsibilities* (2014).

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1 Definition

The term ‘bar association’ in the context of this report means a general professional organisation of lawyers in a given jurisdiction.¹⁶ This is broader than the meaning used in some jurisdictions. Specifically, jurisdictions that follow the British legal tradition have separate organisations for solicitors (law societies) and barristers (bar associations). The latter is an association exclusively for barristers (ie, lawyers authorised to argue before higher courts) and the former for solicitors (ie, lawyers who advise clients, represent them in the lower courts and prepare cases for barristers to try in higher courts). This paper refers to both as ‘bar associations’.

Bar associations vary widely across jurisdictions. No single model encompasses them all. Nevertheless, these associations tend to share certain characteristics regardless of jurisdiction or legal system. Independent bar associations are usually not-for-profit associations with a set mission, reflecting and promoting the goals set in the United Nations Basic Principles on the Role of Lawyers (the ‘Basic Principles’).¹⁷ The Basic Principles and the IBA Standards for the Independence of the Legal Profession¹⁸ (the ‘IBA Standards’) encapsulate the fundamentals for professional bar associations and the role of lawyers in society.

16 IBA and New Perimeter, *Understanding Bar Associations and their role and responsibilities* (2014), 4.

17 UN Office on Drugs and Crime, *Basic Principles* (1990).

18 IBA, *Standards for the Independence of the Legal Profession* (1990).

2 Legal standards

The Basic Principles, regional recommendations and IBA Standards presented here provide the fundamental framework for professional bar associations.

The 1990 Basic Principles provide that:

- Under Principle 23: ‘Lawyers like other citizens are entitled to association and assembly, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization.’
- Under Principle 24: ‘Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity...’

Recommendation (2000) 21 of the Council of Europe’s Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer states that:

- ‘Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers’ (Principle V, 1).

The 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that:

- ‘Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity’ (paragraph I, 1).

The 1990 IBA Standards provide that:

- ‘There shall be established in each jurisdiction one or more independent self-governing associations of lawyers recognised in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists’ (paragraph 17).

3 Role of Bars and the organisation of the legal profession

The Special Rapporteur on the Independence of Judges and Lawyers (the ‘Special Rapporteur’) has constantly emphasised the importance of an organised legal profession and the role of bar associations.¹⁹ The Special Rapporteur has highlighted that the foundation of an independent and self-regulated association is one of the most significant steps in a period of political transition.²⁰ This is why he has always recommended the establishment of an independent professional organisation as a priority in such contexts.²¹ Treaty bodies have also recommended that Member States take action in this regard.²²

In most jurisdictions, freedom of association protected by law or the constitution applies to lawyers, who are thus free to form or join any professional organisation. The ways in which lawyers assemble and associate vary among jurisdictions. In most jurisdictions, this is done through independent bar associations and, to a lesser degree, through other NGOs.

In the words of the then Special Rapporteur Leandro Despouy, ‘associations of lawyers are created for two main purposes: safeguarding the professional interests of lawyers and protecting and strengthening the integrity and independence of the legal profession’.²³ These two functions are referred to here as representative and regulatory functions, respectively.

A bar association can have representative and/or regulatory functions and this may vary greatly across jurisdictions, ranging from direct regulation of the profession and the practice of law to no regulatory power and strictly representative functions. Between these two extremes exists a wide variety of models, as shown in the following examples.

*Canada*²⁴

In Canada, the legal profession is organised in such a way that the regulatory and representative functions are separate. The Federation of Law Societies of Canada (FLSC) is the national coordinating body of Canada’s 14 provincial and territorial law societies, which regulate more than 100,000 lawyers and 4,000 Quebec notaries. Therefore, provincial and territorial law societies are members of the FLSC, while the national representative body for lawyers is the Canadian Bar Association (CBA), which has branches in each province. Membership of the CBA is not mandatory as lawyers are required to join their provincial law society or bar association. However, there are benefits to joining the national Bar, including receiving nationwide access to professional development, advocacy, publications and activities.

19 See A/HRC/4/25/Add.2, paras 43 and 89; E/CN.4/2003/65/Add.3, para 39; E/CN.4/2002/72/Add.1, para 98; and A/64/181, para 20.

20 *Ibid.* See A/HRC/11/41/Add.2, para 73.

21 See A/HRC/4/25/Add.2, paras 43 and 89.

22 See CAT/C/CR/30/1 and Corr1, para 7.

23 See n 4, para 20.

24 Example provided in n 3, 94.

*Switzerland*²⁵

In Switzerland, the representative and regulatory functions are also distinct. A mixed authority exists in every canton – three members of which are appointed by lawyers, three by the executive and three by legislative powers – and has regulatory power over the legal profession. In addition, private organisations exist that represent the profession, to which the registration is voluntary, for example, the Geneva Order of Advocates (l'Ordre des Avocats de Genève).

*Sweden*²⁶

In Sweden, the Swedish Bar Association (SBA) has regulatory and representative functions. It is a self-regulated body with both public administrative functions stated in law (the Swedish Code of Judicial Procedure) and representative functions (on behalf of its members (advocates)). Thus, the SBA can be characterised as an association under private law, bearing a number of characteristics of a public law body. The same applies, for instance, in Lithuania, where the Lithuanian Bar Association is a professional association of lawyers with the status of a public legal entity, representing the interests and supervising the activities of advocates and their assistants.

Germany

Some countries count a number of voluntary organisations in addition to regulatory organisations. This is the case in Germany, where voluntary organisations, such as the German Bar Association and the Republican Bar Association, coexist with regulatory bar associations.

Colombia

As in a number of countries in the Latin American region, the legal profession in Colombia is regulated by the judiciary. This may change as in 2015 constitutional reform provided that the disciplinary functions be assumed by a bar association upon the adoption of a new law. Meanwhile, in the present context, a number of voluntary lawyers' organisations exist and the Colombian Chamber of Legal Services (Cámara de Servicios Legales of Colombia), a union of 31 private law firms created in 2006, works on an enabling and effective framework for the development of the legal services market and promotes social values and social responsibility.

25 See Annex, response from the Geneva Order of Advocates.

26 See Annex, response from the Swedish Bar Association.

3.1 Protection of lawyers' professional interests

The freedom to associate through independent bar associations and organisations refers to the ability of lawyers to form or join organisations established with the aim of protecting the collective interest of the profession, educating, informing and bringing lawyers closer together. In most cases, freedom of association is recognised in general terms in the national constitution and is, as such, applicable to lawyers. It can be read together with the freedom to choose one's profession.

By exercising the right to free association through independent bar associations or other NGOs, the profession can engage more easily in collective action in the face of challenges to the basic tenets of their profession or to the rule of law.

Where the profession is unable to exercise its right to associate freely or where that right is restricted, lawyers risk finding themselves isolated and unable to act collectively to influence important matters that concern the profession, the rights of those they represent and the public as a whole. Lawyers become more vulnerable to abuse and risk losing their independence.²⁷

For example, where governments enact legislation aimed at curbing the proliferation of civil society actors, they also indirectly attack independent bar associations and other organisations, including NGOs where lawyers may be assembling or working.²⁸ Restrictions on the right to associate can affect funding opportunities available to bar associations and other NGOs. In addition, the existence of onerous laws and regulations that limit the purpose and context within which associations can be established, or laws imposing severe punishment on associations and other independent organisations, can deter lawyers from forming professional or other associations.²⁹

Among others, the Special Rapporteur has noted with deep concern the closure of such professional associations by the authorities as a trend.³⁰ He noted as a fact that professional associations operate in many countries under a continuing threat of immediate closure by the authorities. In Turkey, since the declaration of a state of emergency in 2016, 34 law societies or lawyers' associations³¹ have been shut down by decrees.³² All their assets have been confiscated without compensation. Chairmen, members of the board and ordinary members of law societies have also been prosecuted and sentenced to long-term imprisonment. This severely hampers the independence of the legal profession and could render it completely ineffective.³³

27 See n 7, 14 and fn 47.

28 *Ibid.*

29 *Ibid.*, fn 50.

30 See n 4 above, para 26.

31 Çağdaş Hukukçular Derneği, Konya Denge Hukukçular Derneği, Manisa Hukukçular Derneği, Samsun Güven Law, Mediation and Arbitration Association, Uşak Hukukçular Derneği, Aksaray Baran Hukukçular Derneği, Aydın Hukukçular Derneği, Ankara Hukuk and Hayat Derneği, Hukuk Adamları Birliği Derneği (Jurists Union Association), Hukuk Etik Siyaset Araştırmaları Derneği, Antalya Kural Hukukçular Birliği Derneği, Gaziantep Müdafaa Demokrasi and Hukuk Derneği, Adalet Okulu Derneği (Justice Academy Association), Mezopotamya Hukukçular Derneği, Özgürlükçü Hukukçular Derneği, Kocaeli Cihan Hukukçular Derneği, Balıkesir Hukukçular Derneği, İstanbul Nizam Hukukçular Derneği, Elazığ Hukuk and Hayat Derneği, Eskisehir Hukuksal Bakış Derneği, İstanbul Denge Hukuk and Düşünce Derneği, Mersin Ahenk Hukuk Derneği, Mizan Hukuk Derneği, Adana Nizam Hukukçular Derneği, Hatay Denge Hukuk Derneği, Boğaziçi Hukukçular Derneği, Isparta Hukukçular Derneği and Van Burç Hukuk Derneği.

32 Decree Nos 667, 677, 679, 689 and 694, codified by Law Nos 6749, 7083, 7084, 7088 and 7078. See IBAHRI, Challenges to the Independence of the Legal Profession under the State of Emergency in Turkey (2018), available at: www.ibanet.org/Article/NewDetail.aspx?ArticleUid=1a2be423-0c56-4a89-bc83-01134565d110 accessed 6 November 2018.

33 *Ibid.*

3.2 Regulation of the legal profession

The ‘regulation’ of the legal profession usually covers the different stages of the lawyer’s ‘life cycle’: admission, registration, conduct and discipline, and exit from the profession.

The 2016 IBA Directory of Regulators of the Legal Profession (the ‘IBA Directory’), covering 158 countries and 233 jurisdictions, showed that:³⁴

- Five main regulatory models can be identified,³⁵ where the legal profession is:
 1. largely regulated by court;
 2. exclusively regulated by a bar association: in those cases, such as in Slovakia and Northern Ireland,³⁶ the Bar is responsible for every stage of lawyers’ regulation and, in most cases, also acts as the main representative body for the profession;
 3. predominantly or exclusively regulated by the government;
 4. predominantly regulated by independent or delegated authorities;³⁷ or
 5. predominantly regulated on a mixed or shared basis by representatives of different organisations.³⁸

Regulators of the legal profession	Largely court-regulated	Exclusively Bar-regulated profession	Predominantly or exclusively government-regulated profession	Predominantly regulated by independent or delegated authorities	Predominantly regulated on a mixed or shared basis by representatives of different organisations
Countries	Mostly South America and the Caribbean, and some states in the US	Mostly Europe, and Francophone and Lusophone Africa	The Gulf and some countries in Central and East Asia (eg, China, Kyrgyzstan, Taiwan, Tajikistan and Vietnam)	For example, England and Wales, a number of US states, Canada, and parts of Australia	Parts of West Africa (the Gambia and Ghana) and in parts of the Caribbean (eg, Belize and Jamaica)

Table 1: Main regulatory models of the legal profession worldwide

³⁴ IBA, Directory of Regulators of the Legal Profession (2016), 13.

³⁵ *Ibid*, 12.

³⁶ See Annex, response from the Law Society of Northern Ireland.

³⁷ In this model, separate regulatory organisations are usually set up under the auspices of the ultimate statutory or constitutional authority responsible for lawyer regulation. The distinguishing feature of such authorities is usually their exclusive regulatory competence, separated from any representative interests of the practising profession. Eg, in many states in the United States, the ultimate authority is the State Supreme Court, but day-to-day regulatory authority has been delegated to professional regulators, and it is therefore worth distinguishing this from the model of court regulation that is largely about the maintenance of the registration list. In Canada, regulation is carried out by independent provincial and territorial law societies mandated by statute to regulate in the public interest.

³⁸ Characteristically, a ‘General Legal Council’ or similar is established to oversee the key stages of lawyer regulation and involves some combination of the Attorney-General, possibly Ministry of Justice, judiciary, bar association representatives and separately elected members of the profession.

- The regulatory functions are often broken down into different entities:³⁹
 - in 52 per cent of the jurisdictions considered, the same regulator is responsible for a lawyer’s admission, ongoing registration, conduct and discipline, and exit from the profession; and
 - in 48 per cent, different bodies are responsible for the different stages of regulation.
- Looking at all the jurisdictions considered, it was found that:⁴⁰
 - in 42 per cent of cases, the Bar is responsible for admitting lawyers to practise, either through national (32 per cent) or local (ten per cent) Bars;
 - in 60 per cent of cases, Bars are responsible for regulating lawyers in practice, either through national (52 per cent) or local (eight per cent) Bars;⁴¹ and
 - in 53 per cent of cases, Bars are responsible for disciplining lawyers, either through national (46 per cent) or local (seven per cent) Bars.

3.3 The Bar and the independence of the legal profession

A bar association can only serve the independence of the legal profession if it is itself established by law as, and in practice is, independent and self-governing and enjoys financial sustainability.

The premise that the bar association should be self-regulated and independent is established at international and regional levels,⁴² and was reaffirmed in a number of authoritative cases.⁴³

39 See n 35, 13.

40 *Ibid*, 13–14.

41 Regulation in practice is defined here as the promulgation and monitoring against a code of conduct, but may also include the renewal of practising certificates, the imposition and monitoring of continuous education or training requirements and professional indemnity insurance, and any oversight of anti-money laundering requirements imposed on lawyers. In many jurisdictions, however, there is little active monitoring of the legal profession post-admission.

42 Principle 24 of the Basic Principles states that: ‘the executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.’ Principle 25 of the Basic Principles stipulates that: ‘Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.’ Recommendation 21 (2000) provides that: ‘Bar associations or other professional lawyers’ associations should be self-governing bodies, independent of the authorities and the public’ (Principle V, 2). The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide: ‘The executive body of the professional association shall be elected by its members and shall exercise its functions without external interference’ (Principle I, 1). The 1990 IBA Standards state that: ‘There shall be established in each jurisdiction one or more independent self-governing associations of lawyers recognised in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists.’

43 *Attorney General et al v Law Society of British Columbia et al* (1982) 2 SCR 307, 335–336. In South Africa, in the matter of *S v Ntuli* 2003(4) 258 (W) para 3, the Western Cape High Court commented that: ‘An independent judiciary without an independent Bar would be akin to having frame without a picture.’ In *S v Yengeni* (A1079/03) [2005] ZAGPHC 117 (South Africa), the High Court commented that: ‘The untrammelled exercise of their powers in a spirit of professional independence is vital to the functioning of the legal system. The independence of the Judiciary is directly related to, and depends upon, the independence of the legal professions and of the National Director of Public Prosecutions. Undermining this freedom from outside influence would lead to the entire legal process, including the functioning of the Judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth.’ Czech Republic, Constitutional Court of 2 February 2017, ref no IV ÚS 3638/15. Lithuania, 09/06/2011 Constitutional Court ruling on the provision of the Real Property Register information for advocates. Lithuania, 07/01/2008 Constitutional Court ruling on compulsory membership in the Bailiffs Chamber of Lithuania.

At the same time the Basic Principles provide, in several provisions, for cooperation between Bars and the government. Both have an obligation to work together to promote access to justice and human rights for the public,⁴⁴ as well as education and training for the profession.⁴⁵ But in working together, Bars should exercise caution and ensure the right balance is reached so as not to compromise independence.⁴⁶ As such, independence is always an issue of balance.

The Special Rapporteur interpreted Principles 24 and 25 as putting on the authorities ‘the duty to support the establishment and work of professional associations of lawyers without interfering in these processes’.⁴⁷ ‘Although lawyers associations should not be State-controlled, they should enjoy an official status in order to be able to carry out their work with the necessary impact.’⁴⁸ The Special Rapporteur particularly emphasised that ‘the central role in the establishment, the work and appointment of executive bodies of the legal profession need to remain with the lawyers’.⁴⁹

A review of the relevant literature and survey data indicates that there is a correlation between self-regulation and independence.⁵⁰ A complete lack of self-regulation can have a negative impact on the independence of lawyers, especially in jurisdictions in which the stability and credibility of political institutions is under threat or where lawyers are subject to persecution by the government, as this increases the risk that the regulatory bodies in question will end up serving the state as opposed to serving their members.

44 Basic Principle, Principle 3.

45 Basic Principle, Principle 9.

46 See n 3, 33.

47 See n 4, para 21.

48 *Ibid*, para 23.

49 *Ibid*, para 26.

50 See n 7, 22. *Ibid*, fn 76: ‘For example, a 2011 IBAHRI report on Syria indicates that at the time the report was produced, there were widespread perceptions that the bar association structures, though formally subject to regular democratic charge, were neither independent nor truly representative of the Syrian legal profession. Several respondents told the IBAHRI delegation that the Baath Party dominated the respective councils of all bar associations by occupying about 60 per cent of posts in all of these bodies. The president of the central Bar and the branch associations had to be members of the Party. Many lawyers claimed that this meant that leaders were effectively appointed from above rather than elected from below. The government and Party retained great influence over the regulatory body in Syria. Under Article 7, the Ministry of Justice retains the power to supervise and inspect the Syrian Bar Association and its branches. Article 107 allows the cabinet to dissolve the national organisation and local affiliates at any time where it considers that there has been a deviation from their duties and goals. In line with this, the IBAHRI noted that rather than offering assistance to human rights lawyers persecuted by the government, the Syrian Bar Association had on many occasions used its power to institute disciplinary proceedings against lawyers. See IBAHRI, ‘Syria – Human Rights Lawyers and Defenders in Syria: A Watershed for the Rule of Law’ (2011), pp 6 and 32 www.ibanet.org/Article/Detail.aspx?ArticleUid=f31793c1-2fb7-449e-9f4e-6af14f332262 accessed 4 July 2018.’

4 Guaranteeing the independence of bar associations: an issue of balance

A bar association is generally deemed to be independent when it is mostly free from external influence and can withstand pressure from external sources on matters such as the regulation of the profession, disbarment proceedings and the right of lawyers to join the association.⁵¹

The fact that there is external involvement in the regulatory scheme (eg, in the form of governmental regulation) does not necessarily threaten the independence of the profession, *provided this does not have an impact on the ability of lawyers to carry out their professional duties in accordance with the rule of law*. In assessing independence, one should thus examine both *the legal and regulatory provisions* in place and the *actual impact* they have on the ability of lawyers to carry out their duties in an independent and impartial manner.

As established by the 2016 IBA Presidential Task Force on the Independence of the Legal Profession (the ‘IBA Task Force’), *a greater degree of independence is presumed when:*⁵²

- constitutional guarantees of judicial independence exist;
- the freedom to associate through independent bar associations and organisations is recognised and effectively protected;
- the bar association is established by law as independent, self-governing and free from direct ties with the government or other external entities;
- clear and transparent rules on admission to the Bar, disciplinary proceedings and disbarment are established by law; and
- legal professional privilege, professional secrecy – the scope of protection – and procedural guarantees are protected by law.

When there is some executive control over the regulatory process, the risk of infringements on lawyers’ professional independence is greater.

4.1 Establishment, composition and mission of bar associations

The way bar associations are set up and operate differs from jurisdiction to jurisdiction and the effect this has on the independence of the legal profession varies depending on the broader political and social context in a particular jurisdiction.

4.1.1 Establishing bar associations by law

The preamble to the Basic Principles requires that the role of lawyers be respected and taken into account by governments ‘[w]ithin the framework of their national legislation and practice and should

51 See n 7, 8.

52 See n 7, 8–9.

be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general’.

Interpreting Principles 24 and 25, the Special Rapporteur established that bar associations ‘should enjoy an official status in order to be able to carry out their work with the necessary impact’.⁵³

For a bar association to fulfil its role within society, the IBA Standards provide that it shall be established by law. Legal security ensures that its status, objectives and functions are clear to all.⁵⁴ Its recognition in law also ensures that its duties and responsibilities can be enforced if necessary. Many will also draft a constituent document, such as a constitution or charter, or deed of foundation, for instance, the Royal Charter of the Law Society of England and Wales.⁵⁵

In practice, in most jurisdictions, a Bar is established through primary legislation.⁵⁶ The IBA Directory shows a model of lawyers’ regulation set out in legislation in *63 per cent of jurisdictions*.⁵⁷

- Where the power to regulate resides exclusively with the Bar, this is universally enshrined in legislation. Bar associations with a regulatory component are generally established by statute or as adjuncts of the judicial branch.
- Bar organisations without a regulatory component are voluntarily incorporated by their members.

Bar associations should be organised with an eye to the unique needs of the local legal profession. Initially, this requires a decision as to whether the Bar should be a national association. This in turn means determining the relationship between the national Bar and any regional or local bar associations. It also requires determining whether and to what degree the Bar will directly regulate the profession, which may depend on the regulatory authority of regional or local bar associations.

The Special Rapporteur considers it preferable to establish a single professional association regulating the legal profession: ‘When forces are consolidated in one main association, it is easier to ensure the integrity of the entire profession and the quality of legal services, allowing the membership to effectively take part in discussions regarding the enhancement of the legal and judicial system and to achieve a desirable impact on other actors in the justice system. This does not, however, preclude the establishment of regional and local professional organizations working under one umbrella association.’⁵⁸

In Germany, all the bar associations together constitute the Federal Bar Association, which functions as the umbrella organisation of the bar associations, with regulatory powers. Likewise, in Italy, one national Bar serves as an umbrella organisation for local Bars.

A different model is the Law Society of South Africa (LSSA),⁵⁹ which is established in terms of South African common law as a voluntary association with no regulatory power and has a constitution as

53 *Ibid*, para 23.

54 See n 3, 26.

55 *Ibid*.

56 See Annex, responses from the Flemish Bar Association (Orde van Vlaamse Balies), the Law Society of British Columbia, the Law Association of Zambia, the Law Society of Northern Ireland, the Law Society of South Africa, the Geneva Order of Advocates and the Swedish Bar Association.

57 See n 35, 12.

58 See n 4, para 24.

59 See Annex, response from the Law Society of South Africa.

its founding document. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association, the National Association of Democratic Lawyers and the four statutory provincial law societies: the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Northern Provinces and the Law Society of the Free State.

4.1.2 *Ensuring self-governing and regulatory bar associations*

The right to self-governance in the legal profession 'is at the heart of the independence of the Bar'.⁶⁰

For the purpose of this report, self-regulation or self-governance means that the majority of individuals who promulgate the rules and regulations and investigate and make decisions about lawyers are also lawyers or legal professionals.⁶¹ The rationale behind self-regulation is that legal professionals are better equipped to understand and appreciate the complex challenges and issues faced by their colleagues on a daily basis. Moreover, a self-regulated profession ensures that lawyers have a say, whether direct or indirect, in the promulgation of the rules and regulations that govern the profession.⁶² At the same time, self-regulation safeguards the public's right to an independent legal profession and ensures that government control, whether direct or indirect, is eliminated or minimised to the greatest extent possible.⁶³

For a Bar to self-govern, it should be able to set its own rules and regulations, make its own decisions, free from influence, using clear and transparent structures and procedures, and represent its members' interests and sustain itself.⁶⁴ This entails the profession's right to set up bodies to oversee compliance with such regulations, through the power to admit, discipline and disbar. Self-regulation includes conditions for entering into the profession, rules of conduct, maintaining professional standards through continuing legal education (CLE), production and dissemination of a code of ethics, discipline of members and enforcement of entry into requirements.

State practice on the regulation of the profession varies depending on the jurisdiction in question. What works in one state may not work in another. A legal profession act is very often adopted by the state and that is systematically the case when the Bar has regulatory power.⁶⁵ Effective self-regulation or self-governance is, in most circumstances, delivered through a regulatory system that is able to regulate the profession independently with no or minimal external influence from third parties, such as private actors or the government.⁶⁶ It is, however, important to note that effective self-regulation can be achieved in many ways and, through the use of different regulatory arrangements, can vary from pure self-regulation to some form of co-regulatory arrangement.⁶⁷ Governments must strike a balance between complete self-regulation and complete governmental control, but the way governments tip the scale depends on a number of factors.⁶⁸

60 Gavin Mackenzie, 'Lawyer Discipline and the Independence of the Bar: Can Lawyers Still Govern Themselves?' (1990), 24 Gazette 319 at 320. See also Art 24, UN Basic Principles; Gabriela Knaul, Special Rapporteur on the Independence of Judges and Lawyers, Report on missions to Mozambique, UN Doc. A/HRC/17/30/Add.2 (2011).

61 See n 7, 20.

62 *Ibid*, 21.

63 *Ibid*.

64 See n 3, 20.

65 See n 35.

66 See n 7, 20.

67 *Ibid*.

68 *Ibid*, 21.

In practice, states tend to retain a mixed approach, where the direct involvement of the profession is retained while there is some form of state involvement through varying models of co-regulation.⁶⁹ This can help to alleviate concerns voiced by those who are sceptical of total self-regulation and contribute to the establishment of a more balanced regulatory system.⁷⁰ While some jurisdictions may allow for certain regulatory functions to be assigned to the judiciary or executive, these should be limited to avoid unnecessary interference in the legal profession. In each instance, however, the balance between independence, integrity, confidentiality and the public interest has to be struck.⁷¹

BRITISH COLUMBIA (CANADA)

The Law Society of British Columbia is the governing body of lawyers in the province of British Columbia. Its authority is set out in provincial legislation and therefore might be said to be ‘delegated’. The Law Society Rules are passed by the Benchers, the Law Society’s executive body, on the authority of the Legal Profession Act. These Rules are not subject to review or vetting by the executive or legislative branches of the provincial government.

GERMANY

In Germany, the Federal Bar Association is a corporation under public law and is subject to the state supervision of the Ministry of Justice and Consumer Protection. Such supervision is limited to ensuring compliance with the law. Resolutions passed by the executive body of the Federal Bar Association are reviewed by the Ministry. However, the review is limited to examining whether the resolution is compatible with higher-ranking law.

SWEDEN⁷²

In Sweden, it follows from the law (the Code of Judicial Procedure) that the Code of Professional Conduct is adopted by the Bar itself, and the Charter of the Bar is confirmed by the government, which gives it status of an ordinance. The activities of the Bar and advocates are supervised by the Chancellor of Justice, and decisions to disbar an advocate or refuse an applicant membership of the Bar can be appealed against directly at the Supreme Court.

69 *Ibid.*

70 *Ibid.*

71 See n 3, 100.

72 See Annex, response from the Swedish Bar Association.

Many Bars do not discipline their members themselves, but have another independent body responsible for this task. Where this is the case, the Bar's independence is not necessarily undermined, provided that the regulatory body is also truly independent and not in some way under the influence and control of the state.

The IBA has identified the following criteria for the independence of the Bar:

1. At the most basic level, Bars should not be in a position where their very existence depends on the whim of the state.
 - The Special Rapporteur several times criticised the existence of state-controlled associations with compulsory membership owing to the fact that such a stipulation seriously undermines the independence of lawyers.⁷³ He also underlined that associations of lawyers need to be independent from the executive branch.⁷⁴
 - In 2002, the Government of Ireland⁷⁵ attempted to introduce regulatory reform through the Legal Services Regulation Bill, which would have had the effect of undermining the legal profession's independence.⁷⁶ The Law Society of Ireland successfully challenged the bill through an international campaign on the basis that it represented 'a real and dangerous threat to the continued existence of an independent legal profession in Ireland, with incalculable consequences for such fundamental democratic principles as the separation of powers, access to justice and the rule of law'.⁷⁷
 - In 2003, the Special Rapporteur sent a communication to the Government of Equatorial Guinea in response to the Minister of Justice and Religion's issuance of a resolution dissolving the bar association.⁷⁸ In its place, the resolution created a general council of lawyers, chaired by the minister that was to be responsible for the preparation of a new statute to regulate the activities of lawyers and the holding of new council elections. The Special Rapporteur recalled that one of the fundamentals to ensuring the independence of lawyers is to allow them to work freely without being obliged to obtain clearance or permission from the executive arm of government.
 - The Human Rights Committee also expressed its concern over provisions in Belarus compelling lawyers to form part of a centralised state-controlled body.⁷⁹

In countries where unlawful prosecutions, imprisonment of lawyers and instances of arbitrary disbarments have been reported, the profession is predominantly regulated by the

73 See n 4, paras 71 to 76 and 357.

74 See E/CN.4/2006/52/Add.4, para 93.

75 Example provided in n 3, 21.

76 *Ibid.*

77 *Ibid.*

78 Economic and Social Council (ECOSOC), Fifty-Ninth Session 25 February 2003 'Report of the Special Rapporteur on the independence of judges and lawyers, Dato Param Kumaraswamy' (25 February 2003) UN Doc E/CN.4/2003/65/Add.1. See also ECOSOC, Fifty-Fifth Session 13 January 1999 'Report of the Special Rapporteur on the independence of judges and lawyers' UN Doc E/CN.4/1999/60, in which the Special Rapporteur sent a letter concerning the dissolution of the Egyptian Bar Association and regional bar associations, and appointed sequestrators to administer them; and IBAHRI, 'Equatorial Guinea: At the Crossroads' (IBAHRI 2003).

79 See CCPR/C/79/Add.86, para 14.

government as opposed to being independently regulated.⁸⁰ For example, the profession is predominantly or exclusively regulated by the government in states such as China, Kyrgyzstan, Oman, Qatar, Saudi Arabia, Taiwan, Tajikistan, the United Arab Emirates and Vietnam. Incidents of human rights violations, such as persecution by the government, unlawful prosecution, imprisonment or arbitrary disbarment of lawyers have been reported in states including China, Oman, Saudi Arabia, Tajikistan and Vietnam.⁸¹ Occurrences of arbitrary disbarment have been reported in some states where authority to grant or revoke professional licences is vested outside of independent boards or bar associations, such as China, Nigeria, Russia, Singapore and South Africa.⁸² There is a link between the level of third-party control over the regulatory process and the risk of arbitrary disbarments.⁸³

- Occurrences of arbitrary disbarment have been reported in, inter alia, China and Russia, but less often in states in which the authority to grant or revoke professional licences vests outside the independent board or bar association in the jurisdiction.⁸⁴
2. The selection process for members of the executive body must be democratic, ensuring the Bar's independence, as required by Basic Principle 24. Elections should take place regularly. The executive body of a Bar must be free from interference – particularly from the state – to fulfil its role in upholding the rule of law.⁸⁵ This prohibits the existence of a regulatory framework that is predominantly or exclusively made up of government-appointed members.
- In most jurisdictions, the members of the executive body are elected by the members of the association.⁸⁶
 - The Special Rapporteur on several occasions stated that ‘a Bar association should not act as a part of a bureaucratic apparatus allowing for government control of the legal profession, but should operate as a professional association, working to protect the rights of its members’ (see, eg, A/64/181, paragraph 22, and A/71/348, paragraph 86). The mandate of the Special Rapporteur has, on a number of occasions, expressed concern ‘about instances where State authorities control the Bar or attempt to take control over it by adopting legal amendments or decrees, placing lawyers favourable to the government in the governing bodies or using direct or indirect threats, pressure or intimidation’ (see eg, A/71/348, paragraph 86). Situations in which the state, the executive branch in particular, controls all or part of a bar association or its governing body, and where membership in such an organisation is compulsory, are clearly incompatible with the principle of the independence of the legal profession. He has reiterated this statement during all attempts to install individuals close to the executive branch as heads of professional associations. In one case, he expressed concern at the competency of a Ministry of Justice to nominate a chairperson, who in turn designated the chairpersons of the

80 See n 7, 22. See n 35.

81 See n 7, 22.

82 *Ibid.*

83 *Ibid.*

84 *Ibid.*

85 See n 3, 35.

86 See annex, responses from the Flemish Bar Association, the Law Association of Zambia, the Law Society of British Columbia (mixed system with 25 Benchers elected by the members and six Benchers appointed by the executive branch of the provincial authority), the Law Society of Northern Ireland and the Swedish Bar Association.

regional branches and deputy chairpersons of the Chamber of Lawyers – this clearly represents overreaching on the part of the executive branch in the establishment and functioning of the legal profession.⁸⁷

- The African Commission decided on this issue with regard to the situation in Nigeria when the Legal Practitioners (Amendment) Decree 1993 established a new governing body of the Nigerian Bar Association, the Body of Benchers.⁸⁸ Of this, only 31 of the 128 members were nominees of the bar association, while the remainder were nominated by government. The African Commission found that the Body of Benchers was ‘dominated by representatives of the government’ and that as ‘an association of lawyers legally independent of the government, the Nigerian Bar Association should be able to choose its own governing body’.⁸⁹
 - In 2016, the Government of Malaysia endeavoured to amend the 1976 Legal Profession Act⁹⁰ with the effect of changing how individuals can be elected on the Bar Council. Some of these amendments included the appointment of two government representatives, the extension of the term of office of the Bar Council from one year to two years; and the increase in the quorum for general meetings from 500 to 4,000 members.⁹¹ These attempts by the Malaysian government to amend its regulatory framework pose a serious threat to the independence of the legal profession, as the proposed amendments were effectively to deprive the profession of its ability to regulate itself. Concerns were expressed by civil society organisations⁹² and law councils⁹³ about the implicit governmental interference in the independence of the bar association.
3. The executive body must be representative of its membership, particularly in the case of federal systems and their respective Bars.
- In larger federal states, where it is geographically difficult for all members to attend meetings, forms of electronic attendance can be provided for in procedures for the meeting of executive members to counter challenges in ensuring proper representation in the Bar’s executive body.⁹⁴
4. Furthermore, the Special Rapporteur considers it crucial for the membership of the executive body of lawyers’ associations to be pluralistic so that they are not dependent upon one political party’s interests, a situation that clearly undermines the integrity and credibility of the profession.⁹⁵

87 See A/HRC/11/41/Add.1, para 356.

88 Example provided in n 3, 35.

89 African Commission on Human and Peoples’ Rights, 101/93: Civil Liberties Organisation (in respect of the Nigerian Bar Association)/Nigeria.

90 1976 Legal Profession Act www.malaysianbar.org.my/legal_profession_act_1976, accessed 4 July 2018.

91 See <https://aliran.com/civil-society-voices/2016-civil-society-voices/ngos-decry-open-attack-independence-malaysian-Bar> accessed 4 July 2018 and www.malaysiakini.com/news/349319, accessed 4 July 2018.

92 See n 57.

93 See www.lawsocietywa.asn.au/news/law-council-backs-malaysian-Bar-council-attacks-independence, accessed 4 July 2018.

94 See n 3, 36.

95 See n 4, para 27.

- In Zimbabwe,⁹⁶ there has been a state-sponsored media campaign against lawyers for some time. For example, on 6 August 2006, the state-run *The Sunday Mail* ran an opinion piece titled ‘Lawyers’ body fights for return of Rhodesia’. *The Sunday Mail* and *The Herald*, another state-run newspaper, published articles alleging that the Law Society of Zimbabwe had been working with the European Union and the Government of the United Kingdom to circumvent a state ban on election observers from the EU. One lead article alleged that the Law Society was asking law firms to observe the elections on behalf of the EU and quoted the Minister of Justice as saying: ‘It has come to my knowledge that the Law Society of Zimbabwe leadership has turned the society into a political party to the extent of soliciting from British and other foreign governments funds to engage in active politics... I will no longer treat them as a professional society, but a political opposition party.’⁹⁷
- The independence of Bars may also be undermined in more subtle ways, for instance, through the withdrawal of business.⁹⁸ In the past, the President of the Malawi Law Society has complained of what he termed ‘white-collar harassment’. Successive governments had been suspected of withdrawing their legal business from lawyers perceived to sympathise with the opposition as a way of penalising them. Similarly, perceived affiliation to the government in power appeared to be a criterion for deciding which lawyers in private practice were hired to act on behalf of the government.⁹⁹

4.1.3 Guaranteeing access to justice to all: the case of a monopoly of legal services and mandatory registration to the Bar in focus

Some countries confer a unique competence to an individual with the legal title of ‘lawyer’ to provide legal services. The legal profession is a profession, which may be practised and pursued only under the Legal Profession Act (eg, British Columbia (Canada), South Africa and Germany). This does not mean that representation by lawyers in courts or in carrying out certain legal acts is always compulsory. For instance, in Slovakia, registration to the Slovak Bar Association is mandatory and lawyers have the exclusive right to act as defence counsel in criminal and administrative (save some exceptions) proceedings, and only in a few selected types of proceedings.

In other countries anyone can proclaim themselves as a ‘lawyer’ and provide legal services, but a specific title is reserved for lawyers who meet specific conditions. That is the case in Sweden,¹⁰⁰ where there is no monopoly of legal services, and anyone can provide legal services. Furthermore, litigants are not required to employ qualified legal counsel in court. However, members of the SBA have an exclusive right to offer legal advice under the professional title *advokat* (advocate). Registration is mandatory to have the title.

96 Example provided in n 3, 24.

97 See n 3, 23.

98 See n 3, 25.

99 *Ibid.*

100 See annex, response from the Swedish Bar Association.

The Special Rapporteur recently clarified international standards in case a country passes a law requiring mandatory registration to bar associations in order to practise law:

‘When the Bar association has strong regulatory powers, registration to the Bar to practise is usually mandatory. This is usually the case so to ensure the quality and independence of the legal profession. In many countries, registration with the competent authority of the State, usually the Bar which has jurisdiction in the area of the lawyer’s residence, constitutes a necessary precondition to represent clients before national judicial authorities. Requiring lawyers to become members of the Bar in order to exercise their professional activities with the Bar is fully consistent with international standards relating to access to legal services. However, in countries where there is a shortage of qualified lawyers, States are under an obligation to adopt all appropriate measures to ensure that (1) all persons within the territory and under the jurisdiction of the State concerned have effective access to legal services provided by an independent legal profession, and (2) legal practitioners can have equal and effective access to the Bar on the basis of fair, objective and clearly formulated criteria.’¹⁰¹

TAJKISTAN¹⁰²

In Tajikistan, the Union of Lawyers of Tajikistan was established in September 2015 under a new Law on Legal Practice of Tajikistan (Law on Advocatura). Prior to the adoption of the law, more than 2,000 lawyers were providing legal services in the country, including legal representation in courts. Following the adoption of the legislation, the number of lawyers dropped to about 600 due to restrictive requirements as to who may practise as a lawyer.

AZERBAIJAN¹⁰³

In Azerbaijan, like Tajikistan, laws were recently passed that made it compulsory to register to the Bar for lawyers to practise. If registration as such is not in contradiction with international standards, the lack of independence of the Bar, obstacles to the admission process and vague disciplinary processes have led to clear interference from the government in the work of the legal profession and a significant and problematic reduction of the number of lawyers, specially targeting lawyers addressing human rights and politically sensitive cases.

On 31 October 2017, the Azerbaijani Parliament amended the country’s Civil Code giving the state-controlled bar association complete control over the legal community.¹⁰⁴ The amendments state that practising attorneys who are not yet members of the bar association are effectively prohibited from appearing in court or representing clients, unless they are affiliated Bar members. This amendment has effectively barred human rights attorneys in Azerbaijan and attorneys who take politically sensitive cases.¹⁰⁵ As a result of the passage of these laws, it is reported that approximately 90 per cent of the country’s legal professional are unable to practise law, many of whom are independent attorneys.

101 Special Rapporteur on the Independence of Judges and Lawyers, OL AZE 1/2018.

102 IBAHRI submission to the UPR (2015).

103 See n 101 above.

104 Mike Runey, ‘Azerbaijan Moves to Drastically Cut Number of Lawyers’, *eurasianet* (New York, 7 November 2017) <https://eurasianet.org/node/85946>, accessed 4 July 2018.

105 See www.amnesty.org/en/latest/news/2017/12/azerbaijan-new-blow-for-justice-as-lawyers-excluded-from-trials, accessed 4 July 2018.

Lawyers were said to have been brought to local police stations, barred from being licensed to practise law and were cautioned of their possible arrest or fines if they continued within 24 hours of the ratification of the amendments.

4.1.4 Ensuring that a bar association is financially sustainable

To ensure true independence, a Bar must be able to sustain itself. The absence of financial sustainability can affect the operation and effectiveness of bar associations.¹⁰⁶ A review of the relevant literature suggests that in states in which bar associations are not adequately funded, their ability to carry out their functions is severely undermined because they are less able to provide adequate training, professional development and support for lawyers.¹⁰⁷ As bar associations are often places where lawyers can associate and express their concerns through organised events and conferences, bar associations that lack adequate resources are less likely to organise such events.

A number of Bars sustain themselves by membership fees and organising training and events. Some may receive grants or international funds. For instance, the Law Society of South Africa receives a grant from the Attorneys Fidelity Fund for legal education and the enhancement of professional standards.¹⁰⁸

FUNDING FROM OUTSIDE THE LEGAL PROFESSION

As it may often be necessary to obtain funding from outside the legal profession, such as from donor organisations or sponsors, Bars should always ensure that, where this is the case, its independence is not compromised.¹⁰⁹ Bar associations should be particularly cautious of receiving government funding, as such support may be aimed at keeping the Bar close and uncritical of the state machinery. For example, there are cases in which executive members of the Bar receive well-paid work from the government. Such cases should be avoided due to the risk of influence and interference in the work of the legal profession.

MALAWI AND ANGOLA¹¹⁰

Although the Malawi Law Society is a statutory body and eligible for state funding, it had been reluctant to take advantage of this because it did not want to create a perception of dependency on the state and so undermine its independence. Although the receipt of government funds does not necessarily result in a lack of independence, there is nonetheless a potential for – and at the very least, an appearance of – state interference. In this area, the IBAHRI has expressed concern over government funding of the Angolan Bar.

106 See n 7, 9.

107 *Ibid.*

108 See Annex, response from the Law Society of South Africa.

109 See n 3, 32.

110 *Ibid.*

SWAZILAND¹¹¹

In Swaziland, when the IBAHRI was facilitating the creation of the Law Society of Swaziland, it had no money to rent, let alone buy, its own premises. Consequently, the High Court allowed it to use two rooms in a government-maintained High Court building. Bars should be careful in situations such as this, which could potentially open the door to interference.

KAZAKHSTAN

In Kazakhstan, 'the Bar Association depends on the contributions of its members, which are essential to ensure its financial independence. A draft law under consideration would eliminate entrance fees for new lawyers, allegedly as a measure to facilitate access to the legal profession to new lawyers. This measure, however, does not take into account the need to maintain the financial independence of the Bar Association, which is, in turn, crucial to ensuring the independence of the legal profession from the government and any other party. Furthermore, the measure constitutes an interference with the self-regulation of the legal profession. It is for the Bar Association as a "self-governing professional association" to decide on how to finance its activities. While it is appropriate for national legislation to determine in general terms the aims and objectives of bar associations, it is only for the single bar association as an independent institution to make its own decisions, following clear and transparent structures and procedures, to represent its members' interests and to sustain itself.'¹¹²

4.1.5 Attacks to Bars' presidents and members

When Bars' executives are effectively independent from government, arbitrary arrest, detention and prosecutions and attacks against Bars' presidents and members have been reported as a measure of interference in the work of associations. Among others, the IBAHRI has called for a prompt release or investigation in the following cases:

SUDAN

On 13 March 2014, Abdelmoniem Adam Mohamed, member of the Darfur Bar Association, was arrested at his office by representatives of the Sudanese National Security Service.¹¹³ No information was provided on the charges made against him. This came after the arrest and detention of four members of the Darfur Bar Association on 1 July 2012 in Khartoum, Sudan.¹¹⁴ The head of the Darfur Bar Association, Mohamed Abdella Al-Douma, was arrested with Rehab El-Fadel Sharif, Rashida Ansari and Jibril Hamid Hassabou. These arrests were conducted by government security services at a press conference held on behalf of the human rights activist Victor Bushra Gamal, who was previously detained by Sudanese security forces for more than a year. Similar to Adam Mohamed's case, no information was provided on their arrest and detention.

111 *Ibid*, 33.

112 Special Rapporteur on the Independence of Judges and Lawyers, OL KAZ 1/2018. See also UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Monica Pinto' (2016) UN Doc A/71/348, para 85.

113 See <http://girifna.com/blog-girifna/?p=9321>, accessed 4 July 2018.

114 See www.ibanet.org/Article/NewDetail.aspx?ArticleUid=88f555b8-0daf-4461-8258-c02b42bd88e4, accessed 4 July 2018.

SRI LANKA

On 15 July 2014, the reported surveillance of Upul Jayasuriya, President of the Bar Association of Sri Lanka (BASL), drew significant attention by the IBA.¹¹⁵ This was said to occur on two occasions by an individual: one on a motorcycle and others in a three-wheeled vehicle. Though Jayasuriya made complaints to the necessary police authorities, no action was taken to identify the suspects or provide adequate protection. The incidents were allegedly said to have occurred shortly after the BASL released a critical statement of the Sri Lankan National Secretariat for NGOs communiqué, which was issued on 7 July 2014 and prohibited NGOs from conducting press conferences, workshops and journalism training, and from disseminating press releases. Although evidence was not provided as to a direct link, such actions may amount to an implied intimidation of Jayasuriya. Concern can be further buttressed with the existing culture of impunity in Sri Lanka due to the absence of thorough and transparent investigations.

TURKEY

In Turkey, where Bars are relatively independent, bar associations and professional bodies that issue practising licences have been targeted. On 3 March 2016, the IBA reported on the murder of the chairman of the Diyarbakir Bar Association, Tahir Elci, who was shot dead during a press conference on 28 November 2015.¹¹⁶ There have been reports of a lack of transparency into the investigation into his killing. He had been charged for spreading terrorist propaganda, received death threats and detained for a short period indicative of a possible attack on the bar association's role as a human rights proponent before his death.¹¹⁷ Additionally, concerns were raised about his death due to the high levels of impunity in Turkey. Since the attempted coup in July 2016, presidents and former presidents of 14 provincial bar associations across the country have been prosecuted and imprisoned.¹¹⁸ The government also refused to issue licences for new applicants. Presidents and members of boards have been detained for their alleged affiliation with the Gülen movement, rendering the work of the Bars very difficult. In law, the arbitrarily prosecuted members are to be replaced by their alternates (*suppléant*). In cases when alternates are also arrested, in practice, the government should appoint new members until the next election.

TANZANIA

In Tanzania, multiple arrests¹¹⁹ of Tundu Antiphas Mughwai Lissu, advocate and President of the Tanzania Law Society, were reported. These arrests occurred on 6 February 2017 for undisclosed charges, 16 March 2017 before his High Court petition against election regulations, 20 July 2017 for

115 See www.americanbar.org/content/dam/aba/images/abanews/SriLankaROL_09092014.pdf, accessed 4 July 2018.

116 See www.ibanet.org/Article/NewDetail.aspx?ArticleUId=FB931EB4-28BB-42B3-8FC1-4E74CBD52359, accessed 4 July 2018.

117 See <http://communities.lawsociety.org.uk/international/international-rule-of-law/lawyers-at-risk/intervention-letters/turkey-tahir-elci-lawyer-at-risk/5051809.article>, accessed 4 July 2018.

118 President of Konya Bar Association, Fevzi Kayacan; President of Trabzon Bar Association Orhan Öngöz; President of Siirt Bar Association Cemal Acar; President of Gumushane Bar Association Ismail Tastan; former Presidents of Manisa, Erzurum, Erzincan, Afyon Bar Associations Zeynel Balkiz, Mehmet Güzel, Cemalettin Özer, Mehmet Akalın; presidents of the Aksaray and Kahramanmaraş Bar Associations, Levent Bozkurt and Vahit Bağcı; and former presidents of Yozgat Bar Association Hacı İbis and Fahri Acikgoz.

119 The Citizen Reporter, 'Lissu arrested in Dodoma' *The Citizen* (Dar es Salaam, 16 March 2017) www.thecitizen.co.tz/News/Lissu-arrested-in-Dodoma/1840340-3852006-format-xhtml-16cme9z/index.html, accessed 4 July 2018; All Africa, Tanzania: Queries as Lissu arrested <http://allafrica.com/stories/201707210106.html>, accessed 4 July 2018; The Citizen Reporter, 'Police: Too early to determine nature of explosion at IMMMA House' *The Citizen* (Dar es Salaam, 26 August 2017) www.thecitizen.co.tz/News/Police-Too-early-to-say-city-law-firm-was-hit-by-bomb-blast/1840340-4071684-5g3n0n/index.html, accessed 4 July 2018.

the use of abusive language against President Magufuli and 20 August 2017 after his sedition case. These arrests were said to be linked to his critical statement against the state of democracy and rule of law of the administration, as they all occurred shortly after.¹²⁰ He was also subjected to the bombing of his law firm on 26 August 2017. These events can be inferred as amounting to a significant infringement of the independence of the Tanzanian Bar Association.

4.2 Bar associations' general missions

The aforementioned Recommendation (2000) 21 of the Council of Europe provides that:

- '3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.
4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, inter alia, to:
 - a. promote and uphold the cause of justice, without fear;
 - b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity;
 - c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice;
 - d. promote and support law reform and discussion on existing and proposed legislation;
 - e. promote the welfare of members of the profession and assist them or their families if circumstances so require;
 - f. co-operate with lawyers of other countries in order to promote the role of lawyers, in particular by considering the work of international organisations of lawyers and international intergovernmental and non-governmental organisations;
 - g. promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline.'

The IBA Standards provide that 'the functions of lawyers' associations in ensuring the independence of the legal profession shall be inter alia:¹²¹

- 'a) to promote and uphold the cause of justice, without fear or favour;
- b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession; and to protect the intellectual and economic independence of the lawyer from his or her client;
- c) to defend the role of lawyers in society and preserve the independence of the profession;

120 Frank Kimboy, 'Tanzania: Lissu hits at JPM directive' *The Citizen* (Dar es Salaam, 2 August 2016) www.thecitizen.co.tz/News/Lissu-hits-at-JPM-directive/1840340-3326648-61mtxwz/index.html, accessed 4 July 2018.

121 IBA Standards for the Independence of the Legal Profession, para 18.

- d) to protect and defend the dignity and independence of the judiciary;
- e) to promote free and equal access of the public to the system of justice, including the provision of legal aid and advice;
- f) to promote the right of everyone to a prompt, fair and public hearing before a competent, independent and impartial tribunal and in accordance with proper and fair procedures in all matters;
- g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
- h) to promote a high standard of legal education as a prerequisite for entry into the profession and the continuing education of lawyers and to educate the public regarding the role of a Lawyers' Association;
- i) to ensure that there is free access to the profession for all persons having the requisite professional competence, without discrimination of any kind, and to give assistance to new entrants into the profession;
- j) to promote the welfare of members of the profession and the rendering of assistance to members of their families in appropriate cases;
- k) to affiliate with and participate in the activities of international organisations of lawyers.'

The aims and objectives of Bars should be clearly set out in the governing legislation and in its constitution or charter.¹²² Bars should also have a clear vision and mission – that is, the ultimate goals that define their main purpose – and should ensure all their objectives and activities are geared towards realising that vision.¹²³

All Bars should be working to promote the rule of law, human rights and access to justice. This is the fundamental function of the legal profession.¹²⁴ In practice, it is noteworthy that a common theme running through the visions and objectives of Bars across the world is: the promotion of democratic principles, such as the rule of law and human rights, and the upholding of justice and the integrity of the legal profession.

For example, the Law Society of England and Wales clearly states its vision as follows: 'We want to be valued and trusted as a vital partner to represent, promote and support solicitors while upholding the rule of law, legal independence, ethical values, and the principle of justice for all.'

Looking at legislation governing Bars in various jurisdictions, examples of the areas commonly dealt with through both primary and secondary legislation, aims and objectives of the Bars are as follows:¹²⁵

122 See n 3, 29.

123 *Ibid.*

124 *Ibid.*, 49.

125 See n 3, 26–27.

- *qualifications and procedure for admission* of legal practitioners and issuing of practising certificates;
- *duties and functions of members*, including duties towards clients, the courts, other lawyers and officers of the court, the Bar and to the public in general;
- *disciplinary mechanisms and procedures*, situations when disciplinary action can be taken and types of action that can be taken against members, such as suspension, striking off and requirement to reimburse or compensate;
- *subscription fees* (often the legislation may state that the amount is to be determined by the Bar and subsidiary rules or regulations may deal with this) and date for payment (legislation often provides that a Bar will not recommend a practitioner for renewal of the practising certificate unless subscription fees have been paid);
- *remuneration of lawyers*: primary legislation may govern how this is determined and the procedure for disputes, but secondary legislation may be used to set out the amounts and other rules governing costs;
- *structure of the Bar*, that is, executive or council, general membership, subcommittees and their respective duties;
- *internal accountability*, for example, timing and procedure for general, annual, special or extraordinary meetings; procedure for elections of executive or council members, as well as any disciplinary body and subcommittees (specifying secret ballot where appropriate); and auditing of the Bar's accounts;
- *powers of the Bar*, such as the ability to raise or borrow money and to acquire, hold and dispose of property, as well as derive income from such property; and
- *CLE and training*: this may be done in conjunction with a body responsible for legal education, such as a Council for Legal Education, and in some jurisdictions, this may be governed by separate legislation.

4.3 Bar associations' regulatory functions

Governing legislation should clearly mention the regulatory functions of the bar association.

Where bar associations have a strong regulatory character, a specific committee within the association performs the regulatory function and is responsible for discipline and admission to practise in the jurisdiction.¹²⁶ Where the bar association has strictly representative functions, it typically has no authority over discipline and admissions.¹²⁷ Between these extremes are bar associations that possess no actual authority but nevertheless enjoy significant influence, such as by accrediting law schools or promulgating widely adopted model rules.¹²⁸

126 See n 16, 4. See Annex, responses from the Flemish Bar Association, the Law Society of British Columbia, the Law Association of Zambia, the Law Society of Northern Ireland, the Law Society of South Africa and the Swedish Bar Association.

127 Eg, the German Bar Association.

128 *Ibid.*

One factor of independence is that a Bar is able to set standards for professional practice, and controlling the standards of entry into, and exclusion from, the profession is a means to achieving this.¹²⁹

4.3.1 Independence of the admission body

COMPOSITION OF THE ADMISSION BODY

Regardless of which procedure is followed for admission, caution must be exercised when deciding on the composition of the body responsible for determining who is qualified to enter, or be excluded from, the legal profession. It is of fundamental importance that this body is able to discharge its functions independently with minimal executive interference.¹³⁰

The mandate of the Special Rapporteur has affirmed on a number of occasions that the authorisation to practise as a lawyer or to accede to this profession should be taken by an independent body. The legal profession is best placed to determine admission requirements and procedures and should thus be responsible for administering examinations and granting professional certificates (see, eg, A/64/181, paragraph 34). This is the case in many countries.¹³¹

South Africa¹³²

In South Africa, admission is regulated by the four provincial law societies that are regulatory bodies. The LSSA, as a legal education service provider, sets the admission exams, but these are administered by the four provincial law societies. Part of the mission of the LSSA is to uphold and encourage the practice of law, and to promote and facilitate access to the profession (5.1.4. Constitution). The admission requirements for attorneys in South Africa are prescribed by the Attorneys Act and the rules promulgated in terms of the Act. The Legal Education and Development (LEAD) division of the LSSA provides training and development activities for the profession at both pre- and post-admission level. Currently there is no mandatory CLE, but this will be required under the Legal Practice Act.

United States¹³³

In some jurisdictions, such as the US, the bar association sets the examinations that qualify a person for admission to practise as a lawyer. Bars do not usually, however, undertake the training – this is left to universities and other educational institutions. Bars can, nonetheless, have significant input into the curriculum for the training of lawyers.

129 See n 3, 71.

130 *Ibid*, 74.

131 See, eg, Annex, responses from the Flemish Bar Association, the Law Society of British Columbia, the Law Association of Zambia, the Law Society of Northern Ireland, the Law Society of South Africa and the Swedish Bar Association.

132 See Annex, response from the Law Society of South Africa.

133 See n 3, 72.

MINIMUM STANDARDS

A Bar committee can be established to set minimum standards for both university law faculties and for CLE after graduation. It can carry out regular reviews of law schools through the country and ensure that minimum standards are met.¹³⁴

United Kingdom

In the UK, there is agreement between the Solicitors Regulation Authority (SRA), the regulatory body for solicitors and the Bar Standards Board (BSB), the regulatory body for barristers, that dictates the mandatory content of the qualifying law degree.

Government ministry¹³⁵

In many jurisdictions, the relevant government ministry may have a role to play in training and qualifications for legal practice. However, the control over these decisions must rest with the legal profession, and there should be transparent standards and procedures, as well as a proper system of appeals from decisions. In Singapore, the Ministry of Law determines the qualifications to be admitted to the Bar, while importantly, the Law Society assesses suitability for admission. The Ministry has the responsibility of setting admission requirements and determining ‘approved universities’.

CLEAR AND TRANSPARENT RULES ON ADMISSION

The existence of comprehensible, clear and transparent rules on admission to the Bar ensures that those seeking admission are well informed of the requirements and are assessed on the basis of objective criteria that apply equally to all candidates. Clear and transparent rules reduce the risk of arbitrary disciplinary proceedings and disbarment, and also guarantee that lawyers are held accountable and responsible for their actions. Lawyers, those they represent and the general public should have access to efficient, fair and functioning mechanisms that allow for the resolution of disputes between the profession and the public, imposition of disciplinary measures (where appropriate) and an effective appeals system. This ensures that the rights of all parties are protected in accordance with the rule of law.

In contrast with the above, some states interfere in the admission and licensing process or restrain the number of lawyers able to address politically sensitive or human rights cases. Mandate holders have often expressed concerns about situations in which the entry into or continued practice within the legal profession is conditioned or controlled by the executive branch (see A/71/348, paragraph 75 and A/64/181, paragraphs 31–39). This may occur in conjunction with unclear rules on admission, which increase the risk of arbitrary refusals of those seeking to enter the profession and limiting entry to certain groups based on their affiliation or socio-economic status.

¹³⁴ *Ibid*, 73.

¹³⁵ See n 3, 74.

In many countries, state authorities use their control over the licensing of lawyers to prevent certain persons from entering the legal profession or to exclude lawyers who they deem to be ‘problematic’; these lawyers are often those who take human rights cases or other sensitive cases, such as police abuse, corruption or terrorism-related cases.

Tanzania

In 2017, in Tanzania, reports¹³⁶ were made of proposed plans by the Ministry of Justice and Constitutional Affairs of Tanzania to create a statutory body called Bodi ya Usajili wa Wanasheria. This body was authorised with the power to manage and control the appointment, administration and removal of members of the legal profession. Such a transfer of power would result in the threat to the independence of the bar association, as such decision-making powers were initially within the authority of the Tanganyika Law Society (TLS), the bar association of mainland Tanzania. The concern of such interference is also bolstered by reports of the multiple arrests of Tundu Antiphas Mughwai Lissu, advocate and President of the TLS.

Tajikistan¹³⁷

In Tajikistan, the regulatory bar association, called the Union of Lawyers, is highly susceptible to government interference. The Qualification Commission is located within the Ministry of Justice and includes representatives of the Ministry, with the Deputy Minister serving as the Head of the Qualification Commission. Under the law, the Qualification Commission makes decisions regarding a lawyer’s status. Such a provision contradicts the fundamental principle of the independence of the legal profession. In addition, this provision is inconsistent with paragraph 24 of the Basic Principles, which states that lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training, and protect their professional integrity. While it is not uncommon for representatives of the Ministry of Justice to sit on a body such as the Qualification Commission, the IBAHRI is concerned that the balance of power might be weighted in the Ministry of Justice’s favour, as the Deputy Minister of Justice was to chair the commission. Attempting to direct who should be permitted to practise law, and similarly, to expel controversial elements of the profession, could be an abuse of the powers of the Ministry or the executive, thereby breaching Basic Principle 16 (see above at page 24).

136 IPP Media www.ippmedia.com/en/news/lissu-smells-rat-proposed-board-register-lawyerslawyers, accessed 4 July 2018.

137 See n 102.

Azerbaijan

In Azerbaijan, the Special Rapporteur recommended the adoption of all appropriate measures to facilitate access to the Bar of legal practitioners who meet the criteria provided for by national legislation. ‘These include, for example, the review of the procedure and the criteria for the admission to the Bar, in consultation with the legal profession, with a view to developing fair, objective and clearly formulated criteria for the assessment of candidates and the holding of Bar exams on a regular basis. In case of insufficient number of lawyers in the country, states should ensure that the functioning of the Bar allows responding effectively, for instance, by organising regular admission exams.’¹³⁸

Turkey¹³⁹

In Turkey, licensing is compulsory for practice. The Bars assess the eligibility of applicants and send the list to the Minister of Justice, which is the entity with the power to issue licences. The government targeted dismissed prosecutors, academics (members of law faculties) and judges who wanted to be admitted to the Bar. The Bars accepted their admission after checking the criteria established by law. They then sent the list to the Minister of Justice to prepare the licences. The Minister of Justice refused to issue licences on the basis that the candidates were dismissed under emergency decrees. The Bars accepted the decisions and did not do anything; in theory the board of the Bar could object by a two-thirds majority, which would then force the Minister of Justice to issue the licences. One Bar tried to object and obtained the two-thirds majority. The Minister of Justice challenged the legality of the decision before the administrative court, which granted an interim injunction to suspend the effect of the Bar’s decision until the court reached its final decision, which is upcoming.

Licensing¹⁴⁰

Admission to practise and licensing (or the issuing of a practising certificate) are two different, but interdependent, requirements for lawyers. Usually, a lawyer cannot obtain the right to practise until admitted, but admission alone does not entitle a lawyer to practise. Commonly, an annual practising licence or certificate will be required.

Licensing is usually prescribed by legislation but in some jurisdictions the licence is issued by the judiciary, such as a supreme court, and in others, by the Bar. In most jurisdictions, the latter has a significant input into the decision of whether a person is qualified to practise law. The matter is how the balance between the competences of the relevant institutions to make this decision is to be decided.

Tajikistan

In Tajikistan, according to the new law, all lawyers are required to retake the qualification exams every five years to renew their licences and continue their professional work. The Qualification Commission under the Ministry of Justice will again conduct the subsequent qualification exam. Such regulation makes lawyers permanently dependent on the Ministry of Justice. This compulsory renewal is used in a number of other countries, such as China, to keep control over the legal profession.

¹³⁸ Special Rapporteur on the Independence of Judges and Lawyers, OL AZE 1/2018.

¹³⁹ See n 33, 5.

¹⁴⁰ Paragraph extracted from n 3, 75–76.

Basic Principle 9 provides that governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training. It is therefore clear that bar associations are to have an input into what this training should entail and how certification of its completion is to be indicated.¹⁴² Each country must decide for itself, in accordance with its own needs and circumstances, how the balance of powers and responsibilities are to be shared between the Bar, the government and educational institutions to achieve this. It is important that entry requirements are standardised, transparent and fair. Anyone who has not satisfied these requirements should not be permitted to practise law. This will both strengthen the legal profession and help to foster public confidence in it.

Comprehensive legal education and professional training refers to appropriate, well-rounded, targeted education and training for those seeking to enter the legal profession. Proper education and training is one of the pillars of a strong and independent legal profession as it lays the foundation on which young lawyers build their careers and enables them to understand the importance of independence, objectivity and impartiality. Thorough and well-rounded education and training ensure that young lawyers appreciate the complex legal and ethical obligations associated with the practice of law and that they are able to undertake their duties and responsibilities in line with their ethical and professional obligations.

There is a correlation between a lack of comprehensive legal education and training and a weakened state of independence in a jurisdiction. In states in which the legal educational system is weak or ineffective, graduates are generally ill-prepared to practise law after completing their studies. Problems related to ensuring and upholding the independence of the legal profession begin at the educational and training stage, as graduate lawyers are unable to appreciate important concepts that underpin the profession, let alone apply them in practice. Problems could arise in jurisdictions in which there are no, or very low, admission standards, as those who enter the profession are not always able to provide competent, intelligent and independent legal advice. In jurisdictions in which legal education and continued professional development is wanting, issues such as waning respect for an independent and impartial judiciary, occurrences of political interference with prosecutorial functions, and an overall lack of respect for the rights of lawyers have been reported. A lack of proper education and training weakens the profession at the outset and undermines its ability to withstand the external pressures that threaten its independence and its very existence.

Bars should consider whether they, or another regulatory body, have the responsibility of determining: (1) what constitutes a qualifying law degree; (2) which institutions meet the requirements of the qualifying law degree; and (3) what further studies, examinations or training are required. Even where it is another body, such as a ministry or education council, that determines the qualifications and training required, the Bar should maintain involvement so as to ensure continued independence of the legal profession.¹⁴³

141 The information presented here is extracted from n 3, 77–86.

142 See n 3, 71.

143 See n 3, 75.

Promotion of CLE¹⁴⁴

Basic Principle 9 refers to '[g]overnments, professional associations of lawyers and educational institutions' as those responsible for providing CLE.¹⁴⁵ The former UN Special Rapporteur Gabriela Knaul has recommended that ongoing legal education should be mandatory.¹⁴⁶

Basic Principle 24 further provides that 'continuing education and training' is one of the purposes of forming and joining bar associations, with a view to protecting professional integrity.

One of the ways in which lawyers exercise their right to associate freely through independent bar associations is by participating in various outreach or educational programmes organised and led by bar associations, or programmes established with the aim of driving law reform. This ensures that lawyers keep abreast of any changes in the regulations pertaining to their duties and responsibilities and benefit from continuous professional education, allowing them to carry out their duties with the requisite degree of skill and knowledge.

A review of the relevant literature indicates that a great number of bar associations offer training and CLE seminars and conferences, sponsor networking events and provide career development resources, such as access to job boards and publications.¹⁴⁷ Some bar associations even offer their members confidential counselling and mentoring.

In most jurisdictions with an established Bar, CLE will be mandatory and a requirement for the renewal of a practising certificate or licence. Indeed, CLE ensures that lawyers are able to fulfil their ethical duty to work in a competent and timely manner. Moreover, in some cases, CLE is used by Bars as a means of certifying a lawyer's speciality, so that they may publicise their expertise as, for example, an employment lawyer or aircraft leasing lawyer, or in a particular area of banking, finance or tax.

In most jurisdictions, CLE falls under the control of either a national council of legal education or within the remit of the local law society or Bar.¹⁴⁸

Kenya¹⁴⁹

For example, in Kenya, although the Council of Legal Education has responsibility for education for the legal profession under the Legal Education Act 2012, it is the Law Society that has taken over responsibility for this. It has a continuing professional development (CPD) programme mandated with the responsibility of ensuring continuous professional learning for all advocates in Kenya after they are admitted to the Bar. It has been in operation for years, and the programme is self-financed by registration fees, charged on participation in CPD sessions.

144 Information extracted from n 3, 77–86.

145 Basic Principles, Principle 9.

146 A/HRC/14/26.

147 See n 3.

148 *Ibid*, 81.

149 Example provided in n 3.

4.3.2 Independence of the disciplinary body

RULES OF ETHICS

The Basic Principles provide that:

- ‘Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice’;¹⁵⁰ and
- ‘Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognised international standards and norms.’¹⁵¹

It has been said that a profession’s most valuable asset is its collective reputation and the confidence it inspires.¹⁵² If ethical standards exist and clearly define the duties a lawyer owes to their client, the public can bring to account those that fall short of these standards. Ethical standards and codes of professional conduct for lawyers are, in this way, essential to achieving accountability and empowering the public to ensure lawyers maintain the high degree of professionalism expected. This was recognised by the IBA in publishing its International Principles on Conduct for the Legal Profession in May 2011. The IBA Standards state that: ‘Lawyers’ associations shall adopt and enforce a code of professional conduct of lawyers’ (paragraph 21).

As part of the fundamental principle of independence, Bars should themselves take responsibility for developing their code of ethics in most jurisdictions. Indeed, the legal profession’s right to self-govern, as stipulated in Basic Principle 24, goes hand in hand with the obligation to also self-regulate effectively. This is normally the case. A useful example can be drawn from the American Bar Association (ABA), which has a number of standing committees pertaining to ethics and conduct, including a Standing Committee on Ethics and Professional Responsibility, which develops and revises as necessary model ethics standards for lawyers and judges and publishes formal ethics opinions interpreting those standards, and a Standing Committee on Professional Discipline, which develops, updates, promotes and implements national model regulatory enforcement procedures.

Bars considering producing a code of ethics should note that while ethical and professional standards are usually derived from domestic primary and secondary legislation, they may also – and in fact should – be consistent with international and regional standards.¹⁵³

A Bar must carefully consider its role as the author, provider and/or upholder of these ethical requirements through informing and educating members and the public about rules of ethics, and enforcing them through disciplinary proceedings.

In a number of countries, the national legislation enables the legal profession to set down rules of professional conduct.¹⁵⁴

150 UN Basic Principle 12.

151 UN Basic Principle 26.

152 See n 3.

153 *Ibid*, 107.

154 See Annex, responses from the Flemish Bar Association, the Law Society of British Columbia, the Law Association of Zambia, the Law Society of Northern Ireland, the Law Society of South Africa and the Swedish Bar Association.

Basic Principle 28 provides that: ‘Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority or before a court, and shall be subject to independent judicial review.’

The IBA Standards state that:

‘22. There shall be established rules for the commencement and conduct of disciplinary proceedings that incorporate the rules of natural justice.

23. The appropriate lawyers’ association will be responsible for or be entitled to participate in the conduct of disciplinary proceedings.

24. Disciplinary proceedings shall be conducted in the first instance before a disciplinary committee of the appropriate lawyers’ association. The lawyer shall have the right to appeal from the disciplinary committee to an appropriate and independent appellate body.’

As provided in the Basic Principles, the system for dealing with complaints must be independent of the state and transparent. There should also be a right to independent judicial review.

There are a range of models that are available for disciplinary proceedings.¹⁵⁶ They could involve the judiciary taking the lead role or an ombudsman or other body independent from the Bar. Alternatively, discipline can fall within the remit of the Bar itself and indeed this is often the case.¹⁵⁷

When information on disciplinary and disbarment orders is made widely available, it increases awareness and ensures that lawyers are held accountable to the public. A large number of state bar associations or Bar councils make regulations on disbarment and disciplinary proceedings publicly available.

To minimise the risk of arbitrary disbarments or targeted disciplinary action against lawyers, regulatory bodies must ensure that the provisions governing punitive measures against lawyers are clear and transparent. Information regarding the procedures by which complaints against lawyers are handled should be publicly available and easily accessible. This ensures transparency and helps strengthen public confidence in the profession. In some states, the relevant regulatory authorities publicise information about sanctions against lawyers who have been disbarred or reprimanded.

155 Information extracted from n 3, 115–120.

156 See n 3, 115.

157 See Annex, responses from the Flemish Bar Association, the Law Society of British Columbia, the Law Association of Zambia, the Law Society of Northern Ireland, the Law Society of South Africa and the Swedish Bar Association.

Unclear requirements undermine the quality of legal representation and negatively affect the independence of lawyers. Where regulations governing disciplinary proceedings and disbarment are not comprehensible and transparent, or they fail to provide a right of appeal, lawyers are more exposed to targeted disciplinary action and arbitrary disbarments. Disciplinary proceedings can become a powerful weapon in the hands of governments or third parties with direct or indirect influence over professional regulatory mechanisms. Lawyers around the world are subject to arbitrary disbarment or targeted disciplinary proceedings in a number of jurisdictions, mainly for bringing cases against the government or representing causes or clients that are unpopular with the existing regime.

Cuba

The Special Rapporteur found that in Cuba, the government, through the Ministry of Justice, appeared to have some control over disciplinary sanctions. The Criminal Procedure Law in Cuba contained certain provisions with regard to the functions of lawyers. The law included a provision that disciplinary measures against members of the organisation may be appealed to the highest levels, and disciplinary sanctions may be appealed by the courts against legal professionals for misconduct in the performance of their functions. However, the fact that the appeal was to the Ministry of Justice indicated that there may not be provision in the legislation for an independent judicial review as required by Basic Principle 28.

Burundi

The Committee against Torture likewise expressed concern at the request made by the Public Prosecutor at the Court of Appeal of Bujumbura to the President of the Bar Association to disbar lawyers as reprisals against members of civil society working with the Committee.¹⁵⁸

Kazakhstan

In Kazakhstan, the draft Law on Lawyers' Activity and Legal Aid provides that disciplinary commissions will be composed by six lawyers, three representatives of the executive and two former judges. This provision represents a significant step backwards because the new composition of the disciplinary commissions – and, in particular, the presence of three representatives of the executive power – can no longer guarantee that this body 'be free from any influence or pressure from the legislative or the executive branches of power or any other party' (A/64/181, paragraph 55).¹⁵⁹

¹⁵⁸ CAT/C/BDI/CO/2/Add.1 (CAT, 2016).

¹⁵⁹ Special Rapporteur on the Independence of Judges and Lawyers, OL KAZ 1/2018.

5 Bars' role in strengthening and defending the role of lawyers and rule of law in society

5.1 Partnership between the government and bar association to promote access to justice, rule of law and human rights¹⁶⁰

The primary obligation to guarantee the rule of law, promote human rights and provide legal aid services rests on the state, as provided by international human rights instruments, such as Article 14 of the International Covenant on Civil and Political Rights (ICCPR).¹⁶¹ The Basic Principles further clearly set out the duties of governments to ensure, among other things:

- that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons, without discrimination (Principle 2);
- the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons (Principle 3); and
- that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention, or when charged with a criminal offence (Principle 5).

However, there is also a clear obligation for Bars to cooperate and coordinate with governments in promoting rights and access to justice:

- Professional associations of lawyers shall cooperate in the organisation and provision of services, facilities and other resources (Principle 3).
- Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers (Principle 4).
- Professional associations of lawyers shall cooperate with governments to ensure that everyone has effective and equal access to legal services (Principle 25).

Often the relationship between the legal profession and state can be difficult, particularly where Bars have had to continuously speak out against the concentration of power in the executive and abuses of this power. Bars can, nevertheless, strategise as to how to approach the government and state institutions through, for example, holding meetings to highlight the mutual benefits that can be achieved through cooperation. Indeed, it is not enough for Bars to react to a situation; they must also take a proactive role. If they are merely reactionary, underlying problems will remain and real change, in terms of enhancing and developing democratic principles, such as the rule of law and

¹⁶⁰ Information extracted from n 3, 154–156.

¹⁶¹ See n 3, 152.

human rights, will not take place. Therefore, determining appropriate strategies is central to creating Bars that can lead the way in truly transforming societies.¹⁶²

The legal profession in any society has a crucial role to play in upholding the rule of law and ensuring that access to justice is not merely illusory but a reality for all.¹⁶³ As provided by the Basic Principles, the ‘adequate protection of the rights and fundamental freedoms to which all persons are entitled... requires that all persons have effective access to legal services provided by an independent legal profession’.

Bars, therefore, are integral to ensuring that human rights are respected and protected. Indeed, they have an obligation to promote and provide ‘effective access to legal services’ to all persons and ‘cooperat[e] with governmental and other institutions in furthering the ends of justice and public interest’, as stated in the preamble of the Basic Principles.

Bars must not only be free to highlight issues around access to justice and the rule of law, but also must be seen to campaign against governments who fail to promote or provide these.¹⁶⁴ If this is not the case, they could either be not allowed to be independent or have allowed themselves to be part of a government policy not to adhere to the rule of law or provide proper access to justice.

It is fundamental that Bars ensure the independence of the legal profession by working to remain free from any influences and supporting lawyers who may be subject to attacks, intimidation or harassment. An independent legal profession, and in particular Bars, are fundamental to the maintenance of the rule of law and the protection of rights and freedoms.

A number of international human rights treaties, principles and guidelines further specify the indispensable role of lawyers in the promotion and protection of the rule of law and human rights. Their role is particularly fundamental in countries with weak or developing legal systems, where rule of law principles are possibly not being respected by state institutions.¹⁶⁵ In such circumstances, a Bar can play an essential role in transforming society. More specifically, it can develop strategies that give due attention to promoting:

- legislation that is in conformity with international human rights law and responds to the country’s current needs and realities;
- a strong and independent judiciary and legal profession, which is at the institutional core of systems based on the rule of law;
- lawful police services, humane prison services, fair prosecutions and capable associations of criminal defence lawyers;
- effective legal mechanisms for redressing civil claims and disputes;

162 *Ibid*, 153–154.

163 *Ibid*, 125.

164 *Ibid*, 26.

165 *Ibid*, 128.

- juvenile justice systems that ensure that children in conflict with the law are treated appropriately in line with recognised international standards for juvenile justice; and
- gender sensitivity.

5.1.1 Access to justice

In a number of countries, bar associations may be called on to play a role in opposing the growing trend by the executive in reducing access to justice in legal areas related to terrorism or security crimes.

TURKEY¹⁶⁶

In the aftermath of the attempted coup in 2016, Turkey adopted a law prohibiting lawyers from defending a person when both the lawyer and defendant are being investigated for the same crime. In practice, when a lawyer is taking a politically sensitive case, they are soon being pursued for the same crime, in violation of the principle of the assimilation of the lawyer to their client's cause. This legislation and practice is currently having a strong deterrent effect, putting lawyers in an impossible position.

IRAN

In January 2018, state-approved lists were submitted by the judicial branch naming 20 lawyers out of the more than 20,000 lawyers registered with the bar association allowed to represent individuals charged with 'national or international security crimes, political and media crimes'.¹⁶⁷ As a result, many members of the Bar are restricted from ensuring that the access to justice right is attained in Iran. Of greater concern is that the approved list also does not include women or human rights attorneys.¹⁶⁸ Entities such as Human Rights Watch¹⁶⁹ and the Center for Human Rights in Iran¹⁷⁰ expressed their displeasure with the decision, given its negative impact on detainees' rights and suppression of many members of Iran's bar association.

5.1.2 Legal aid

Governments should ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers should cooperate in the organisation and provision of services, facilities and other resources (Basic Principle 3).

166 See n 33.

167 Jason Lemon 'Iran only allows 20 government-approved lawyers to represent activists charged with political or media "crimes"' *Newsweek* (London, 6 June 2018) www.newsweek.com/iran-20-government-approved-lawyers-represent-activists-961169, accessed 4 July 2018.

168 See n 108 above.

169 See www.hrw.org/news/2018/06/05/want-choose-your-lawyer-good-luck-iran, accessed 4 July 2018.

170 See www.iranhumanrights.org/2018/06/iranian-human-rights-attorneys-speak-out-against-state-approved-list-of-20-lawyers-for-national-security-cases, accessed 4 July 2018.

Governments and professional associations of lawyers should promote programmes to inform the public about their rights and duties under the law, and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and, where necessary, call upon the assistance of lawyers (Basic Principle 4).

States should guarantee the right to legal aid (UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('UN Legal Aid Guidelines', Principles 1–11)).

States should recognise and encourage the contribution of lawyers' associations, universities, civil society, and other groups and institutions in providing legal aid, and public–private partnerships should be established to extend the reach of legal aid (UN Legal Aid Guidelines, Principle 14).

Bar and legal associations should be encouraged to draw up rosters of lawyers and paralegals, where appropriate, to visit prisons to provide legal advice and assistance at no cost to prisoners (UN Legal Aid Guidelines, Guideline 6 (47)(b)).

In practice, the bar will often establish a list of lawyers in charge with pro bono aid (eg, Belgium). While in some cases, the state is responsible for legal aid (eg, UK), in others, there is a form of partnership between state and the legal profession (eg, South Africa).

BRITISH COLUMBIA (CANADA)¹⁷¹

The Law Society of British Columbia has been active in trying to improve access to justice in British Columbia. Among various initiatives, it has promoted the 'unbundling' of legal services and has amended provisions of the Code to better advance this initiative. It was integral in creating what is now 'Access Pro Bono' through which the provision of pro bono legal services is organised (<http://accessprobono.ca>). The Law Society was also integral in establishing legal aid in British Columbia starting in the late 1950s and has continued to advocate for better funding of the system. It has recently released a 'Vision for Publicly Funded Legal Aid'. It has created an Access to Legal Services Advisory Committee and a Legal Aid Advisory Committee.

SWEDEN

In Sweden, the government-funded legal aid system is subsidiary to a private insurance regime, where the private legal protection insurance must be invoked before and often instead of state-funded legal aid. Even though the governmental funding of the legal aid system in many aspects is inadequate, the Swedish regime of legal aid functions well as a whole and gives most individuals in need of legal representation a public counsel. Pro bono activities of lawyers are therefore not a common feature of the Swedish legal system, but exist and originate from the initiative of the individual lawyer.

171 See Annex, response from the Law Society of British Columbia.

5.1.3 Law reform

Bar associations are uniquely placed to advocate changes in the law. These efforts take many forms. Bar associations take up issues ranging from broader societal concerns to the more narrowly defined interests and functions of the legal profession. In many jurisdictions, bar associations are involved in bills concerning the interests of the legal profession (eg, Germany and Slovakia).

The intensity and effectiveness of advocacy vary from jurisdiction to jurisdiction. But in each case, advocating law reform represents a key aspect of the bar association's mission and identity.

Many bar associations offer comments and suggestions to national, state and local legislatures on pending bills:¹⁷²

- In Sweden, a mandatory part of the Swedish legislative process is the government inviting comments on draft bills from various bodies in society. The SBA has a frequent role as a consultative body in the legislative process. The SBA annually submits legal opinions and comments on some 120 to 130 legislative proposals.
- In Japan, the Japan Federation of Bar Associations (JFBA), which is composed of the 52 bar associations in Japan, lobbies the National Diet (the Japanese Parliament) to adopt a pre-indictment bail system and to require video recording when police interrogate criminal suspects.
- In the US, the ABA has an active legislative advocacy programme intended to promote legal and social change, a trait shared by many state-level bar associations in the US.
- The Hong Kong Bar Association (HKBA) advocates in areas as wide-ranging as immigration policy, data privacy, regulation of expression and legislative procedure. In addition, the HKBA's complementary Law Society of Hong Kong (HKLS) submits a similarly broad range of recommendations for reform in areas as diverse as retail price regulation, refugee-status determinations, taxation, intellectual property laws and pollution controls. In 2013 alone, the HKLS made roughly 30 such submissions.

5.2 Human rights advocacy

Bar associations also generally take an active interest in the promotion and advancement of the legal rights of individuals, including human rights.

- In Australia, where state-level bar associations wield the greater share of influence, the Law Institute of Victoria (LIV) has conducted an audit of Victoria legal decisions raising human rights issues under Australia's Charter of Human Rights and Responsibilities Act. They seek to enable greater public access to otherwise restricted materials. The LIV also promotes indigenous rights, anti-discrimination laws and human rights-orientated immigration laws and policies.

¹⁷² See Annex, responses from the Flemish Bar Association, the Law Society of British Columbia, the Law Association of Zambia, the Law Society of Northern Ireland, the Law Society of South Africa, the Geneva Order of Advocates and the Swedish Bar Association.

- For its part, the Malaysian Bar, through its main organs and various committees, takes public stances on specific human rights issues relevant to Malaysian society. For instance, the President of the Malaysian Bar called on his country to ratify several core international human rights instruments. In addition, specific Malaysian Bar committees are dedicated to general issues of indigenous rights and human rights.

Examples of human rights featuring prominently in the advocacy work of bar associations can be found in other jurisdictions as well:

- The Law Society of Northern Ireland (representing solicitors) endeavours to keep human rights and equality considerations at the fore, in part by consulting with government leaders on important human rights objectives.
- In Japan, the JFBA cites as one of its primary activities the protection of fundamental rights and the advancement of social justice. The Lawyer Act, which is the JFBA's founding statute, mandates this commitment.
- In addition, the HKBA, with a standing Special Committee on Constitutional Affairs and Human Rights, is similarly committed to understanding and advocating human rights.

The IBA Task Force found that the ability to associate through independent bar associations and organisations enables lawyers to:¹⁷³

- stay in touch with the profession;
- engage in discussions on important legal issues;
- assemble and raise concerns on behalf of the profession; and
- have access to intelligent, unbiased and up-to-date advice on lawyers' professional duties and obligations.

The administration of justice, operation of the rule of law and access to justice all rely on the Bar as a representative body to ensure the existence of an independent profession of independent lawyers.¹⁷⁴ An effective Bar must not only support individual lawyers, but also provide a strong representative voice against broader action, particularly by governments or state institutions that affect the profession's ability to uphold the rule of law. Hence, bar associations must be able to represent the legal profession as a whole against threats to the proper administration of justice. Each Bar can represent the interests of the profession through advocacy in the form of press statements, written representations to professional bodies or *amicus* briefs in litigation.

Bar associations can help to ensure that lawyers are able to respond to community, media and political pressure in times of war, terror and emergency by offering training and advice. In addition, bar associations that receive adequate resourcing can do more to educate the profession, media and public on the importance of the role of lawyers in society and the pressing need for an independent legal profession.¹⁷⁵

173 See n 35, 13.

174 See n 3, 92.

175 See n 35, 27.

BRITISH COLUMBIA (CANADA)¹⁷⁶

The Law Society has established a Rule of Law and Lawyers Independence Advisory Committee that monitors rule of law violations and attacks on the independence of judges and lawyers both in Canada and abroad. From time to time it comments or recommends responses to events that it views as significantly serious to warrant comment.

The most prominent response to improper interference in the exercise of lawyers' functions in Canada was the response by all the law societies in Canada, through the Federation of Law Societies, to the government of Canada's efforts to require lawyers to report in connection with the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, resulting in a decision by the Supreme Court of Canada that recognised as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes (see *Canada (Attorney General) v Federation of Law Societies of Canada* [2015] 1 SCR 401.)

TURKEY¹⁷⁷

In Turkey, Van and Diyarbakir Bars are the two main Bars with an interest in the rule of law; they systematically react to any violations. Other Bars have reacted to violations but not systematically (eg, Istanbul and Ankara Bars). Most of the Bars that remain active are pro-government. Presidents and members of boards have been detained (for their alleged affiliation with the Gülen movement). This made the work of the Bars very difficult.

5.3 Protection of individual lawyers

RECOMMENDATION (2000) 21 OF THE COUNCIL OF EUROPE

The Recommendation provides that:

'Bar associations or other professional lawyers' associations should take any necessary action, including defending lawyers' interests with the appropriate body, in case of:

- a. arrest or detention of a lawyer;
- b. any decision to take proceedings calling into question the integrity of a lawyer;
- c. any search of lawyers themselves or their property;
- d. any seizure of documents or materials in a lawyers' possession;
- e. publication of press reports which require action on behalf of lawyers'.¹⁷⁸

¹⁷⁶ See Annex, response from the Law Society of British Columbia.

¹⁷⁷ See n 33.

¹⁷⁸ Para 5.

IBA STANDARDS

The IBA Standards state that:

‘To enable the lawyers’ association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention and place of detention of any lawyer; and the lawyers’ association shall have access to the lawyer arrested or detained.’¹⁷⁹

BELGIUM¹⁸⁰

The Secretary of State for Asylum and Migration has on multiple occasions accused lawyers in aliens’ law cases of abuse of procedures for their own benefit. The Flemish Bar Association reacted in the media by denying the accusations and by underscoring that it is opposed to abuse of procedures.

GERMANY

The German Bar Association (GBA) reacts to cases of attacks or threats by state and non-state actors against individual lawyers in a prompt manner through press releases and public statements by its president. Depending on the case, the GBA hosts or participates in public events in solidarity of freedom and security of individual lawyers and in order to prevent the realisation of security threats. See, for example, a press conference by the President of the GBA and a German migration lawyer who faced severe security threats for representing a refugee in a deportation law case. Moreover, in January 2017, a high-ranking GBA delegation, accompanied by press representatives, travelled to Turkey in order to obtain a better picture of the situation of lawyers and the judiciary after the coup attempt of 15 July 2016 and to show solidarity with colleagues.

LITHUANIA

In Lithuania, Article 46, paragraph 4 on the Law of the Bar states that perquisition of the workplace, home or vehicle of an advocate entered on the List of Practising Advocates of Lithuania is allowed only with the presence of a member of the Council of the Lithuanian Bar or its authorised person. The Lithuanian Bar Association (LBA) provides the authorities with such people. The LBA has no formal procedure in case of threat. It evaluates each situation individually and, depending on the circumstances, reacts accordingly. For example, it may send an official statement to a competent or responsible authority. Recently, the issue of the advocate’s client privilege has been a certain concern. Parliament is conducting an inquiry regarding the alleged unlawful influence of business on political processes. One episode that is of concern is regarding the communication of an advocate and client that could be made public. The bar association has publicly addressed Parliament about the need to respect advocate–client privilege.

In addition, there is more general concern that despite the legislation explicitly forbidding (Law on Bar, Article 46, paragraph 3) wiretapping or control of other forms of telecommunication of advocates, it is still common practice to wiretap not advocates but their clients. There are no

¹⁷⁹ Para 20.

¹⁸⁰ See Annex, response from the Flemish Bar Association.

mechanisms established in general wiretapping activities to create clear and certain rules on the implementation for the aforementioned formally existing exception for advocates.

NORTHERN IRELAND¹⁸¹

The Law Society of Northern Ireland has a security of members' protocol in the case of threats to lawyers, which involves close liaison with the police to ensure that individual solicitors are protected.

SOUTH AFRICA¹⁸²

The LSSA responds in cases in which an individual attorney is subject to attack or arrest, as in the case of the South African attorney recently arrested in Tanzania.¹⁸³ The attorney was subsequently released and returned to South Africa.

SWEDEN¹⁸⁴

In Sweden, in terms of physical protection for advocates in their daily endeavour, law firms have a general labour law responsibility to have an administration and office routines that secure the protection of individual lawyers. Furthermore, there are specific Swedish laws stipulating the safeguard of lawyers in different aspects (eg, the Act on Anti-Money Laundering). The SBA adopts ad hoc responses depending on the individual case of attacks on lawyers.

SWITZERLAND¹⁸⁵

In Switzerland, the Geneva Order of Advocates has established a human rights commission, which intervenes to support lawyers abroad through a rapid response mechanism and fact-finding missions on the basis of the Basic Principles.

TURKEY¹⁸⁶

As aforementioned, Turkish bar associations are not able to operate as independent professional bodies and to protect the rights of their members. Bar associations and professional bodies that issue practising licences have been targeted. Presidents and former presidents of 14 provincial bar associations across the country have been prosecuted and imprisoned.¹⁸⁷ Since the state of emergency, the provincial bar associations that are left have refused, without any legal basis, the applications of public agents, such as judges or academics, dismissed from their profession by decrees. This is the case, for example, of Cenk Yi iter, Yasin Bedir and former judge Murat Ozkan. Law students prosecuted for alleged terrorist activities are also denied access.

181 See Annex, response from the Law Society of Northern Ireland.

182 See Annex, response from the Law Society of South Africa.

183 See www.lssa.org.za/news-headlines/press-releases/arrest-of-lawyers—an-attack-on-the-independence-of-the-legal-profession-and-access-to-justice, accessed 4 July 2018.

184 See Annex, response from the Swedish Bar Association.

185 See Annex, response from the Geneva Order of Advocates.

186 See n 33.

187 See n 32.

In 2017, the Law Association of Zambia (LAZ) decided to defend one of its members, Nchima Nchito when he was charged with the offence of impersonation. The criminal charge arose from a civil matter in which shareholders of one of Zambia's privately owned newspapers, *The Post*, was placed in liquidation. Some of the directors and shareholders of Post Newspapers Limited later appointed Nchito to represent them in a related matter. Subsequently, Nchito was charged with impersonation, essentially on the ground that he was purporting to represent Post Newspapers Limited or its shareholders when he had not been so appointed by the provisional liquidator of Post Newspapers Limited.

The LAZ took up the defence of Nchito pursuant to section 4 (n) of the Law Association of Zambia Act, which stipulates that part of the objectives of the LAZ is 'to represent, protect and assist members of the legal profession in regard to their conditions of practice, remuneration and otherwise'. The Council of the LAZ took up the matter as it was of the view that the criminal charges raised against Nchito were a threat to the independence of the legal profession, especially that the law in Zambia permits directors of a company to use the name of the company in liquidation to litigate against the liquidator or receiver of the company. The case was eventually withdrawn by the complainant.

188 See Annex, response from the Law Association of Zambia.

Annex: Responses to Questionnaire on the Role, Composition and Functions of Bar Associations

The following questionnaire responses were submitted to the IBAHRI and are reprinted here with permission from the authors. Respondents' names and email addresses have been removed.



INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

Questionnaire on the Role, Composition and Functions of Bar Associations

Submissions should be sent electronically and no later than **26 May 2018** to Helene Ramos dos Santos, IBAHRI UN Senior Legal Consultant (helene.santos@int-bar.org)

BELGIUM

Respondent's name and email address:

1. Please indicate whether the legal profession is regulated, in your country, by:

- a professional association of lawyers
- a court
- the Government
- an independent or delegated authority
- a mixed system

Please describe briefly the system in place (as relevant at national/regional/local levels).

2. Where a professional association of lawyers plays a role in the regulation of the legal profession:

2.1. Please provide:

- a) the exact name of the association: Orde van Vlaamse Balies (translation: *Ordre des Barreaux Flamands/Flemish Bar Association*)
- b) the legal basis for its establishment (constitution/ordinary law/internal rules):
Judicial Code, volume III, title III, articles 488 to 508/25
- c) whether it is established as an ‘independent’¹ and self-governing association in the law:

Yes No Legal reference: Act of 4 July 2001

- Please describe briefly the composition, and appointment and renewal processes of the executive body of the association; and the role of the Executive, Legislative or Judiciary powers in relation to the establishment and functioning of this association (please mention who is overseeing the establishment and functioning of the association, if the association is not independent)

The Executive consists of the Board of Administrators (*raad van bestuur*), elected by the General Assembly (*advocates’ parliament composed of representatives of the local Bars*), for a term of three years. The Board proposes regulation, which is then legislated by the General Assembly. The latter can adopt amendments to the proposed text. The Flemish Bar Association itself does not have judiciary powers.

d) whether the membership of the association is mandatory to practise law:

Yes No Legal reference: Practising law is conditioned by registration as a member of a local Bar which is a member of the Flemish Bar Association or as a trainee lawyer or as an European lawyer (Judicial Code Article 428, 477bis to 477quater and 477quinquies to 477nonies)

2.2. Please provide the legal basis (name/date/latest review/reference) and describe briefly the current practice regarding the role of the association in:

- a) The **admission process** to the legal profession, the licensing of lawyers and renewal of practicing certificates.

The candidates have to follow a three years traineeship established by the Council of the local Bar Association (Judicial Code Article 434 and 435) and pass the so-called BUBA-exam in order to obtain the BUBA-certificate.

Candidates of European member states must previously pass an aptitude test organized by the Flemish Bar Association (Judicial Code Article 428quater).

1 Is independent and self-governing an association whose council or other executive body is freely elected by all the members without interference of any kind by any other body or person.

- b) The **free access to the profession** for all persons having the requisite professional competence, without discrimination of any kind, and assistance to new entrants into the profession. (see articles 25–39, Code of Ethics for lawyers)
- Please mention the specific measures adopted for minorities and foreign lawyers. For other EU lawyers see articles 477bis - 477nonies ('PRACTICE OF THE LEGAL PROFESSION IN BELGIUM BY LAWYERS WHO ARE NATIONALS OF A MEMBER STATE OF THE EUROPEAN UNION', transposition of Directives 77/249/EEC and 98/5/EEC). We can also refer to the Vademecum/guide for other EU and non EU lawyers of the two Brussels Bars (Dutch speaking and French speaking (attached).
- c) The imposition and monitoring of **continuous legal education** or training requirements.
- Is education on the deontology/**ethical duties of lawyers** **human rights** and/or **fundamental freedoms** provided? Article 495 Judicial Code – The mission of the Flemish Bar Association and the French- and German-speaking Bar Association, each for the Bars that form part of them, shall be to defend the honour, rights and common professional interests of their members and shall be in charge of legal aid, traineeships, *professional training of trainee lawyers, and training of all lawyers* belonging to the Bars that form part of them.

They shall take any initiatives and measures that may be useful in connection with training, disciplinary rules and loyalty of the profession and for the promotion of the interests of lawyers and litigants.

Either may make suggestions concerning those matters to the competent authorities.

- d) The promulgation of a code of conduct/rules of conduct for the legal profession.
- The executive body of the Flemish Bar Association establishes the code of conduct and enforces it through a disciplinary process (Judicial Code, Article 455; 'Codex deontologie voor advocaten').
- Please refer to the provisions of the code/rules incorporating regional² and international standards on the legal profession, including the Basic Principles on the Role of Lawyers. (See part X of the Deontology Code/Code of ethics for lawyers: 'Code of Conduct for European Lawyers').
- e) **Disciplinary processes** against lawyers.

The Dean (*Stafhouder* or *Bâtonnier*) of the local Bar receives complaints, investigates and has the discretionary power to decide whether to seize the disciplinary committee or not. (Judicial Code Article 458)

² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003; Recommendation Rec (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer (Council of Europe).

- Please mention when disciplinary proceedings are brought before an impartial disciplinary committee established by the legal profession, or before an independent statutory authority. Article 456 Judicial Code – *At the seat of each court of appeal, a disciplinary committee shall be set up for the purpose of penalizing all infringements of the dignity, integrity and discretion that form the basis of the legal profession and that are intended to ensure a proper practice of the profession, as well as all violations of the regulations, without prejudice to the jurisdiction of the courts, where appropriate.*

Article 458 Judicial Code – section 1. The Dean shall receive and investigate the complaints against the lawyers of his Bar. Under penalty of nullity, complaints must be lodged in writing, signed and dated, and must bear the full name of the complainant. The Dean may also institute an investigation ex officio or upon written notification from the Attorney-General.

The Dean shall conduct the investigation or appoint an investigator, whose duties and powers he shall define. The complainant and the lawyer being investigated shall be notified in writing of the institution of the investigation.

The complainant shall have the right to be heard during the investigation and may supply additional information and evidence if necessary.

A record shall be made of the statements of the complainant, the lawyer and the witnesses. The persons being heard shall be given a copy of the record of their statements at their request.

The lawyer being subjected to a disciplinary inquiry may be assisted during the investigation by a lawyer of his choice, but cannot have himself represented.

Section 2. If, after the investigation, the Dean believes that there are reasons to have the lawyer appear before the disciplinary committee, he shall pass on the case together with his reasoned decision to the president of the disciplinary committee, so that the latter can convene the disciplinary committee in accordance with the provisions of Article 459. He shall notify the complainant and the lawyer of this.

If the Dean believes that the complaint is inadmissible, unfounded or insufficiently serious, he shall inform the complainant and the lawyer of this in writing. The complainant shall have three months in which to challenge this decision by registered letter addressed to the president of the disciplinary committee.

The lawyer or the complainant may also appeal to the president of the disciplinary committee within the same time limit and in the same manner if the Dean fails to take a decision either to drop or to press charges within six months after the complaint has been lodged.

Section 3. The president of the disciplinary committee before whom the case is brought by the lawyer or the complainant may do the following within a period of three months after the case has been brought:

1. If he finds that the investigation by the Dean has not been instituted yet, he may either request the Dean to complete this investigation within a time limit to be set by him, or investigate the complaint himself, or appoint an investigator whose duties and powers he defines. In the latter case, the Dean shall hand over the case and pass on the file immediately to the president of the disciplinary committee;

2. By a duly reasoned and written decision, where appropriate after an inquiry, he may refuse to consider complaints that are inadmissible, unfounded or insufficiently serious;

3. He may, where appropriate after an inquiry, decide that the lawyer must appear before the disciplinary committee, in which case Article 459 shall apply.

The Dean, the lawyer and the complainant shall in any case receive a copy of this decision, which shall not be appealable.

f) The provision of **legal aid** for groups whose need for legal services is not met. (See articles 508/1–508/25 Judicial Code)

- Please mention the specific measures taken (eg, compulsory pro bono legal services).

Each year, each Bar draws up a list of lawyers who wish to provide first-line and second-line legal aid services, sends them to the concerned Legal Aid Commissions; and oversees the quality of the services (Judicial Code Article 508/5, 508/7 and 508/8).

g) The **protection** granted to the legal profession.

2.3. Please mention how the association is being financed.

Individual advocates pay a yearly membership fee to their local Bars, who in turn pay part of that fee to the Flemish Bar Association.

2.4. If the association encounters obstacles/challenges in fulfilling its functions, please mention the obstacles encountered.

2.5. If the association has no mandate to fulfil objectives that you think **should** be within the scope of its mandate, please state them and indicate the reasons for your response.

3. Please provide the **legal safeguards** in your country:

3.1. Against unlawful interferences from the authorities in the work of lawyers;

3.2. Protecting the freedom of association of lawyers

See articles 488–508 Judicial Code for the institutional provisions of the Bar Associations. The Belgian Constitution guarantees the freedom of association in article 27: ‘Belgians have the right to enter into association or partnership; this right cannot be subject to any preventive measure.’; and

- 3.3. Ensuring the security of lawyers threatened as a result of discharging their functions (including travelling abroad, communicating with their clients, statements made in or outside a court of law in the course of representing their clients).
4. Please provide reference to **authoritative case law** (case name and citation if reported) related to the freedom of association of the legal profession in your country.
5. Please list independent associations of the legal profession in charge of **professional representation** in your country.
- Flemish Bar Association (*Dutch speaking lawyers in Flanders and Brussels*), Ordre des Barreaux Francophone et Germanophone (*French and German speaking lawyers in Brussels, the Walloon Region, and the latter's German speaking lawyers in the German Speaking Community*).
6. Please describe when an independent association of lawyers is responsible for, and has actively engaged in:
- 6.1. The **protection of individual lawyers** from any form of intimidation, hindrance, harassment or improper interference in the exercise of their functions.
- Is the association promptly informed? Possibly, there is no procedure in place.
 - Does the association have procedures in place to respond to attacks on lawyers (rapid response mechanisms/other)? If no procedures exist, how do associations respond? Please provide concrete examples
 - Communication and lobbying towards government and Parliament.
 - Annulment or intervention proceedings before the Constitutional Court/Council of State in abstract and concrete constitutional review.
- 6.2. The **promotion and protection of the role of lawyers in society and their independence** (For instance, has the association raised awareness about the role of lawyers? addressed barriers arising from political/media/community pressure after their involvement in controversial or unpopular cases or cases in which lawyers are prevented from appearing in court on behalf of a client? Has the association reacted in cases in which they face pressure to interpret the law in the government's favour; or refrain from challenging the constitutionality of questionable legislation?).
- 6.3. The **adoption of laws, policies and strategies relating to the administration of justice**. Please provide concrete examples.
- 6.4. The drafting of **new laws and legal debates in general**. Please provide concrete examples. The Flemish Bar Association regularly drafts legislative proposals or proposes amendments.

7. Do you know of any case where an independent association of lawyers has faced **threats or reprisal** (eg, closure, sanctions, verbal accusations) after discussing or taking an active position on issues affecting the rule of law and/or human rights?

- Please, describe what have been the most relevant cases and situations, when it occurred and what is the ongoing situation regarding that case(s). The secretary of State for Asylum and Migration has on multiple occasions accused lawyers in aliens' law cases of abuse of procedures for their own benefit.
- Was any protection mechanism used in protection of the association? What impact did it have?

The Flemish Bar Association reacted in the media by denying the accusations and by underscoring that it is opposed to abuse of procedures.

8. In general, how would you rate:

8.1. The level of independence of the regulatory body of the legal profession in your country?

0 1 2 3 4 5 6 7 8 9 10

8.2. The level of independence of the associations of lawyers in your country?

0 1 2 3 4 5 6 7 8 9 10

8.3. The level of protection of lawyers by the authorities when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

8.4. The level of protection of lawyers by bar associations/law societies when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

Thank you.



Human Rights
Institute

INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

Questionnaire on the Role, Composition and Functions of Bar Associations

Submissions should be sent electronically and no later than **26 May 2018** to
Helene Ramos dos Santos, IBAHRI UN Senior Legal Consultant (helene.santos@int-bar.org)

CANADA (PROVINCE OF BRITISH COLUMBIA)

Respondent's name and email address:

1. Please indicate whether the legal profession is regulated, in your country, by:

- a professional association of lawyers
- a court
- the Government
- an independent or delegated authority
- a mixed system

We are not sure how to categorise ourselves in light of the options. The Law Society comprises all the lawyers who are admitted to practise law in the province of British Columbia, and therefore constitutes a 'professional association', but we are a completely independent (non-governmental) body that regulates the legal profession in the province in the interest of the public, not in the interest of the lawyers. That authority is set out in provincial legislation and therefore might be said to be 'delegated'.

Please describe briefly the system in place (as relevant at national/regional/local levels).

The Law Society of British Columbia is the governing body of lawyers in the province of British Columbia. The Law Society's responsibilities are set out in:

the *Legal Profession Act* S.B.C. 1998 c.9, a provincial statute that describes the Law Society powers to admit members who are thereby entitled to practise law, make rules and monitor the conduct and competence of lawyers.

The powers, objects and duties of the Law Society are set out in the *Legal Profession Act*. In the performance of its statutory mandate, the first responsibility of the Law Society is to uphold the public interest in the administration of justice. This is given the force of law in s. 3 of that *Act*:

The Law Society is governed by a Board of Directors, called the Benchers. Twenty-five Benchers are elected by members of the Law Society; up to six are appointed by the Executive Branch of the provincial government as full voting Appointed Benchers to represent the views of the public. The Chief Elected Officer is the President.

2. Where a professional association of lawyers plays a role in the **regulation** of the legal profession:

2.1. Please provide:

- a) the exact name of the association: Law Society of British Columbia
- b) the legal basis for its establishment (constitution/ordinary law/internal rules):

Legal Profession Act S.B.C. 1998 c. 9 www.bclaws.ca/civix/document/id/complete/statreg/98009_01

Law Society Rules, passed by the Benchers on the authority of the *Legal Profession Act*. These Rules are *not* subject to review or vetting by the Executive or Legislative Branches of the provincial government. www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules

- c) whether it is established as an ‘independent’¹ and self-governing association in the law:

Yes No Legal reference: *Legal Profession Act* S.B.C. 1998 c. 9

- Please describe briefly the composition, and appointment and renewal processes of the executive body of the association; and the role of the Executive, Legislative or Judiciary powers in relation to the establishment and functioning of this association (please mention who is overseeing the establishment and functioning of the association, if the association is not independent)

There are 31 governors who are called Benchers. 25 are lawyers elected by the members of the Law Society. (The members comprise all the lawyers in the Province) and six are appointed by the Lieutenant-Governor in Council (the Executive branch of the provincial government). The Attorney General is also a Bencher. Those appointed by the Lieutenant-Governor in Council are not lawyers. Lawyer Benchers are elected for two-year terms, and may serve a maximum of four terms. Appointed Benchers are

¹ Is independent and self-governing an association whose council or other executive body is freely elected by all the members without interference of any kind by any other body or person.

generally also appointed for two-year terms, but these appointments may be rescinded by the Lieutenant- Governor in Council although in practice they rarely, if ever, are.

- d) whether the membership of the association is mandatory to practise law:

Yes No Legal reference: *Legal Profession Act*

As currently constructed, the *Legal Profession Act*, subject to limited exceptions, prohibits anyone other than a practising lawyer from engaging in the practice of law. ‘Practising lawyer’ is defined as a member in good standing in the Law Society. See sections 1 and 15

2.2. Please provide the legal basis (name/date/latest review/reference) and describe briefly the current practice regarding the role of the association in:

- a) The **admission process** to the legal profession, the licensing of lawyers and renewal of practicing certificates.

See Part 2, *Legal Profession Act* and Part 2, Division 2 of the Law Society Rules

For further information on applications processes, see www.lawsociety.bc.ca/becoming-a-lawyer-in-bc

- b) The **free access to the profession** for all persons having the requisite professional competence, without discrimination of any kind, and assistance to new entrants into the profession.

- Please mention the specific measures adopted for minorities and foreign lawyers.

There are no particular specific processes for minorities.

Information about foreign lawyers seeking admission as members of the Law Society to entitle them to practise Canadian law can be found at www.lawsociety.bc.ca/becoming-a-lawyer-in-bc/transfers

There are separate provisions allowing the Law Society to permit foreign lawyers who wish to practise, in BC, the law of their home jurisdiction – see in particular Rules 2–28 to 2–34. These ‘practitioners of foreign law’ (or ‘foreign legal consultants’) are regulated by the Law Society, but they are not members of the Society.

- c) The imposition and monitoring of **continuous legal education** or training requirements.

See Rules 3-29 to 3-32 of the Law Society Rules.

- Is education on the **ethical duties of lawyers** **human rights** and/or **fundamental freedoms** provided?

The Law Society is not an education provider (other than the professional legal training course that is required of applicants for admission). The Law Society requires each member to engage in a minimum of 12 hours of legal education annually, of which a minimum of two hours must be focussed on ethics, professionalism and/

or practice management. Consideration is being given to issues relating to cultural competency in connection with CPD requirements.

- d) The promulgation of a **code of conduct/rules of conduct** for the legal profession.
- Please refer to the provisions of the code/rules incorporating regional² and international standards on the legal profession, including the Basic Principles on the Role of Lawyers.

The *Legal Profession Act* provides the Benchers authority to create Rules. In addition, the Benchers have published the Code of Professional Conduct for British Columbia for the guidance of lawyers in BC. www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia

- e) **Disciplinary processes** against lawyers.
- Please mention when disciplinary proceedings are brought before an impartial disciplinary committee established by the legal profession, or before an independent statutory authority.

For an explanation of the complaint and disciplinary processes for lawyers in BC, see www.lawsociety.bc.ca/complaints-lawyer-discipline-and-public-hearings

- f) The provision of **legal aid** for groups whose need for legal services is not met.
- Please mention the specific measures taken (eg, compulsory pro bono legal services).

The Law Society has been active in trying to improve access to justice in British Columbia. Amongst various initiatives, it has promoted the ‘unbundling’ of legal services and has amended provisions of the Code to better advance this initiative. It was integral in creating what is now ‘Access Pro Bono’ through which the provision of pro bono legal services is organised (<http://accessprobono.ca>). The Law Society was also integral in establishing legal aid in BC starting in the late 1950s and has continued to advocate for better funding of the system. It has recently released a ‘Vision for Publicly Funded Legal Aid’. It has created an Access to Legal Services Advisory Committee and a Legal Aid Advisory Committee. Further information on Law Society initiatives relating to access to justice and legal aid can be found on our website: www.lawsociety.bc.ca/our-initiatives/legal-aid-and-access-to-justice

- g) The **protection** granted to the legal profession.

2.3. Please mention how the association is being financed. Each lawyer pays an annual practice fee that funds the Law Society.

² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003: Recommendation Rec (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer (Council of Europe).

2.4. If the association encounters obstacles/challenges in fulfilling its functions, please mention the obstacles encountered.

The Law Society is an independent organisation and generally faces few, if any, obstacles in undertaking its statutory mandate.

2.5. If the association has no mandate to fulfil objectives that you think **should** be within the scope of its mandate, please state them and indicate the reasons for your response.

N/A

3. Please provide the **legal safeguards** in your country:

3.1. Against unlawful interferences from the authorities in the work of lawyers;

In *Canada (Attorney General) v Federation of Law Societies of Canada* [2015] 1 SCR 401, the Supreme Court of Canada held that, as a principle of fundamental justice, the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes.

3.2. Protecting the freedom of association of lawyers;

The Law Society has maintained that lawyer self-governance is integral to the preservation of the rule of law. The importance of an independent bar is generally supported in Canadian law through decisions such as those referred to in paragraph 4 below.

and

3.3. Ensuring the security of lawyers threatened as a result of discharging their functions (including travelling abroad, communicating with their clients, statements made in or outside a court of law in the course of representing their clients).

These are largely set through the common law, through constitutional law and through international norms such as the rule of law and UN declarations.

4. Please provide reference to **authoritative case law** (case name and citation if reported) related to the freedom of association of the legal profession in your country.

There are many decisions on the subject in Canada. Some of the most commonly cited are:

- *Pearlman v Manitoba Law Society Judicial Committee* [1991] 2 SCR 869
- *Attorney General of Canada v Law Society of British Columbia* [1982] 2 SCR 307
- *Andrews v Law Society of British Columbia* [1989] 1 SCR 143
- *Finney v Barreau du Quebec* [2004] 2 SCR 17
- *Canada (Attorney General) v Federation of Law Societies of Canada* [2015] 1 SCR 401

There are also a series of decisions that describe solicitor–client privilege as a principle of fundamental justice:

- *Lavallee, Rackell & Heintz v Canada (Attorney General)* [2002] 3 SCR 209
- *Miranda v Richer* [2003] 3 SCR 193
- *Canada (Information and Privacy Commissioner) v Blood Tribe Department of Health* [2008] 2 SCR 574
- *Alberta (Information and Privacy Commissioner) v University of Calgary* [2016] 2 SCR 555

5. Please list independent associations of the legal profession in charge of **professional representation** in your country.

Canadian Bar Association (BC Branch) Trial Lawyers Association of BC Criminal Defence Advocacy Society Indigenous Bar Association

6. Please describe when an independent association of lawyers is responsible for, and has actively engaged in:

6.1. The **protection of individual lawyers** from any form of intimidation, hindrance, harassment or improper interference in the exercise of their functions.

- Is the association promptly informed?
- Does the association have procedures in place to respond to attacks on lawyers (rapid response mechanisms/other)? If no procedures exist, how do associations respond? Please provide concrete examples

The Law Society has established a Rule of Law and Lawyers Independence Advisory Committee that monitors rule of law violations and attacks on lawyers' independence and judicial independence both in Canada and abroad. From time to time it comments or recommends responses to events that it views as significantly serious to warrant comment.

Lawyers in Canada, British Columbia included, are generally free from improper interference from government or other political authorities. If an example of such interference were to become apparent, the Law Society would be prepared to go to court to assert and defend the legal principles of the rule of law and of a free and independent bar, as well as any related core principles that may have been jeopardised in the particular interference, for example, solicitor–client confidentiality or applicable forms of privilege recognised at law. The Canadian courts have generally recognised and upheld the fundamental importance of such principles when there have been issues of potential encroachment.

The most prominent response to improper interference in the exercise of lawyers' functions in Canada was the response by all the law societies in Canada, through the Federation of Law Societies, to the government of Canada's efforts to require lawyers to report in connection with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, resulting in a decision by the Supreme Court of Canada that recognised as a principle of fundamental

justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. See *Canada (Attorney General) v Federation of Law Societies of Canada* cited above.

- 6.2. The **promotion and protection of the role of lawyers in society and their independence** (For instance, has the association raised awareness about the role of lawyers? addressed barriers arising from political/media/community pressure after their involvement in controversial or unpopular cases or cases in which lawyers are prevented from appearing in court on behalf of a client? Has the association reacted in cases in which they face pressure to interpret the law in the government's favour; or refrain from challenging the constitutionality of questionable legislation?).

The Rule of Law and Lawyer Independence Advisory Committee comments on violations of the rule of law and on the principle of an independent bar where necessary to do so. Most examples come from foreign countries. The Law Society will intervene in litigation (either on its own or by recommending that the Federation of Law Societies do so) where the issue of any fundamental principles of justice arise or where the rule of law or lawyer independence may be threatened or compromised. See aforementioned cases as examples.

The Law Society has also established an annual public Lecture on the Rule of Law.

- 6.3. The **adoption of laws, policies and strategies relating to the administration of justice**. Please provide concrete examples.

In British Columbia, the Law Society of British Columbia is usually (although not always) consulted by the provincial government when the government is considering legislation relating to the administration of justice. Even where the government may not have consulted the Law Society prior to passing the legislation, the Law Society is usually consulted prior to the legislation being promulgated, which has sometimes led to amendments to the legislation prior to it coming into effect. A recent example of the latter was the *Civil Resolution Tribunal Act* S.B.C. 2012 c.25.

The *Legal Profession Act* is never substantively amended by the provincial government without consultation with the Law Society. In many instances, amendments to that legislation are driven by requests from the Law Society itself.

- 6.4. The drafting of **new laws and legal debates in general**. Please provide concrete examples.

The Law Society actively participates in many groups within the justice system in British Columbia that the government participates in as well and which, from time to time, result in new or amended legislation. These include the semi-annual or annual Justice Summits (required by the *Justice Reform and Transparency Act* S.B.C. 2013 c.7) and groups like Access to Justice BC which brings together justice system participants to identify reforms to improve access to legal services.

7. Do you know of any case where an independent association of lawyers has faced **threats or reprisal** (eg, closure, sanctions, verbal accusations) after discussing or taking an active position on issues affecting the rule of law and/or human rights?

No, not in Canada.

- Please, describe what have been the most relevant cases and situations, when it occurred and what is the ongoing situation regarding that case(s).
- Was any protection mechanism used in protection of the association? What impact did it have?

8. In general, how would you rate:

8.1. The level of independence of the regulatory body of the legal profession in your country?

0 1 2 3 4 5 6 7 8 9 10

8.2. The level of independence of the associations of lawyers in your country?

0 1 2 3 4 5 6 7 8 9 10

8.3. The level of protection of lawyers by the authorities when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

8.4. The level of protection of lawyers by bar associations/law societies when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

Thank you.



Human Rights
Institute

INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

Questionnaire on the Role, Composition and Functions of Bar Associations

Submissions should be sent electronically and no later than **26 May 2018** to
Helene Ramos dos Santos, IBAHRI UN Senior Legal Consultant (helene.santos@int-bar.org)

GERMAN BAR ASSOCIATION (DEUTSCHER ANWALTVEREIN, DAV)

Respondent's name and email address:

Please note: the following questions will be answered provided that they are within the German Bar Association's competences. Questions referring to regulation of the legal profession in Germany will be marked 'not applicable' as the German Federal Bar is competent in this respect.

1. Please indicate whether the legal profession is regulated, in your country, by:

- a professional association of lawyers
- a court
- the Government
- an independent or delegated authority
- a mixed system

Please describe briefly the system in place (as relevant at national/regional/local levels).

2. Where a professional association of lawyers plays a role in the **regulation** of the legal profession:
Not applicable.

2.1. Please provide:

- a) the exact name of the association:

- b) the legal basis for its establishment (constitution/ordinary law/internal rules):
- c) whether it is established as an ‘independent’¹ and self-governing association in the law:

Yes No Legal reference:

- Please describe briefly the composition, and appointment and renewal processes of the executive body of the association; and the role of the Executive, Legislative or Judiciary powers in relation to the establishment and functioning of this association (please mention who is overseeing the establishment and functioning of the association, if the association is not independent)

- d) whether the membership of the association is mandatory to practise law:

Yes No Legal reference:

2.2. Please provide the legal basis (name/date/latest review/reference) and describe briefly the current practice regarding the role of the association in:

- a) The **admission process** to the legal profession, the licensing of lawyers and renewal of practicing certificates.

Not applicable.

- b) The **free access to the profession** for all persons having the requisite professional competence, without discrimination of any kind, and assistance to new entrants into the profession.

- Please mention the specific measures adopted for minorities and foreign lawyers.

Not applicable.

- c) The imposition and monitoring of **continuous legal education** or training requirements.

- Is education on the **ethical duties of lawyers** **human rights** and/or **fundamental freedoms** provided?

The ‘German Federal Lawyers Act’ (BRAO) contains an obligation to continuing legal education. Section 43a para. 6 BRAO reads: ‘A Rechtsanwalt has a duty to engage in Continuing Legal Education’. However, this obligation is lacking further clarification and definition (at least with respect to those lawyers who are not qualified as certified specialist lawyers because certified specialist lawyers are subject to an already existing, particular CLE regime).

The German Bar Association (DAV) has a specialised institution for continuing legal education. The Deutsche Anwalt Akademie (DAA) is a wholly-owned subsidiary of the German Bar Association and in charge of providing and organising training

¹ Is independent and self-governing an association whose council or other executive body is freely elected by all the members without interference of any kind by any other body or person.

programmes for lawyers. The DAA does not offer trainings focusing on ethical duties of lawyers, human or fundamental rights only. This is done by the German Bar Association.

- d) The promulgation of a **code of conduct/rules of conduct** for the legal profession.
- Please refer to the provisions of the code/rules incorporating regional² and international standards on the legal profession, including the Basic Principles on the Role of Lawyers.

Not applicable.

- e) **Disciplinary processes** against lawyers.
- Please mention when disciplinary proceedings are brought before an impartial disciplinary committee established by the legal profession, or before an independent statutory authority.

Not applicable.

- f) The provision of **legal aid** for groups whose need for legal services is not met.
- Please mention the specific measures taken (eg, compulsory pro bono legal services).

Germany has two forms of governmental legal aid: assistance under the legal advice scheme and assistance with court costs.

The Act on Advisory Assistance and Representation for Citizens with a Low Income (Beratungshilfegesetz, of 18 June 1980 (BGBl. I S. 689)) provides the legal basis for legal advice and representation for citizens with low incomes in out-of-court-proceedings (particularity in Hamburg and Bremen: the legal advice scheme is not being applied because of independent forms of extrajudicial legal advice). As regards legal assistance and representation in court, the provision of legal aid is regulated in Section 114 et seq of the Code of Civil Procedure (Zivilprozessordnung as republished at 5 December 2005 (BGBl. I S. 3202, ber. 2006 I S. 431, ber. 2007 I S. 1781)) and applies to proceedings before the courts.

Assistance under the legal advice scheme is primarily provided by lawyers and legal advisors who are members of a regional Bar. It ought to be mentioned that regional Bars have compulsory membership in the German Federal Bar (Bundesrechtsanwaltskammer), whereas local bars comprising the German Bar Association (DAV) can obtain their membership voluntarily. This means the DAV, unlike German Federal Bar, has no legal means to influence the decision of its members on provision of bono legal services.

Lawyers are legally obliged to take over the assistance provided under the Act on Advisory Assistance and Representation for Citizens with a Low Income and may only

² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003: Recommendation Rec (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer (Council of Europe).

refuse the advice in individual cases based on serious grounds (section 49a of the Federal Lawyers' Act).

Assistance under the legal advice scheme (advice and, where necessary, representation) is given in civil cases including employment, administrative, constitutional and social cases. In criminal cases and cases involving administrative offences, only advice may be granted given. In cases where the laws of other states must be applied, assistance under the legal advice scheme is given as far as the matter has a connection with Germany. No assistance under the legal advice scheme is granted in connection with tax cases.

Legal aid in court proceedings is granted for all types of civil cases, cases involving voluntary jurisdiction and cases brought before industrial tribunals, administrative courts, social courts and tax courts. No assistance with court costs is granted to the accused in criminal court proceedings and debtors in bankruptcy proceedings. The rules on court-appointed defence counsels contain special provisions covering criminal proceedings.

g) The **protection** granted to the legal profession.

2.3. Please mention how the association is being financed.

DAV is financed through membership fees paid by individual members (local Bar associations) and individual extraordinary members.

2.4. If the association encounters obstacles/challenges in fulfilling its functions, please mention the obstacles encountered.

The DAV has not encountered such obstacles.

2.5. If the association has no mandate to fulfil objectives that you think **should** be within the scope of its mandate, please state them and indicate the reasons for your response.

3. Please provide the **legal safeguards** in your country:

3.1. Against unlawful interferences from the authorities in the work of lawyers;

Section 1 Bundesrechtsanwaltsordnung (Federal Lawyer's Act) stipulates the basic principal of the independence of lawyers: 'The lawyer is an independent body of the judiciary.' This principle aims in particular at insuring the independence of lawyers from state interference. Moreover, specialised fields of law contain provisions which protect the lawyer from unlawful state interference in particular situations. This is particularly well established in the Criminal Procedure Code. For example, it assigns lawyers the right to refuse to give evidence and prohibits search measures of law firms, sections 52, 97 Criminal Procedure Code.

3.2. Protecting the freedom of association of lawyers; and

The freedom of association is guaranteed in Article 9 of the German Basic Law. Associations of lawyers, such as the German Bar Association, are covered and hence protected by this fundamental right.

3.3. Ensuring the security of lawyers threatened as a result of discharging their functions (including travelling abroad, communicating with their clients, statements made in or outside a court of law in the course of representing their clients).

Germany has no further legal safeguards in this regard in place that would go beyond those already stated under 3.1.

4. Please provide reference to **authoritative case law** (case name and citation if reported) related to the freedom of association of the legal profession in your country.

The German legal system is a system of civil law which is not based on authoritative case law. However, landmark verdicts for the legal profession in Germany are the so-called Bastille decisions issued by the German Federal Constitutional Court in 1987. The Court declared the rules governing the legal profession at the time incompatible with the right to freely exercise a profession. As a result, the Rules of Professional Practice and for Certified Specialist Lawyers were enacted in 1994 which govern the legal profession today.

5. Please list independent associations of the legal profession in charge of **professional representation** in your country.

The German Bar Association consists of 256 local bar associations. The local bar associations are represented by 16 state associations (Landesverbände), one for each federal state, and every individual local bar association is a member of the German Bar Association.

6. Please describe when an independent association of lawyers is responsible for, and has actively engaged in:

6.1. The **protection of individual lawyers** from any form of intimidation, hindrance, harassment or improper interference in the exercise of their functions.

- Is the association promptly informed?

An automatic information mechanism is not in place. The information received by the DAV depends therefore on the individual case.

- Does the association have procedures in place to respond to attacks on lawyers (rapid response mechanisms/other)? If no procedures exist, how do associations respond? Please provide concrete examples

There is no standardised mechanism in place. However, the German Bar Association reacts to cases of attacks or threats by state and non-state actors against individual lawyers in a promptly manner through press releases and public statements by its president. Depending on the actual case, the German Bar Association hosts or participates in public events in solidarity of freedom and security of individual lawyers and in order to prevent the realisation of security threats. See, for example, a press conference by the president of the DAV and a German migration lawyer who faced severe security threats for representing a refugee in a deportation law case. Moreover, in January 2017, a high-ranking DAV delegation, accompanied by press representatives, travelled to Turkey, in order to get a

better picture of the situation of the lawyers and the judiciary in Turkey after the coup attempt of 15 July 2016 and to show solidarity with the Turkish colleagues. In June 2017, a friendship agreement was signed between the DAV and the UTBA in Ankara to intensify their relations and establish common values such as human rights and the rule of law as the basis of their cooperation. In situations when the rule of law has become particularly under pressure, such country visits are an important part of the work of the DAV President. <https://anwaltsblatt.anwaltverein.de/de/anwaeltinnen-anwaelte/vereinsarbeit/Keine-Anti-Abschiebeindustrie-Pressekonferenz>.

- 6.2. The **promotion and protection of the role of lawyers in society and their independence** (For instance, has the association raised awareness about the role of lawyers? addressed barriers arising from political /media/ community pressure after their involvement in controversial or unpopular cases or cases in which lawyers are prevented from appearing in court on behalf of a client? Has the association reacted in cases in which they face pressure to interpret the law in the government's favour; or refrain from challenging the constitutionality of questionable legislation?).

The German Bar Association promotes the role of lawyers in society and as the foundation for a functioning rule of law also through press releases, public statements and events. Support for human rights and rule of law principles is enshrined in its founding statute (section 3 para. 2.). Working groups of the German Bar Association organise conventions and seminars on different areas of law including human rights. This year, the human rights committee hosted a joint event on the role of the European Court for Human Rights in Turkey (www.lto.de/recht/hintergruende/h/egmr-tuerkei-menschenrechte-verletzungen-rechtsstaat-beschwerden-rechtswegerschoepfung), arranged together with European Association of Lawyers for Democracy and World Human Rights, the Law Society of England and Wales, Lawyers for Lawyers and Observatoire International des Avocats.

Further general information and a comprehensive leaflet are available on the website <https://anwaltverein.de/de/beliebte-themen/english-information>.

- 6.3. The **adoption of laws, policies and strategies relating to the administration of justice**. Please provide concrete examples.

The submission of position papers by the Legislative Committees of the German Bar Association regarding national draft laws and proposals on EU level is one of the main activities of the German Bar Association. This primarily fulfills its function as a lobbying organisation for the interests of the legal profession by exerting influence on parliamentary intentions in Germany and Europe. Recent examples of Legislative Committees' position papers pertain to the tightening of police and emergency response law in some federal states, the fight against illegal online content and monetary compensation to unlawfully detained persons. All opinions are available here: <https://anwaltverein.de/de/newsroom?newscategories=3>.

- 6.4. The drafting of **new laws and legal debates in general**. Please provide concrete examples.

Through its Legislative Committees, the German Bar Association initiates and supports efforts for the creation of new legislation on national and European level:

See for the national level for example at: <https://anwaltverein.de/de/newsroom?searchKeywords=Fortbildung&newscategories=3&category=16>

See for the European level for example at: <https://anwaltverein.de/de/newsroom?newscategories=3&category=26>

7. Do you know of any case where an independent association of lawyers has faced **threats or reprisal** (eg, closure, sanctions, verbal accusations) after discussing or taking an active position on issues affecting the rule of law and/or human rights?
- Please, describe what have been the most relevant cases and situations, when it occurred and what is the ongoing situation regarding that case(s).
 - Was any protection mechanism used in protection of the association?

What impact did it have?

The German Bar Association was mandatorily disbanded during the dictatorship of the Third Reich in Germany. The association was refounded only following the end of the Second World War.

8. In general, how would you rate:

8.1. The level of independence of the regulatory body of the legal profession in your country?

0 1 2 3 4 5 6 7 8 9 10

8.2. The level of independence of the associations of lawyers in your country?

0 1 2 3 4 5 6 7 8 9 10

8.3. The level of protection of lawyers by the authorities when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

8.4. The level of protection of lawyers by bar associations/law societies when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

Thank you.



Human Rights
Institute

INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

Questionnaire on the Role, Composition and Functions of Bar Associations

Submissions should be sent electronically and no later than **26 May 2018** to
Helene Ramos dos Santos, IBAHRI UN Senior Legal Consultant (helene.santos@int-bar.org)

NORTHERN IRELAND

Respondent's name and email address:

1. Please indicate whether the legal profession is regulated, in your country, by:

- a professional association of lawyers
- a court
- the Government
- an independent or delegated authority
- a mixed system

Please describe briefly the system in place (as relevant at national/regional/local levels).

The Law Society of Northern Ireland was established in 1922, when a Royal Charter was granted to solicitors in Northern Ireland to permit the setting up of the Incorporated Law Society of Northern Ireland. The Law Society of Northern Ireland is the representative body for the solicitors' profession in Northern Ireland with the aim of protecting the public. Under the Solicitors (Northern Ireland) Order 1976, the Law Society also acts as the regulatory authority governing the education, accounts, discipline and professional conduct of solicitors in order to maintain the independence, ethical standards, professional competence and quality of services offered to the public.

2. Where a professional association of lawyers plays a role in the **regulation** of the legal profession:

2.1. Please provide:

- a) the exact name of the association: the Law Society of Northern Ireland.
- b) the legal basis for its establishment (constitution/ordinary law/internal rules):

The Law Society of Northern Ireland was established under a Royal Charter in 1922 and functions under a number of statutes, primarily the Solicitors (Northern Ireland) Order 1976.

- c) whether it is established as an ‘independent’¹ and self-governing association in the law:

Yes No Legal reference: Solicitors (Northern Ireland) Order 1976.

- Please describe briefly the composition, and appointment and renewal processes of the executive body of the association; and the role of the Executive, Legislative or Judiciary powers in relation to the establishment and functioning of this association (please mention who is overseeing the establishment and functioning of the association, if the association is not independent)

The Society operates through an elected Council of 30 members, all solicitors, who serve on a voluntary basis. Council members are elected every two years by a vote of all members of the Society (ie, all solicitors). The Council has a statutory function pursuant to the Solicitors (Northern Ireland) Order 1976. The Council is assisted by the Society’s secretariat led by the Chief Executive. The Chief Executive is also the Registrar with a statutory responsibility for the admittance of solicitors on to the Roll and the issue or removal of practising certificates.

- d) whether the membership of the association is mandatory to practise law:

Yes No Legal reference: Solicitors (Northern Ireland) Order 1976.

2.2. Please provide the legal basis (name/date/latest review/reference) and describe briefly the current practice regarding the role of the association in:

- a) The **admission process** to the legal profession, the licensing of lawyers and renewal of practicing certificates.

The Law Society of Northern Ireland is responsible for the admission process to the legal profession. It liaises with the Institute of Professional Legal Studies which is the organisation who delivers the two year professional training course to enable qualification as a solicitor in Northern Ireland. The Society deals with the issue and renewal of Practising Certificates which are necessary for solicitors to practise in this jurisdiction. This function is carried out pursuant to the Solicitors (Northern Ireland) Order 1976.

1 Is independent and self-governing an association whose council or other executive body is freely elected by all the members without interference of any kind by any other body or person

- b) The **free access to the profession** for all persons having the requisite professional competence, without discrimination of any kind, and assistance to new entrants into the profession.

- Please mention the specific measures adopted for minorities and foreign lawyers.

Subject to a person having the requisite professional competences and fulfilling the other levels of education and training criteria required by the Society, there are no bars to access to the profession such as would constitute discrimination of any kind. Solicitors transferring from a foreign jurisdiction may be required to take additional study modules to ensure that they have the necessary competencies. There are special interest groups available such as mentoring programmes available to solicitors to assist with integration and development within the profession.

- c) The imposition and monitoring of **continuous legal education** or training requirements.

The Society requires solicitors to undergo continuous professional development post-admission. A number of group study and private study hours are required every year. Solicitors are also required to undertake specific training on risk management and conveyancing (where they carry out this type of work). This is monitored on an ongoing basis by the Society to ensure compliance.

- Is education on the **ethical duties of lawyers** **human rights** and/or **fundamental freedoms** provided?

Yes. All three categories listed above are included within a solicitor's training in Northern Ireland.

- d) The promulgation of a **code of conduct/rules of conduct** for the legal profession.

The Society makes regulations which prescribe the necessary rules of conduct for solicitors in Northern Ireland. This is monitored through a number of Society Committees.

- Please refer to the provisions of the code/rules incorporating regional² and international standards on the legal profession, including the Basic Principles on the Role of Lawyers.

- e) **Disciplinary processes** against lawyers.

The Council has the power to impose sanctions against solicitors in Northern Ireland. A range of sanctions are available including suspension of a solicitor's practising certificate.

The Council can refer solicitors to the Solicitors Disciplinary Tribunal for further sanctions. This Tribunal is independent of the Society.

² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003: Recommendation Rec (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer (Council of Europe).

- Please mention when disciplinary proceedings are brought before an impartial disciplinary committee established by the legal profession, or before an independent statutory authority.

See comments on the Solicitors Disciplinary Tribunal above.

- f) The provision of **legal aid** for groups whose need for legal services is not met.
- Please mention the specific measures taken (eg, compulsory pro bono legal services).

The Legal Service Agency NI deals with legal aid in Northern Ireland. This Agency is a part of the Department of Justice and is not part of the Society.

- g) The **protection** granted to the legal profession.

The legal profession in Northern Ireland is protected by statute which ensures independence.

2.3. Please mention how the association is being financed.

The Society is financed entirely by member's fees.

2.4. If the association encounters obstacles/challenges in fulfilling its functions, please mention the obstacles encountered.

No obstacles/challenges other than those that would be considered normal in the exercise of the Society's function.

2.5. If the association has no mandate to fulfil objectives that you think **should** be within the scope of its mandate, please state them and indicate the reasons for your response.

N/A.

3. Please provide the legal safeguards in your country:

- 3.1. Against unlawful interferences from the authorities in the work of lawyers;
- 3.2. Protecting the freedom of association of lawyers; and
- 3.3. Ensuring the security of lawyers threatened as a result of discharging their functions (including travelling abroad, communicating with their clients, statements made in or outside a court of law in the course of representing their clients).

The freedom of association of solicitors is well established in this jurisdiction. The Society facilitates a number of local associations of solicitors throughout the jurisdiction. The Society has a security of members protocol which it can activate in the event of any such threats.

4. Please provide reference to **authoritative case law** (case name and citation if reported) related to the freedom of association of the legal profession in your country.

N/A. This is on a statutory basis as set out above.

5. Please list independent associations of the legal profession in charge of **professional representation** in your country.

As set out above, the Society carries out a representative as well as a regulatory function in this jurisdiction.

6. Please describe when an independent association of lawyers is responsible for, and has actively engaged in:

6.1. The **protection of individual lawyers** from any form of intimidation, hindrance, harassment or improper interference in the exercise of their functions.

- Is the association promptly informed?
- Does the association have procedures in place to respond to attacks on lawyers (rapid response mechanisms/other)? If no procedures exist, how do associations respond? Please provide concrete examples

The Society is involved in such work. Please also see comments on the security of members protocol above.

6.2. The **promotion and protection of the role of lawyers in society and their independence** (For instance, has the association raised awareness about the role of lawyers? addressed barriers arising from political /media/ community pressure after their involvement in controversial or unpopular cases or cases in which lawyers are prevented from appearing in court on behalf of a client? Has the association reacted in cases in which they face pressure to interpret the law in the government's favour; or refrain from challenging the constitutionality of questionable legislation?).

This is fundamental to the representative role of the Society.

6.3. The **adoption of laws, policies and strategies relating to the administration of justice**. Please provide concrete examples.

The Society engages in the process of policy and law reform to ensure adequate regard is given to the interests of the profession and to the public interest. Given the unique role played by solicitors, the Society considers itself uniquely placed to inform policy and law reform discourse. The Society has been involved on this basis in matters such as, for example, the Review of Civil and Family Justice, access to justice and legal aid, fees and mental capacity legislation.

6.4. The drafting of **new laws and legal debates in general**. Please provide concrete examples.

See reply at 6.3.

7. Do you know of any case where an independent association of lawyers has faced **threats or reprisal** (eg, closure, sanctions, verbal accusations) after discussing or taking an active position on issues affecting the rule of law and/or human rights?
- Please describe what have been the most relevant cases and situations, when it occurred and what is the ongoing situation regarding that case(s).
 - Was any protection mechanism used in protection of the association? What impact did it have?

There have been instances where individual solicitors have faced threats in this jurisdiction rather than the Society itself being threatened. These are dealt with by the Society under the security of members protocol and involves close liaison with the police to ensure that individual solicitor is protected.

8. In general, how would you rate:

8.1. The level of independence of the regulatory body of the legal profession in your country?

0 1 2 3 4 5 6 7 8 9 10

8.2. The level of independence of the associations of lawyers in your country?

0 1 2 3 4 5 6 7 8 9 10

8.3. The level of protection of lawyers by the authorities when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

8.4. The level of protection of lawyers by bar associations/law societies when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

Thank you.



Human Rights
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INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

Questionnaire on the Role, Composition and Functions of Bar Associations

Submissions should be sent electronically and no later than **26 May 2018** to
Helene Ramos dos Santos, IBAHRI UN Senior Legal Consultant (helene.santos@int-bar.org)

SOUTH AFRICA

Respondent's name and email address:

1. Please indicate whether the legal profession is regulated, in your country, by:

- a professional association of lawyers
- a court
- the Government
- an independent or delegated authority
- a mixed system

Please describe briefly the system in place (as relevant at national/regional/local levels).

2. Where a professional association of lawyers plays a role in the **regulation** of the legal profession:

2.1. Please provide:

- a) the exact name of the association: The Law Society of South Africa (LSSA)
- b) the legal basis for its establishment (constitution/ordinary law/internal rules):

The LSSA is established as a voluntary association established in terms of South African common law, with constitution as its founding document. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers

Association, the National Association of Democratic Lawyers and the four statutory provincial law societies, namely the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Northern Provinces and the Law Society of the Free State.

c) whether it is established as an ‘independent’¹ and self-governing association in the law:

Yes No Legal reference:

- Please describe briefly the composition, and appointment and renewal processes of the executive body of the association; and the role of the Executive, Legislative or Judiciary powers in relation to the establishment and functioning of this association (please mention who is overseeing the establishment and functioning of the association, if the association is not independent)

The control of the LSSA vests in its Council, which determines the policy of the LSSA in accordance with its aims and objectives as, set out in its constitution, and which shall as far as legally possible carry out the functions of and exercise the powers of the LSSA. The Council consists of 20 practising attorneys of whom: five are nominated by the Black Lawyers Association and five are nominated by the National Association of Democratic Lawyers on the basis that their representatives shall, as far as possible, be geographically spread over the country; one is be nominated jointly by the Black Lawyers Association and the National Association of Democratic Lawyers to act as co-chairperson of the Council; nine are nominated by the statutory law societies in the following manner: three by the Cape Law Society, to be representative of the three provinces within its area of jurisdiction; four by the Law Society of the Northern Provinces, to be representative of the four provinces within its area of jurisdiction; one by the KwaZulu-Natal Law Society; and one by the Law Society of the Free State (Clause 8 of the LSSA’s Constitution).

d) whether the membership of the association is mandatory to practise law:

Yes No Legal reference:

Membership of the LSSA consists of the four constituent members. Individual attorneys are not members of the LSSA, but are mandatory members of the provincial law societies.

2.2. Please provide the legal basis (name/date/latest review/reference) and describe briefly the current practice regarding the role of the association in:

a) The **admission process** to the legal profession, the licensing of lawyers and renewal of practicing certificates.

Admission is regulated by the four Provincial law Societies which are regulatory bodies. The LSSA as legal education service provider sets the admission exams, but these are administered by the by the four Provincial law Societies which are regulatory bodies.

¹ Is independent and self-governing an association whose council or other executive body is freely elected by all the members without interference of any kind by any other body or person.

- b) The **free access to the profession** for all persons having the requisite professional competence, without discrimination of any kind, and assistance to new entrants into the profession.

One of the missions of the LSSA are to uphold and encourage the practice of law, and to promote and facilitate access to the profession (5.1.4. Constitution). The admission requirements for attorneys in South Africa are prescribed by the Attorneys Act and the Rules promulgated in terms of the Act.

Foreign Lawyers are currently not permitted to practise in SA. The Legal Practice Act permits the Minister of Justice and Correctional Services to issue regulations to regulate this aspect.

Any person who qualifies can freely practise for their own account, irrespective of demographics, race or gender (by default also minorities).

- Please mention the specific measures adopted for minorities and foreign lawyers.
- c) The imposition and monitoring of **continuous legal education** or training requirements.

Yes. The Legal Education and Development (LEAD) division of the LSSA provides training and development activities for the profession at both pre and post-admission level. Currently there is no mandatory continuous legal education (CPD) but this will be required under Legal Practice Act.

- Is education on the **ethical duties of lawyers** **human rights** and/or **fundamental freedoms** provided?

Education on the ethical duties of lawyers and human rights are commonly provided at tertiary level by universities, but it is not compulsory. However, a person must be regarded as a fit and proper person by the statutory Law Societies and the High Court before they can be admitted as an attorney. This requirement refers mainly to the moral integrity of a person, their characteristics and particularly honesty, which is considered an important prerequisite for practising as an attorney.

After a student obtains an LLB degree, one of the main requirements for admission as an attorney is two years of service under a contract of articles of clerkship and attendance of a course approved by their statutory provincial law society. Alternatively, if the prospective attorney attends a full-time practical law school, they do not need to attend the Compulsory Course for Candidate Attorneys. Both courses include professional legal ethics.

- d) The promulgation of a **code of conduct/rules of conduct** for the legal profession.

The Rules for the Attorneys' Profession were published accordance with Section 74(4) of the Attorneys Act and apply to individual members falling within the jurisdiction of a particular statutory Law Society and shall be applied by the relevant Statutory Law Society in respect of the members falling within its jurisdiction.

The National Forum on the Legal Profession published the Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities during 2017, which governs the legal profession once the Legal Practice Act comes into operation on 1 November 2018. The Code will assist in the regulation of all legal practitioners in pursuit of the goals of an accountable, efficient and independent legal profession, protection and promotion of the public interests the provision of a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners and the creation of a framework for the development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners.

- Please refer to the provisions of the code/rules incorporating regional² and international standards on the legal profession, including the Basic Principles on the Role of Lawyers.

Not applicable.

e) **Disciplinary processes** against lawyers.

The statutory Law Societies (and in future, the South African Legal Practice Council) have the exclusive mandate to regulate the attorneys' profession. This mandate is captured in a number of provisions of the Attorneys Act, including:

1. Section 58(b) which provides: 'to regulate the exercise of the profession';
2. Section 58(d) which provides: 'to deal with all matters relating to the interests of the profession and to protect those interest';
3. Section 58(e) which provides: 'to uphold the integrity of practitioners';
4. Section 58(f) which provides: 'to uphold and improve standards of professional conduct of practitioners';
5. Section 58(g) which provides: 'to provide for an effective control of the professional conduct of practitioners'; and
6. Section 58(h) which provides: 'to promote uniform practice and discipline among practitioners'.

Similarly, the Legal Practice Act, 28 of 2014, which is due to take over the regulatory function of legal practitioners on 1 November 2018, has among other the following purposes:

1. Section 3(c) – to create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of any accountable, efficient and independent legal profession;

² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003: Recommendation Rec (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer (Council of Europe).

2. Section 3(f) – to provide a fair, effective and transparent procedure for the resolution of complaints against legal practitioners and candidate legal practitioners; and
 3. Section 3(g) – to create a framework for the development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners.
- Please mention when disciplinary proceedings are brought before an impartial disciplinary committee established by the legal profession, or before an independent statutory authority.

An impartial disciplinary body established by the legal profession. In terms of the Legal Practice Act, which comes into operation on 1 November 2018, legal practitioners can appeal to the Legal Practice Council, whilst members of the Public will have recourse to the Legal Ombudsman (retired Judge) who will have access to any record to finalise any appeal by members of the public.

- f) The provision of **legal aid** for groups whose need for legal services is not met.
- Please mention the specific measures taken (eg, compulsory pro bono legal services).

Rule 25 of the Uniform Rules for the Legal Profession currently requires attorneys to perform 24 hours of pro bono services per annum, if requested to do so.

Section 29 (1) of the Legal Practice provides that the Minister [of Justice and Correctional Services] must, after consultation with the Legal Practice Council, prescribe the requirements for community service from a date to be determined by the Minister, and such requirements may include community service by legal practitioners.

In addition there is a Legal Aid South Africa to deal with persons below an income threshold for civil matters and is accessible by anyone who faces criminal prosecution and cannot afford a lawyers.

- g) The **protection** granted to the legal profession.
- 2.3. Please mention how the association is being financed.

By capitation levies (membership subs) from members and by a grant from the Attorneys' Fidelity Fund for legal education and the enhancement of professional standards.

- 2.4. If the association encounters obstacles/challenges in fulfilling its functions, please mention the obstacles encountered.

The LSSA has ordinarily not been subject to obstacles/challenges in fulfilling its functions, except for financial constraints and attacks against the Judiciary.

- 2.5. If the association has no mandate to fulfil objectives that you think **should** be within the scope of its mandate, please state them and indicate the reasons for your response.

Not applicable.

3. Please provide the **legal safeguards** in your country:

- 3.1. Against unlawful interferences from the authorities in the work of lawyers;
- 3.2. Protecting the freedom of association of lawyers; and
- 3.3. Ensuring the security of lawyers threatened as a result of discharging their functions (including travelling abroad, communicating with their clients, statements made in or outside a court of law in the course of representing their clients).

The independence of the attorneys' profession has a long history and is rooted in the rule of law. Likewise, the Legal Practice Act makes provision for the following purposes in terms of Section 3: 'The purpose of the Legal Practice Act is to: (c) create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of any accountable, efficient and independent legal profession.'

4. Please provide reference to **authoritative case law** (case name and citation if reported) related to the freedom of association of the legal profession in your country.

In the matter of *S v Ntuli* 2003(4) 258 (W) para 3, the Western Cape High Court commented that: 'An independent judiciary without an independent bar would be akin to having frame without a picture.' In *S v Yengeni* (A1079/03) [2005] ZAGPHC 117, the High Court commented that: 'The untrammelled exercise of their powers in a spirit of professional independence is vital to the functioning of the legal system. The independence of the Judiciary is directly related to, and depends upon, the independence of the legal professions and of the National Director of Public Prosecutions. Undermining this freedom from outside influence would lead to the entire legal process, including the functioning of the Judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth.'

5. Please list independent associations of the legal profession in charge of **professional representation** in your country.

The Law Society of SA (attorneys)

The General Council of the Bar (Advocates/Barristers)

6. Please describe when an independent association of lawyers is responsible for, and has actively engaged in:

6.1. The **protection of individual lawyers** from any form of intimidation, hindrance, harassment or improper interference in the exercise of their functions.

- Is the association promptly informed?
- Does the association have procedures in place to respond to attacks on lawyers (rapid response mechanisms/other)? If no procedures exist, how do associations respond? Please provide concrete examples.

The LSSA is currently the umbrella body of the attorneys' profession in South Africa. The LSSA is involved in numerous advocacy efforts aimed at protecting the interests

of the attorneys' profession and the public. For a complete list of the LSSA's submissions, please see: www.lssa.org.za/our-initiatives/advocacy/comments-on-legislation

- 6.2. The **promotion and protection of the role of lawyers in society and their independence** (For instance, has the association raised awareness about the role of lawyers? addressed barriers arising from political/media/community pressure after their involvement in controversial or unpopular cases or cases in which lawyers are prevented from appearing in court on behalf of a client? Has the association reacted in cases in which they face pressure to interpret the law in the government's favour; or refrain from challenging the constitutionality of questionable legislation?).

Yes – one of the LSSA's aims and objectives is to promote on a national basis the common interests of members of the profession and the welfare of the profession, having regard at all times to the broader interests of the public whom the profession serves, and to endeavour to reconcile, where they may conflict, the interests of the profession and the public (5.1.1. Constitution).

- 6.3. The **adoption of laws, policies and strategies relating to the administration of justice**. Please provide concrete examples.

- 6.4. The drafting of **new laws and legal debates in general**. Please provide concrete examples.

For a complete list of the LSSA's submissions, please see: www.lssa.org.za/our-initiatives/advocacy/comments-on-legislation

7. Do you know of any case where an independent association of lawyers has faced **threats or reprisal** (eg, closure, sanctions, verbal accusations) after discussing or taking an active position on issues affecting the rule of law and/or human rights?

- Please, describe what have been the most relevant cases and situations, when it occurred and what is the ongoing situation regarding that case(s).
- Was any protection mechanism used in protection of the association? What impact did it have?

The LSSA has not experienced an attack on an association of lawyers in South Africa. To the extent that individual attorneys may be subject to attack/arrest, the LSSA will respond accordingly. Please see the following link for a more recent example when a South African attorney was arrested in Tanzania www.lssa.org.za/news-headlines/press-releases/arrest-of-lawyers--an-attack-on-the-independence-of-the-legal-profession-and-access-to-justice.

The attorney was subsequently released and returned to South Africa.

8. In general, how would you rate:

8.1. The level of independence of the regulatory body of the legal profession in your country?

0 1 2 3 4 5 6 7 8 9 10

8.2. The level of independence of the associations of lawyers in your country?

0 1 2 3 4 5 6 7 8 9 10

8.3. The level of protection of lawyers by the authorities when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

8.4. The level of protection of lawyers by bar associations/law societies when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

Thank you.



Human Rights
Institute

INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

Questionnaire on the Role, Composition and Functions of Bar Associations

Submissions should be sent electronically and no later than **26 May 2018** to
Helene Ramos dos Santos, IBAHRI UN Senior Legal Consultant (helene.santos@int-bar.org)

SWEDEN

Respondent's name and email address:

1. Please indicate whether the legal profession is regulated, in your country, by:

- a professional association of lawyers
- a court
- the Government
- an independent or delegated authority
- a mixed system

Please describe briefly the system in place (as relevant at national/regional/local levels).

The Swedish Bar Association, SBA (*Sveriges advokatsamfund*), is the only existing bar association/lawyers' organisation in Sweden. The SBA is a national organisation and acts for and on behalf of all advocates in Sweden. The members of the Bar have an exclusive right to offer legal advice under the professional title 'advokat'. The Swedish Bar Association is a self-regulated body with both public administrative functions stated in law (the Swedish Code of Judicial Procedure) and representative functions (on behalf of its members; advocates). Thus, the SBA can be characterised as an association under private law, bearing a number of characteristics of a public law body.

2. Where a professional association of lawyers plays a role in the **regulation** of the legal profession:

2.1. Please provide:

- a) the exact name of the association: Swedish Bar Association.
- b) the legal basis for its establishment (constitution/ordinary law/internal rules):

The Swedish Code of Judicial Procedure (CJP), Chapter 8, the Charter of the Swedish Bar Association and the Code of Professional Conduct for Members of the Swedish Bar Association.

Advocates and the Swedish Bar Association are since 1948 regulated by law; the Swedish Code of Judicial Procedure. When the current Swedish Code of Judicial Procedure entered into force in 1948, the Bar Association gained official recognition (Chapter 8 of the Code of Judicial Procedure). The Code stipulates that there shall be a general bar association, the charter of which is ratified by the government.

- c) whether it is established as an ‘independent’¹ and self-governing association in the law:

Yes No Legal reference:

- Please describe briefly the composition, and appointment and renewal processes of the executive body of the association; and the role of the Executive, Legislative or Judiciary powers in relation to the establishment and functioning of this association (please mention who is overseeing the establishment and functioning of the association, if the association is not independent):

The SBA is divided into seven geographical divisions (sections), six for members practising in Sweden and one for those members who practise abroad. Each section has a local board of its own. Every advocate belongs to the division within whose area the advocate principally conducts the business. The boards of the division perform duties in connection with the admission procedure (see more below at 4.1.). They also elect delegates to the Bar’s supreme body, the Council. A regular meeting of the Council is held once a year; the Council elects the board of the Bar and the members of the Disciplinary Committee. The board consists of 20 members (all advocates); the president, the vice president, and 18 other members from different geographical places and with different fields of legal expertise in order to ensure the different regional sections and different professional practice areas are duly represented. The maximum tenure for a board member is six years. The Disciplinary Committee is composed of 11 members. The bar association elects the chairman, the vice chairman, and six of the members (all eight are advocates). The government appoints the remaining three members as representatives of the public (former judges, former members of parliament, former heads of public administration, especially with consumer focus, or other persons from the public administration). The maximum term for the members appointed by the Bar is eight years. The Bar employs approximately 40 persons

¹ Is independent and self-governing an association whose council or other executive body is freely elected by all the members without interference of any kind by any other body or person.

(including the editor and journalists of the Bar magazine). The Chief Executive Officer of the Bar is the Secretary-General.

It follows from the law that the Code of Professional Conduct is adopted by the Bar itself and the Charter of the Bar is confirmed by the government, which gives it status of ordinance. The activities of the Bar and advocates are supervised by the Chancellor of Justice and decisions to disbar an advocate or to refuse an applicant membership of the Bar can be appealed directly to the Supreme Court.

d) whether the membership of the association is mandatory to practise law:

Yes No Legal reference:

No, membership of the SBA is not mandatory to practise law. A special feature for the Swedish profession is that there is no requirement for any lawyer to be a member of the SBA.

Sweden has an open market for legal services. There is no monopoly of legal services in Sweden. Any person may practise law, offering their services to the public, without the need for an authorisation. Moreover, any person may call themselves a lawyer, regardless of any law degree or any other formal education. Litigants are not required to employ qualified legal counsel in court. Anyone may appear before any court, on any level of the court system, representing themselves or another person. Hence, the practice of law is a truly free pursuit. The members of the SBA have, however, an exclusive right to offer legal advice under the professional title 'advokat'. The professional title 'advokat' (advocate) is legally protected by law and is exclusively reserved for the members of the Bar. Hence, only those who have fulfilled the requirements laid down in law and the SBA's charter to become a member of the SBA have the right to use the professional title 'advokat'. It is a criminal offence to use the title without being a member of the SBA. Notwithstanding the fact that litigants may be represented by anybody in legal disputes, Bar members are retained in the vast majority of court cases and disputes involving complex legal issues. In criminal cases it is very rare that other representatives than members of the Bar are appointed as defence counsel or as counsel to persons injured by tortuous acts in connection with crimes.

2.2. Please provide the legal basis (name/date/latest review/reference) and describe briefly the current practice regarding the role of the association in:

The main rules on advocates are regulated in the Swedish Code of Judicial Procedure,² Chapter 8, and the Charter of the Swedish Bar Association,³ the Code of Professional Conduct for Members of the Swedish Bar Association⁴ and also the Code of Conduct for European Lawyers,⁵ which is applicable to all cross-border activities of lawyers in the European Union and the European Economic Area. There is also other legal basis for

2 See www.advokatsamfundet.se/Advokatsamfundet-engelska/Rules-and-regulations/Code-of-Judicial-Procedure.

3 See www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/charter.pdf.

4 See www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/code-of-professional-conduct-with-commentary-2016.pdf.

5 See www.advokatsamfundet.se/globalassets/advokatsamfundet_sv/advokatetik/2006_code_en.pdf.

advocates activities in specific legal fields (eg, the UN Basic Principles on the Role of Lawyers from 1990).⁶

It follows from the law (the Code of Judicial Procedure) that the Code of Professional Conduct is adopted by the Bar itself and the Charter of the Bar is confirmed by the government, which gives it status of ordinance. The activities of the Bar and advocates are supervised by the Chancellor of Justice and decisions to disbar an advocate or to refuse an applicant membership of the Bar can be appealed directly to the Supreme Court.

- a) The **admission process** to the legal profession, the licensing of lawyers and renewal of practising certificates.

The requirements for becoming a member of the bar association are laid down in the Code of Judicial Procedure and in the Charter of the Bar Association. The application is handled by the administration of the SBA and the application is reviewed by the board before its decision. Before the board make its decision, the department of the applicants' geographical area will review the application and give its opinion if the applicant should be accepted as a member of the bar association or not. This decision is only guiding and in no way binding for the board's final decision.

The applicant must – among other requirements – pass the Bar exam (held by the Bar Association) and produce sufficient proof of their previous experience. In order for the Council to be able to assess their suitability, the applicant is required to give references to all Bar members, courts, or other authorities with whom the applicant has had professional contact. The Bar members, courts, and other authorities are requested to give a statement regarding the applicant is suited for membership of the bar association. The board then decides on the membership application. A decision by the board to deny admission to the Bar must include the main reasons for the decision. A negative decision can be appealed directly to the Swedish Supreme Court.

The formal requirements for membership of the SBA according to law (the Code of Judicial Procedure and the Charter of the SBA) are the following:

- I. Domicile in Sweden or another country within the European Union, the European Economic Area, or Switzerland.
- II. Passed proficiency examination required for competency to a judge's office – that is. in Sweden, an LL.M degree (master degree in law). A degree from Denmark, Finland, Iceland or Norway is in principle considered equivalent as a Swedish LL.M without any further assessment. If the candidate holds an LL.M degree from another country, the degree can be evaluated as equivalent to a Swedish LL.M through assessment of the Swedish Council for Higher Education (the Council may give further instruction on completion with extra courses for the foreign LL.M to be equivalent to a Swedish LL.M).

⁶ See www.advokatsamfundet.se/Advokatsamfundet-engelska/Rules-and-regulations/Other-statutes.

- III. Minimum three years' experience of practising law at law firm offering legal services to the public at the time of application.
 - IV. Passed the Bar examination (oral) after completing the mandatory training courses.
 - V. Considered suitable for the legal profession (including reputation for integrity and honesty) – references collected from professional contacts – advocates and other lawyers, judges, public authority representatives, etc – who are able to certify to the level of suitability of the applicant to become an advocate.
- b) The **free access to the profession** for all persons having the requisite professional competence, without discrimination of any kind, and assistance to new entrants into the profession.
- Please mention the specific measures adopted for minorities and foreign lawyers.

As mentioned above the Swedish market for legal services is totally open and free from discrimination of any kind. Anyone can provide legal services in Sweden. However, in order to practise law in Sweden under the professional title 'advokat', one must have fulfilled the requirement for membership of the SBA.

Membership of the SBA is not a prerequisite to practise law. There is no monopoly of legal services in Sweden. Any person may practise law, offering their services to the public, without the need for an authorisation. Moreover, any person may call themselves a lawyer, regardless of any law degree or any other formal education. Litigants are not required to employ qualified legal counsel in court. Anyone may appear before any court, on any level of the court system, representing themselves or another person.

Lawyers are free to join any professional organisations. However, only those who have fulfilled the requirements to become member of the Swedish Bar Association may use the professional title 'advokat' (advocate) when providing legal advice and legal assistance. The title 'advokat' is legally protected and it is a criminal offence to use the title without being a member of the Swedish Bar Association. In that sense one can say that here is a mandatory membership if you want to practise under the protected title 'advokat'. Advocates can only be employed by another advocate and they may not provide legal services in partnership with anyone who is not a member of the Bar. Naturally, if the membership/engagement would have injurious effects on their activities as advocate, this could have implications on either.

Sweden has an open and competitive market for legal services. There is no monopoly for advocates in the sense that legal services are reserved for advocates. The only exception is that a public defence counsel, in principle, should be member of the Swedish Bar Association (be an advocate). As a whole anyone can provide legal services in Sweden without being an advocate and even without being a lawyer. However, only advocates can provide legal services under the professional title 'advokat' (advocate), which is a legally protected title. Furthermore, there are no mandatory requirements to have a legal counsel for a party in court proceedings, not even in the supreme courts.

If the candidate already is a registered lawyer in another country within the EU, it is however also possible to register as an EU lawyer (working in Sweden with your foreign lawyer title). After three years of working – primarily with Swedish law or by achieving sufficient knowledge and experience in other ways to become a member of the Swedish Bar Association – the candidate can apply for membership. If the candidate already is a registered lawyer – or fulfil all the national requirements for becoming a lawyer – in another country within the EU, it is also possible to participate and pass two courses: Swedish procedural law and Swedish introduction to law and thereafter pass the Swedish bar exam (with courses) before applying for membership.

Furthermore, there are some conditions that has to be fulfilled according to Swedish procedural law in order to handle cases in court and represent clients in court disputes. Only a person deemed suitable by the court, by reason of that person's honesty, knowledge and earlier activities, may appear as counsel in a Swedish court of law. The counsel must also master the Swedish language (see the Swedish Code of Judicial Procedure, Chapter 12, Section 2).

- c) The imposition and monitoring of **continuous legal education** or training requirements.

The regime of continuous professional training in Sweden can be summarised as follows.

According to the Charter of the Swedish Bar Association a member shall maintain and develop their professional qualifications. With effect from January 2004 the board issued binding guidelines for the continuing professional training of Swedish lawyers. The guidelines were revised by the board of the Swedish Bar Association on 6 December 2013, to come into effect on 1 January 2014. According to these guidelines a practising lawyer shall every year, with effect from the year after they were granted admission to the bar association, participate in minimum 18 hours of structured professional training, of which a maximum of six hours may constitute e-learning. By structured professional training is understood a lawyer's participation, or a lawyer's commission as a teacher or seminar leader, in internal or external training events such as courses, seminars, and conferences. For every training event, there shall be a plan fixed in advance, with a responsible training leader. Also e-learning is considered as structured training, provided that the training includes elements of active participation from the lawyer, and the implementation and results of the education can be documented and verified by training leaders, and that education always contains elements of image.

When calculating the requirement for training time, 18 hours may be considered as corresponding to three days' of six hours' effective training time each. If a lawyer participates in more than 18 hours of structured training for one calendar year, the lawyer may transfer maximum 12 hours of the surplus time to the following year. In order to attain the quality requisite for the training, one training event should not go below 1 and a half hours' effective training time. The number of participant in one

training event should, except for e-learning, not go below five, the training leader excluded.

The training shall have a bearing upon the legal profession, and shall be of a character typically appropriate for being useful for the lawyer's practice. Besides training with legal contents, training within other areas, such as economics, or languages, may also be counted, provided that the contents have a bearing upon a lawyer's practice.

Temporary breaks in work, such as absence due to illness, parental leave and the like, entitles to a reduction of the requirement for professional training in relation to the actual time worked, provided that the break amounts to three months minimum.

A lawyer is obliged to document their training activities. In connection with the annual financial report for their practice, a lawyer shall give information on whether the requirement for professional training was fulfilled for the last full calendar year. It shall be evident from the auditor's report sent to the bar association that such information has been given; for joint-stock companies this information is best given in connection with the certificate concerning the holding of shares in the law firm.

If a lawyer has failed to fulfil the requirements for professional training, the Board of the bar association may order them to rectify their shortcomings without further requests, and to specially account for his training activities. If there exists a substantial deficiency, or repeated deficiencies, in a lawyer's duties regarding professional training, the board can initiate a disciplinary matter.

With effect from 1 January 2009, professional training and competence is an ethical obligation for the Swedish lawyers. According to Section 2.5 in the revised Code of Conduct for the Members of the Swedish Bar Association, a lawyer has an obligation to maintain and to develop their professional competence by monitoring the development of the law in the fields in which the lawyer is active and to submit to the necessary continued training.

- Is education on the **ethical duties of lawyers** **human rights** and/or **fundamental freedoms** provided?

YES

- d) The promulgation of a **code of conduct/rules of conduct** for the legal profession.

According to Swedish law the Code of Professional Conduct is adopted by the Bar itself and the Charter of the Bar is confirmed by the government, which gives it status of ordinance.

The Code of Professional Conduct for Members of the Swedish Bar Association (CoC) is decided and adopted by the board of the SBA. The first CoC was adopted in 1971. The CoC has since then been revised a number of times. A major revision of the CoC entered into force in 2009.

Also the Charter of the SBA includes a number of professional duties (Section 34–39). As aforementioned, the Charter is adopted by the Council of the SBA and thereafter confirmed by the Swedish government.

Please refer to the provisions of the code/rules incorporating regional⁷ and international standards on the legal profession, including the Basic Principles on the Role of Lawyers.

Swedish law stipulates (Chapter 8, Section 4 of the Code of Judicial Procedure) that an advocate must act in accordance with good ethical standards according to the Code of Conduct of the SBA and other relevant legal instruments (eg, the Code of Conduct for European Lawyers, which is applicable to all cross-border activities of lawyers in the European Union, the European Economic Area and Switzerland, as well as the UN Basic Principles on the Role of Lawyers from 1990).

e) **Disciplinary processes** against lawyers.

The legal ground for the Disciplinary Committee is regulated both in the Code of Judicial Procedure (Chapter 8, Section 6–9 and the Charter, Section 14 and 40–43).

The supervision of Swedish advocates as well as the disciplinary procedures are entirely independent. The Board of the SBA and the Disciplinary Committee exercise supervisory control over the members of the Bar (advocates) and ensure that all members fulfil the duties incumbent upon them when pleading cases in court and in their other activities. If the question of disciplinary action against a member arises in some way other than by a complaint from a client or someone else involved in the matter, the Board will decide whether or not the matter is to be referred to the Disciplinary Committee. The Bar Association Disciplinary Committee consists of a chairman, a vice-chairman and nine other members. Three of the members of the Committee (public representatives) are appointed by the government. The public representatives are appointed one at the time every year for a maximum term of three years. The public representatives of the Committee were introduced in 1982. Initially there were two public representatives. In 1997 their number was increased to three. The main purpose of introducing lay representatives was to ensure transparency in the bar association's disciplinary supervision, in order to maintain public confidence in the legal profession. This is important especially in the light of the fact that the Swedish Bar is the supervisory and the regulatory body for its members and stands independent vis-à-vis the State. Another reason for the public representation in the Disciplinary Committee is that these laymen can bring different experiences, skills and opinions of great value when considering ethical issues. The public representatives are selected from outside the category of persons excluded from being lay judges according to the Swedish Code of Judicial Procedure. Therefore judges (in office), court officers, public prosecutors, police officers, advocates or persons who are otherwise professionally engaged in the representation of litigants in judicial proceedings, cannot be public

7 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003: Recommendation Rec (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer (Council of Europe).

representatives. The vast majority of public representatives during the years have been retired judges, retired politicians, civil servants and officials from different public authorities. One of the public representations has had some sort of professional position as representative for consumer interests.

Any advocate who deliberately commits a wrongful act or omission in their practice or otherwise behaves dishonestly (also outside the scope of his or her professional activities) shall be disbarred from the Bar (or have their EU registration revoked). In extenuating circumstances the advocate may receive a warning instead. An advocate who otherwise fails in their duty as an advocate may receive a warning or a reprimand. In exceptionally serious cases, an advocate may in these cases also be disbarred from the association. The Disciplinary Committee may decide that oral proceedings are to be held in a matter before the Committee. Unless particular reasons dictate otherwise, oral proceedings are to be held when the penalty in question may be disbarment. A member of the bar association appointed by the board will then plead the case to answer as a result of the complaint reported or otherwise evident. Appointment by the board takes place following notification by the Committee or the Secretary-General. Members of the Disciplinary Committee may not be appointed. If a member against whom a complaint has been made is considered to be in need of defence counsel, but does not instruct any such counsel, the Disciplinary Committee may appoint defence counsel to act for him in the proceedings before the Committee. The fee for defence counsel appointed by the Committee will be paid by the bar association, the amount to be determined by the Disciplinary Committee. The same applies to the fee for defence counsel appointed by a member against whom a complaint has been made if the Committee considers the nature of the matter to necessitate counsel for the member's defence. The Committee may order the member against whom a complaint has been made to reimburse the bar association for all or part of the cost of their defence. A decision to disbar, warn or reprimand must state the reasons on which it is founded. Members of the bar association and the public courts of Sweden must be notified of a decision to disbar a member as soon as it enters into effect. If a disbarment decision has been revoked, members of the bar association and the courts mentioned must be notified of this if they have previously been notified of the disbarment. An advocate who has been disbarred may appeal to the Supreme Court. The Chancellor of Justice may request reconsideration of a disciplinary decision.

The decisions by the Disciplinary Committee become public documents. However, the proceedings are not open to anyone else but the advocate and their client or anyone else who has a legitimate interest in the matter and have made an application. It can be the police, court or the opposite party.

Advocates are, as aforementioned, required to observe certain specific duties. Among the most important are the duty of loyalty to the client, the duty to observe professional independence, and the duty of confidentiality. These duties are safeguarded in different ways. The independence is, for example, protected by the prohibition for a member of the Bar to be employed by someone outside the Bar or to form a company

with such a person. Most important however, is the general duty for a bar member always to conduct their business in accordance with the professional and ethical standards developed and adopted by the SBA (the Code of Professional Conduct for members of the Swedish Bar Association; *Vägledande regler om god advokatsed*). A member is obligated to comply with the ethical standards according to the Code of Judicial Procedure, Chapter 8, Section 4.

Professional ethics are not as such defined by any statutory provision. The ethical standards are instead defined by the decisions of the Disciplinary Committee of the Bar and by the board of the Bar by its special declarations on matters of principle. Mainly, however, these ethical standards are laid down in the Code of Professional Conduct for members of the Swedish Bar Association.

The Council and the Disciplinary Committee are empowered with the task to supervise Bar members and to ensure that they satisfy the professional duties of an advocate. The different sanctions available are: reminder, warning, warning combined with a fine, and disbarment. A member, who in their practice intentionally commits a wrong or otherwise act dishonestly, may be expelled from the Bar. If the circumstances of the case so warrant, the Committee may instead chose to issue a warning. A member of the Bar who in any other respect neglects their professional responsibilities may be given a warning or a reminder. In such cases, and if the circumstances are extraordinarily serious, they may be expelled from the Bar. A warning may be combined with a fine of not less than SEK 1,000 and no more than SEK 50,000 (approximately SEK 4,900). If it is considered sufficient, the Disciplinary Committee, instead of issuing a reminder, may issue a statement to the effect that their act or omission was wrongful or otherwise inappropriate.

The procedure is mainly conducted through written preparation although the Disciplinary Committee may decide that oral proceedings are to be held in a matter before the Committee. A member against whom a complaint has been made is under a duty to submit a written statement, produce the documents the Disciplinary Committee or the Secretary-General orders them to supply and to appear before the Committee if ordered to do so.

The complaint/matter will considered by the Disciplinary Committee, usually by an Adjudication Division in the first instance. Should the Adjudication Division agree that no disciplinary action is called for and if the members agree as to the content of the decision, the Adjudication Division may decide the matter. Otherwise the matter must be referred to the Disciplinary Committee.

If a member against whom a complaint has been made is considered to be in need of defence counsel but does not instruct any such counsel, the Disciplinary Committee may appoint defence counsel to act for them in the proceedings before the Committee. The fee for defence counsel appointed by the Committee will be paid by the bar association, the amount to be determined by the Disciplinary Committee. The same applies to the fee for defence counsel appointed by a member against whom

a complaint has been made if the Committee considers the nature of the matter to necessitate counsel for the member's defence. The Committee may order the member against whom a complaint has been made to reimburse the bar association for all or part of the cost of their defence.

A decision by the Disciplinary Committee is not subject to appeal by the complainant. A disbarred member may appeal directly to the Supreme Court. Other sanctions are not possible to appeal. The Chancellor of Justice also has supervisory powers with regards to advocates. They may request that disciplinary measures be implemented by the Disciplinary Committee against a negligent member, or by the Council in respect of members who no longer fulfils the formal requirements for membership. The Chancellor of Justice may also appeal decisions by the Disciplinary Committee to the Supreme Court.

Please mention when disciplinary proceedings are brought before an impartial disciplinary committee established by the legal profession or before an independent statutory authority.

Before an impartial disciplinary committee according to what has been described above.

- f) The provision of **legal aid** for groups whose need for legal services is not met.

Sweden has a government-funded legal aid system which, however, is subsidiary to a private insurance regime, where the private legal protection insurance must be invoked before and often instead of state-funded legal aid. Even though the governmental funding of the legal aid system in many aspects is inadequate, the Swedish regime of legal aid functions well as a whole and gives most individuals in need of legal representation a public counsel. Pro bono activities of lawyers are therefore not any common feature of the Swedish legal system, but exist and then originate from the initiative of the individual lawyer.

According to the Swedish Bar Association, access to justice is a concept covering a wide range of issues, such as legal aid, court fees, the right to a lawyer, availability to courts, etc. Access to justice is a cornerstone and fundamental principle for any rule of law state. It is, however, primarily and foremost a duty of the state more than a duty of the individual lawyer.

Lawyers, however, do have a responsibility to supply access to lawyers and legal services (see also the 1990 UN Basic Principles on the Role of Lawyers) when this is possible and necessary. The Swedish Bar Association therefore believes that it would be positive to have a general provision on access to justice in the principles. It should, however, be considered whether the proposed wording ('A lawyer shall use best endeavours to ensure that those unable to pay or otherwise gain access to justice because of personal circumstances are guided to the best alternatives for such access.') could be clearer and more consistent.

- Please mention the specific measures taken (eg, compulsory pro bono legal services).

The rules for legal aid in Sweden are found in the Act of Legal Aid (1996:1619). Within an extensive definition of legal aid there are five different major forms in Sweden:

- Legal Advice according to the Legal Aid Act
- Legal Aid in civil matters according to the Legal Aid Act
- Public Defence Counsel
- Counsel for the Aggrieved person
- Public Counsel

However, only legal advice and legal aid in civil matters according to the Legal Aid Act are formally considered as legal aid. Legal aid can be granted for individuals, and for an estate if there are extraordinary reasons. Decisions on legal aid are made upon application by the client. The client suggests who they want to represent them. A lawyer, an associate at a law firm or another suitable person can be designated as a legal aid representative.

The hourly fee for services of legal aid providers in legal aid cases is set in a regulation by the Swedish government. The tariff is updated every year. For 2018 the fee is set to SEK 1,359 (excluding VAT). The legal aid covers maximum 100 hours. If there are special reasons a higher level can be granted.

There is an income limit of SEK 260,000 applying to the qualification for legal aid. The claimant shall contribute to the costs in proportion to their ability. The legal aid applicant shall always pay a fee for the legal aid. The size of the fee is based on the costs for the legal representative and the level of financial resources of the legal aid applicant. One important cornerstone in the legal aid system is that legal expenses insurances should be used in the first place.

In specific types of cases, for example in criminal cases and asylum cases, everybody has an absolute right to a public defender or a public counsel regardless of their personal economic situation.

Can parties choose their own lawyer?

All advocates and associate lawyers at law firms and some other lawyers with their own law firms can provide legal aid. With few exceptions, only members of the bar association (advocates) are appointed as public defence counsels in criminal cases; private defence counsels, however, need not be advocates. In practice, virtually only members of the bar association or lawyers employed by members are appointed as legal aid counsel and counsel for the injured party in criminal proceeding, but these appointments are not reserved exclusively for members by law (eg, as regards bankruptcy administrators, they often are members of the SBA).

One thing that could be noted in this context is that there is no obligation to be represented by a counsel. You can always represent yourself in court if you so like or be represented by someone who is not a lawyer.

The Legal Aid Authority or the court which examines a litigant's request for legal aid will inform them in writing about the decision taken by the Authority or the court respectively. If a person is granted legal aid a legal aid counsel will be appointed at the same time. A lawyer or junior barrister or any other suitable person can be appointed as legal aid counsel. If the litigant has proposed a suitable person, they can be appointed if it will not significantly increase the costs of the case or if there is no other particular reason for not doing so.

For more information, see www.rattshjalp.se/In-English/In-English.

g) The **protection** granted to the legal profession.

In terms of physical protection for advocates in their daily endeavour, law firms have a general labour law responsibility to have an administration and office routines that secures the protection of individual lawyers. Furthermore, there are specific Swedish laws stipulating the safeguard of lawyers in different aspects (eg, the Act on Anti-Money Laundering).

2.3. Please mention how the association is being financed.

Mainly by membership fees, paid annually by advocates. The SBA also has a number of activities (training, conferences, etc) which finance the SBA.

2.4. If the association encounters obstacles/challenges in fulfilling its functions, please mention the obstacles encountered.

The position of the SBA is very strong and the organisation is very well-reputed. The SBA and its members have an utmost important role within the Swedish judiciary. There are, however, a number of challenges for the future and even a number of direct threats to the legal profession, especially as regards the core values of the profession. The threats to the core values to a large extent originate from international and national legislation, which undermine professional secrecy of lawyers, the duty of loyalty to the client and independence.

According to the Swedish Bar Association the principle of confidentiality is one of the most fundamental to the administration of justice and the rule of law and must be protected and upheld. It is therefore a major problem that the EU legislator has introduced a number of legislations undermining the principle of lawyers' confidentiality, for example regarding money laundering, tax avoidance, VAT number identification, etc.

Furthermore, the Swedish statutory rules in law and other Bar instruments on confidentiality/professional secrecy are focused totally on the interests of the client. Confidentiality is first and foremost a protection for the client, and not a right of the lawyer. Hence, professional secrecy is not seen as a professional privilege in Sweden as in many other countries. A lawyer in Sweden has solely the interest of the client to bear in mind.

Furthermore, a Swedish lawyer is no ‘officer of the court’ or has in any other way any obligation to serve the administration of justice, for example, the swift and efficient hearing of court cases, etc.

The Swedish Bar firmly believes that the legal profession must protect its core values, especially the principle of professional secrecy. And it is a long-term responsibility for the national bars and law societies to explain the fundamental role of confidentiality from a rule of law perspective, both to governments and the public.

The Swedish Bar has no objection as such to an addition in the commentary to the rule on confidentiality in the IBA International Principles on Conduct for the Legal Profession in line with what has been proposed. However, the example and reference to discussions about lawyers helping clients with tax avoidance through offshore structures should be removed. Such an example may send the wrong signals and has no place in a commentary to an ethical principle on professional conduct.

Furthermore the last paragraph of the proposed addition to the commentary should start with ‘When appropriate, bars are encouraged to ...’, in order to reflect the different situation in different countries regarding the governmental understanding of lawyers’ professional secrecy.

There are several different threats to the independence of the profession. A lawyer needs to be free – politically, economically and intellectually – in pursuing their activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow their independence to be compromised by improper pressure from business associates or others. The lawyer must also remain independent of their own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed, without this independence from the client there can be no guarantee of the quality of the lawyer’s work. The lawyer’s membership of a liberal profession and the authority deriving from that membership helps to maintain independence, and bar associations must play an important role in helping to guarantee lawyers’ independence. Independence of the Bar is a prerequisite for independent lawyers.

The main threats are derived from:

- International and national legislator: terrorism, the refugees and asylum situation, climate change and economic challenges, money laundering and corruption are examples of circumstances that influence the legislator.
- Application of the law – not coherent with legislation mainly due to lack of independence within the judiciary, lack of competent institutions, lack of integrity and corruption.
- Governmental interference such as increased administrative powers given to tax authorities, competition authorities and finance authorities, not to forget intergovernmental organisation such as the Financial Action Task Force (FATF) and the money laundering regulation.

- Technology development opening up for state/surveillance as well as private data retention and commercialisation of data.
- The commercialisation of the profession. This is obvious and to a certain extent even necessary. The law firms must be run efficiently in order to successfully compete with other consultants. It is also necessary if you want to attract young associates. And necessary if you want to keep up the knowledge. But the profession is at risk when accepting to give up the core values.

2.5. If the association has no mandate to fulfil objectives that you think **should** be within the scope of its mandate, please state them and indicate the reasons for your response.

No such mandate is missing.

3. Please provide the **legal safeguards** in your country:

3.1. Against unlawful interferences from the authorities in the work of lawyers;

According to Chapter 8, Section 1 of the Code of Judicial Procedure, there shall be a general bar association and the regulation of the association (the Charter) shall be confirmed by the government. The bar association can be characterised as an association under private law, bearing a number of characteristics of a public law body.

The Swedish Bar Association is independent from the state, the government and the Ministry of Justice. The only role the government (the Ministry of Justice) has in relation to the Swedish Bar Association is when it confirms changes in the Charter of the SBA proposed by the SBA itself. In this way the changes and the Charter becomes Swedish law as it receives legal status as regulation. The government cannot itself initiate changes in the Charter of the SBA. Furthermore, the Chancellor of Justice (a state authority of the Government) supervises the decisions of the Disciplinary Committee of the SBA.

The SBA has a direct and important influence on the legislative procedure in accordance with what has been aforementioned above under 'Legislative influence'.

Thus, the SBA has a frequent role as consultation body in the legislative process (the referral process). The SBA annually submits legal opinions and comments on some 120 to 130 legislative proposals. Advocates and representatives of the SBA are also frequently appointed as experts in commissions of inquiry (appointed by the government) and participate in hearings, legal debates and discussions (media, conferences, seminars, etc). The SBA has well-functioning professional contacts and continuous meetings with the government and government officials, especially with the Ministry of Justice and the Parliamentary Standing Committee on the Administration of Justice. The SBA also work hard to influence the European Union legal agenda.

The SBA and its members have an important role as watchdogs for human rights. Individual fundamental rights and freedoms (personal integrity, etc) according to the European Convention on Human Rights, the EU Charter of Fundamental Rights and the UN Universal Declaration of Human Rights, especially in relation to rule of law issues (fair trial, due process and rights of suspects, access to justice, quality of legislation, independence of the judiciary, independence and self-regulation of the Bar, threats to core values of the profession; eg, confidentiality and client loyalty as a result of inter alia anti-money laundering legislation, etc).

Furthermore, the SBA is totally independent of the legislative powers (the Swedish parliament) and Judiciary powers (the Swedish courts and state authorities).

The Swedish legal profession of advocates is absolutely able to independently regulate itself and has done so for a very long time. There is no outside influence. The Swedish Bar has regulatory, supervisory as well as representative powers. The Swedish market for legal services is open and unregulated, without any lawyers' monopoly and with a well-functioning system for self-regulation and supervision, together with a lawyers' profession of good reputation due to high competence and skills, the threats to the independence of Swedish lawyers and the Swedish Bar are less severe than in many other countries. The market for legal services in Sweden has so far not been under any real domestic political pressure to transform for consumer purposes, which we have seen in most of the other EU Member States lately (results of the Clementi and Monti reports). Sweden has a very independent Bar and independent lawyers. The advocate profession is as a whole totally independent from the state. Advocates and the Bar are governed by law (the Swedish Code of Judicial Procedure, and also by the Code of Professional Conduct). The Code of Conduct is adopted by the Bar. The Charter of the Swedish Bar is confirmed by the government, which gives it status as ordinance (the government, however, cannot change or amend any of the rules of the Charter without the consent of the Bar. It would never happen that the government suggests any changes or amendments unless so required by EU legislation or international law). The Bar is supervised by the Chancellor of Justice and decisions to disbar a lawyer or refuse admittance to the Bar can be appealed to the Supreme Court.

It is a trend that governmental authorities such as the Swedish Financial Supervisory Authority, the Swedish Competition Authority and the Swedish Tax Agency receives powers that in the long run may result in interference with the independence of the profession. We are not there yet. But in the light of the Foreign Account Tax Compliance Act Agreement, FATF and money laundering regulation as well as the European VAT regulation it is vital to be observant.

3.2. Protecting the freedom of association of lawyers; and

See 3.1.

3.3. Ensuring the security of lawyers threatened as a result of discharging their functions (including travelling abroad, communicating with their clients, statements made in or outside a court of law in the course of representing their clients).

Not applicable for Sweden. Advocates are never threatened by government officials or representatives of state authorities in these ways.

4. Please provide reference to **authoritative case law** (case name and citation if reported) related to the freedom of association of the legal profession in your country.

Regulated in law (the law is a primary legal source to case law in Sweden).

5. Please list independent associations of the legal profession in charge of **professional representation** in your country.

See above about the free market for legal services in Sweden. However, the only independent association of the legal profession is the Swedish Bar Association.

In Sweden there is a mandatory membership if you want to practise under the protected title 'advokat'. Lawyers (advocates – members of the Swedish Bar Association) are free to join any independent professional organisation. But as aforementioned they can only be employed by another advocate and they may not provide legal services in partnership with anyone who is not a member of the Bar. Naturally, if the membership/engagement would have injurious effects on their activities as advocate, this could have implications on either.

The general rule is that only advocates may be shareholders or part owners of a law firm conducting legal practice in the form of a limited liability company or partnership, unless the board of the Bar Association grants exemption. However, cooperation with members of other legal professions is possible in Sweden to a limited extent. But, a Swedish lawyer cannot be partner or have any other form of integrated cooperation with other professionals than lawyers ('advokater') and cannot share costs or profits of the law office/company with other than lawyers. Consequently, multi disciplinary partnerships (MDPs) are not permitted in Sweden. Cooperation with other professions is only permitted if the non-lawyer person is employed by lawyers/the law firm. Thus, a lawyer/a law firm can employ consultants such as former partners who are no longer advocate, judges, auditors or patent experts. In these cases the lawyer has to supervise the consultants and to make sure that their work is carried out in accordance with the professional ethics and the Code of Conduct for members of the Swedish Bar Association. Recently it has been possible, upon the discretion of the board of the Swedish Bar, for non-lawyers to act as managing director and as such to own a limited part of the law firm not more than ten per cent.

6. Please describe when an independent association of lawyers is responsible for, and has actively engaged in:

- 6.1. The **protection of individual lawyers** from any form of intimidation, hindrance, harassment or improper interference in the exercise of their functions.

Also in Sweden it is misconduct for a lawyer to engage in harassment or discrimination on the basis of race, gender, religion, national origin, ethnicity, age, sexual orientation, etc. This derives both from the Code of Professional Conduct (Rule 1 and Rule 2.9, where the latter rule prohibit a lawyer from giving legal advice contrary to the rights protected in the

ECHR) and from a recent guiding statement of the board of the Swedish Bar Association, emanating from the #MeToo movement and the subsequent movement in Sweden among female lawyers for better gender equality and the end of harassment in the legal activities of lawyers.

In accordance with the experience of the massive force this gender equality movement has had in Sweden, both in the legal field and elsewhere, the Swedish Bar Association regards the issue of great importance.

4. Are lawyers limited in the clients that they may represent? Are barriers such as fear of prosecution preventing lawyers from acting in controversial or unpopular cases?

Advocates are not limited in representing their clients in any other way than the duty to follow the law and the ethical rules on, for example, conflict of interest. Every suspect, persons accused of terrorism or any other grave offence, have the right to a defence and a counsel who represents their interests before the police/prosecutor/court. Lawyers in Sweden are free to represent whomever they would like to represent. A lawyer, however, is not obliged to accept a mandate offered, but must immediately give notice of their decision to decline a mandate. Fear of prosecution for representing a client in controversial or unpopular cases is not an issue in Sweden. An advocate and advocates do not normally distance themselves from controversial cases due to fear of being judged by the kind of clients they represent. There are, however, rarely advocates who choose not to take certain mandates involving special types of grave and stigmatic crimes (eg, sex crimes on children, etc) since they do not believe they cannot represent such client in a professional way.

The public and the media sometimes have difficulties in distinguishing between defending a suspect and defending a crime. It happens most rarely that advocates are threatened or even physically attacked when defending or representing ‘unpopular clients’ (see also below).

- Is the association promptly informed?

Yes, see above.

- Does the association have procedures in place to respond to attacks on lawyers (rapid response mechanisms/other)? If no procedures exist, how do associations respond? Please provide concrete examples.

Ad hoc responses depending on the individual case of attacks on lawyers (in large such attacks are rare).

- 6.2. The **promotion and protection of the role of lawyers in society and their independence** (For instance, has the association raised awareness about the role of lawyers? addressed barriers arising from political/media/community pressure after their involvement in controversial or unpopular cases or cases in which lawyers are prevented from appearing in court on behalf of a client? Has the association reacted in cases in which they face pressure to interpret the law in the government’s favour; or refrain from challenging the constitutionality of questionable legislation?).

Yes, see answers above.

6.3. The **adoption of laws, policies and strategies relating to the administration of justice.**

Please provide concrete examples.

A mandatory part of the Swedish legislative process is the government inviting comments on draft bills from various bodies in society. The SBA has a frequent role as consultation body in the legislative process (the referral process). The SBA annually submits legal opinions and comments on some 120 to 130 legislative proposals.

Advocates and representatives of the SBA are also frequently appointed as experts in commissions of inquiry (appointed by the government) and participate in hearings, legal debates and discussions (media, conferences, seminars, etc). The SBA has well-functioning professional contacts and continuous meetings with the government and government officials, especially with the Ministry of Justice and the Parliamentary Standing Committee on the Administration of Justice. The SBA also work hard to influence the European Union legal agenda (CCBE/EU Commission) and the international legal agenda (IBA/UN).

The Swedish membership in the European Union has increased both the speed in the legislative process and in the number of drafts. The SBA considers it especially important to monitor issues relating to the rule of law, the respect for human rights, access to justice, the observance of due process and technical quality of the legislation. The SBA is also addressing concerns of the members to the authorities, government departments and law makers ensuring terms for an independent and free practise of the members.

6.4. The drafting of **new laws and legal debates in general.** Please provide concrete examples.

In short the Swedish law-making process can be summarised as follows:

- Initiative for legislative change
- The inquiry stage:
 - Government appoints an inquiry/commission
 - The inquiry/commission presents its proposals in a report
- The consultation/referral process:
 - The responsible ministry circulates the report for comments to relevant consultation bodies (whose activities are affected by the proposals)
- The government drafts a proposal for new legislation
- The proposal is referred to the Council on Legislation (Justices of the Supreme Court and the Supreme Administrative Court)
- The government proposes a government bill
- The government bill is submitted to the parliament for consideration
- The government issues a law (published in the Swedish Code of Statutes).

The SBA has a direct and important influence on the legislative procedure in accordance with what has been mentioned above under ‘Legislative influence’.

Thus, the SBA has a frequent role as consultation body in the legislative process (the referral process). The SBA annually submits legal opinions and comments on some 120 to 130 legislative proposals. Advocates and representatives of the SBA are also frequently appointed as experts in commissions of inquiry (appointed by the government) and participate in hearings, legal debates and discussions (media, conferences, seminars, etc). The SBA has well-functioning professional contacts and continuous meetings with the government and government officials, especially with the Ministry of Justice and the Parliamentary Standing Committee on the Administration of Justice. The SBA also work hard to influence the European Union legal agenda.

The SBA and its members have an important role as watch dogs for human rights. Individual fundamental rights and freedoms (personal integrity, etc) according to the ECHR, the EU Charter of Fundamental Rights and the UN Universal Declaration of Human Rights, especially in relation to rule of law issues (fair trial, due process and rights of suspects, access to justice, quality of legislation, independence of the judiciary, independence and self-regulation of the Bar, threats to core values of the profession; for example, confidentiality and client loyalty as a result of inter alia anti-money laundering legislation, etc).

7. Do you know of any case where an independent association of lawyers has faced **threats or reprisal** (eg, closure, sanctions, verbal accusations) after discussing or taking an active position on issues affecting the rule of law and/or human rights?

No.

- Please, describe what have been the most relevant cases and situations, when it occurred and what is the ongoing situation regarding that case(s).
- Was any protection mechanism used in protection of the association? What impact did it have?

Not applicable.

8. In general, how would you rate:

8.1. The level of independence of the regulatory body of the legal profession in your country?

0 1 2 3 4 5 6 7 8 9 10

8.2. The level of independence of the associations of lawyers in your country?

0 1 2 3 4 5 6 7 8 9 10

8.3. The level of protection of lawyers by the authorities when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

8.4. The level of protection of lawyers by bar associations/law societies when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

Thank you.



Human Rights
Institute

INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

Questionnaire sur le rôle, la composition et les fonctions des associations du barreau

Les réponses doivent être envoyées électroniquement et au plus tard le **26 mai 2018**
à Helene Ramos dos Santos, Consultante IBAHRI pour le Programme Nations Unies
(helene.santos@int-bar.org).

SUISSE, CANTON DE GENÈVE

Nom, organisation et email de contact:

1. Merci d'indiquer si la profession légale est réglementée dans votre pays par :

- une association professionnelle d'avocats
- une instance juridictionnelle
- le gouvernement
- une autorité déléguée ou indépendante
- un système mixte

Décrivez brièvement le système en place (aux niveaux national, régional, local comme applicable).

En Suisse, la profession est réglementée par une loi fédérale puis, dans chacun des cantons suisses, par une loi cantonale d'application. Les autorités de surveillance des avocats sont instituées au niveau cantonal. A Genève, c'est la Commission du Barreau qui est l'autorité de surveillance des avocats.

La commission du barreau comprend 9 membres, soit :

- a) 3 membres nommés par les avocats inscrits au registre cantonal;
- b) 3 membres nommés par le Grand Conseil (pouvoir législatif);
- c) 3 membres nommés par le Conseil d'Etat (pouvoir exécutif).

Deux des membres mentionnés aux lettres b et c sont choisis parmi les magistrats de carrière du pouvoir judiciaire et 2 au moins des autres membres sont choisis en dehors de la profession d'avocat.

2. Lorsqu'une association professionnelle d'avocats joue un rôle dans la réglementation de la profession:

La principale association professionnelle d'avocats à Genève est l'Ordre des avocats. Il s'agit toutefois d'une association privée qui est régie par ses statuts auxquels ses membres se soumettent. L'adhésion à cette association n'est pas obligatoire pour exercer la profession d'avocat. Les questions qui suivent sont dès lors peu adéquates par rapport au système existant à Genève. Ainsi, outre son rôle d'association professionnelle regroupant une très large majorité des avocats à Genève et le poids politique qu'elle peut avoir, cette association n'a juridiquement pas de rôle dans la réglementation de la profession aux termes de la loi à l'exception d'un droit de recours contre les inscriptions au registre cantonal des avocats prévu par l'art. 6 de la loi fédérale sur la libre circulation des avocats (LLCA).

Ainsi, il ne sera pas répondu aux questions 2.1 et 2.2 ci-dessous dès lors que ce n'est pas l'association Ordre des avocats de Genève qui joue un rôle dans la réglementation de la profession tel qu'évoqué dans lesdites questions. La LLCA et, au niveau cantonal, la loi sur la profession d'avocat (LPAv) règlent néanmoins ces différentes questions. Il est toutefois souligné ici que tant au niveau fédéral, par la publication d'un code suisse de déontologie par la Fédération suisse des avocats qu'au niveau cantonal, par les Us et Coutumes de l'Ordre des avocats, ces associations professionnelles ont promulgué un code de conduite pour les avocats membres sur lesquels s'appuient les autorités de surveillance pour interpréter les règles disciplinaires de la profession.

2.1. Merci d'indiquer:

- a) La dénomination exacte de l'association:
- b) Son instrument constitutif (Constitution/ loi ordinaire/Règlement interne) :
- c) S'il s'agit d'une association reconnue comme 'indépendante'¹ et autonome dans la loi:

Oui Non Référence juridique :

¹ Est indépendante et autonome l'association dont le conseil ou organe exécutif est librement élu par ses membres sans quelconque interférence par toute autre organe ou personne.

- Merci de décrire brièvement la composition, la nomination et la procédure d'élection de l'organe exécutif de l'association ; et le rôle des pouvoirs exécutif, législatif et judiciaire dans la création et le fonctionnement de cette association (En particulier si l'association existe mais n'est pas indépendante, qui supervise sa création et son fonctionnement ?).

d) L'adhésion à l'association est-elle obligatoire pour exercer la profession d'avocat ?

Oui Non Référence juridique :

2.2. Merci d'indiquer les dispositions juridiques (nom/date/dernière révision/références de la loi) et les pratiques existantes quant au rôle de cette association dans:

- a) La **procédure d'admission** à la profession d'avocat, la certification des avocats, et le renouvellement du certificat d'aptitude à exercer.
- b) Le **libre accès à la profession**, sans discrimination, pour toute personne ayant les compétences et l'accompagnement des nouveaux entrants dans la profession.
 - Précisez les mesures adoptées pour les minorités et les avocats étrangers.
- c) L'imposition et le contrôle relatifs à la **formation juridique continue** ou aux exigences de formation.
 - La formation promulguée adresse-t-elle les devoirs éthiques des avocats les droits de l'homme et/ou les libertés fondamentales ?
- d) La **promulgation d'un code de conduite/règles de conduite** pour la profession d'avocat.
 - Merci de mentionner les dispositions du code d'éthique ou des règles d'éthique incorporant les standards régionaux² et internationaux, en particulier les Principes de base relatifs au rôle du Barreau.
- e) Les **mesures disciplinaires** à l'égard des avocats.
 - Merci d'indiquer lorsque les procédures disciplinaires sont soumises à un comité disciplinaire impartial mis en place par la profession légale ou à une autorité indépendante créée par une loi.
- f) **L'octroi d'aide juridique** pour les groupes n'ayant pas accès à la justice.
 - Merci d'indiquer les mesures prises (ex. : services d'aide juridique pro bono obligatoire).
- g) La **protection accordée à la profession juridique**.

2.3. Merci de mentionner comment l'association est financée.

L'Ordre des avocats est financé par les cotisations de ses membres et par des donations ou autres soutiens financiers.

² Principes et Lignes Directrices sur le Droit à un Jugement Equitable et Assistance juridique en Afrique, 2003: Recommendation Rec (2000) 21 du Comité des Ministres des Etats Membres sur la liberté d'exercice de la profession d'avocat (Conseil de l'Europe).

2.4. Si l'association rencontre des obstacles/défis dans l'exercice de ses fonctions, merci de mentionner les obstacles rencontrés.

L'association peut exercer librement.

2.5. Si l'association n'a pas mandat pour poursuivre certains objectifs qui, selon vous, devraient être inclus dans son mandat, merci de les indiquer et de justifier votre réponse.

3. Décrivez les **dispositions juridiques** dans votre pays :

a) protégeant contre les interférences illégales des autorités dans le travail des avocats ;

La LLCA et la LPAv fondent les bases de l'exercice de la profession d'avocat, ancre le secret professionnel et le principe de l'indépendance de l'avocat.

b) protégeant la liberté d'association des avocats ; et

L'article 23 de la Constitution fédérale garantit la liberté d'association, rappelant que toute personne a le droit de créer des associations, d'y adhérer ou d'y appartenir et de participer aux activités associatives.

c) assurant la sécurité des avocats menacés en raison de leurs fonctions (incluant les voyages à l'étranger, les communications avec leurs clients, les déclarations faites au sein ou en-dehors du tribunal dans le cadre de la représentation de leurs clients).

Les règles applicables ont été développées par la jurisprudence du Tribunal fédéral en lien avec le secret professionnel, l'indépendance de l'avocat et l'interdiction des conflits d'intérêts, règles reconnues comme cardinales pour la profession.

4. Merci d'indiquer la **jurisprudence de principe** (référence des cas) relative à la liberté d'association de la profession juridique dans votre pays.

S'il n'est à notre connaissance pas de jurisprudence de principe spécifique à la profession juridique, le principe de la liberté d'association et de la liberté de réunion est rappelé à l'arrêt du Tribunal fédéral ATF 96 I 219, 229 comme suit : *Ferner wird allgemein angenommen (eine Rechtsprechung hierüber scheint nicht zu bestehen), dass es mit der Vereinsfreiheit (Art. 56 BV) unvereinbar sei, die Gründung von Vereinen oder die Veranstaltung von Vereinsversammlungen von einer Bewilligung abhängig zu machen.*

5. Merci de lister les associations indépendantes d'avocats en charge de la protection et promotion de l'intérêt collectif de la profession dans votre pays.

Chaque canton a une ou plusieurs associations d'avocats et juristes. A Genève, la principale est l'Ordre des Avocats de Genève. L'association des juristes progressistes réunis des avocats, magistrats et juristes.

6. Merci d'indiquer lorsque l'association est en charge de, et a activement pris part dans :

6.1. La **protection individuelle des avocats** contre toute forme d'intimidation, ingérence, harcèlement et interférence induite dans l'exercice de leurs fonctions.

- Est-ce que l'association est rapidement informée?
- Est-ce que l'association a des procédures en place pour répondre aux attaques contre les avocats (mécanismes rapides de réponse/autre)? Si aucune procédure n'existe, comment l'association répond-elle? Merci de fournir des exemples concrets.

La Commission des droits de l'Homme de l'Ordre des Avocats de Genève accorde une attention particulière à « défense de la défense », soit le droit de tout avocat de pouvoir exercer sa profession en toute liberté et en toute indépendance, protégé de toute entrave, intimidation, harcèlement ou ingérence dans ses fonctions professionnelles.

A cet effet, la Commission :

- soutient des confrères étrangers en danger par un Mécanisme de Réponse Rapide
- accueille des confrères étrangers dans le cadre de programme de formation à Genève
- mène des missions à l'étranger de formation, d'observation ou d'action judiciaire.

La Commission base notamment son action sur les Principes de base des Nations Unies relatifs au rôle du barreau qui compilent les dispositions correspondant aux aspects les plus importants du droit à une assistance, un conseil et une défense indépendante. Ils ont été adoptés à l'unanimité lors du huitième congrès des Nations Unies pour la prévention du crime et le traitement des délinquants, lequel s'est tenu à la Havane le 7 septembre 1990. L'Assemblée Générale des Nations Unies les a adoptés le 18 décembre de la même année dans le cadre de sa résolution relative aux Droits de l'homme dans l'administration de la justice. Le principal dessein des Principes est d'assister les États dans leur rôle de garant de l'indépendance des avocats. Les Nations Unies considèrent qu'un tel outil contribue également aux efforts investis dans la lutte contre la criminalité. Finalement, le respect de l'indépendance que consacrent les Principes constitue un élément fondamental à l'accès inconditionnel à la justice.

6.2. La **promotion et la protection du rôle des avocats** dans la société et leur indépendance (Par exemple, l'association sensibilise-t-elle le public sur le rôle des avocats dans la société ? a-t-elle soulevé les obstacles provenant de la pression politique/médiatique/de la communauté après son implication dans des cas impopulaires ou controversés ou les cas dans lesquels les clients sont empêchés d'apparaître dans le tribunal au nom de son client ? L'association a-t-elle réagi en cas de pression pour interpréter la loi en faveur du gouvernement ; ou de s'abstenir d'invoquer l'inconstitutionnalité d'une législation ?)

L'indépendance des avocats en Suisse n'est pas remise en cause. L'Ordre des Avocats de Genève contribue régulièrement à sensibiliser la population au rôle de l'avocat dans la société. A titre d'exemple, une action régulière appelée « *l'avocat dans la cité* » permet à la population d'obtenir des consultations auprès d'avocats qui donnent de leur temps pour cela.

6.3. **L'adoption de lois, législation et stratégies** en rapport avec l'administration de la justice. Merci de fournir des exemples concrets.

L'Ordre des avocats prends régulièrement positions lors de consultations sur l'élaboration des lois. A titre d'exemple, il s'est prononcé récemment sur la révision du Code de Procédure Civile et la **révision de la loi fédérale suisse sur le droit international privé (LDIP)**.

6.4. L'élaboration de **nouvelles lois** et l'implication dans les **débats juridiques** en général. Merci de fournir des exemples concrets.

Nous pouvons citer ici l'exemple des conditions de détention. L'Ordre des Avocats de Genève, par sa Commission des droits de l'Homme, vise à garantir, dans les lieux de détention suisses, des conditions conformes aux standards internationaux en la matière.

Pour atteindre ce but, la Commission :

- intervient auprès des autorités concernées, direction pénitentiaire, organes politiques et intervenants privés ;
- collecte et centralise les informations disponibles sur les conditions existantes et les violations alléguées, en particulier à Champ-Dollon ;
- compile une base de jurisprudence relative aux questions de détention;
- **épaule** les avocats concernés dans le suivi de cas individuels et collabore avec d'autres organisations et associations concernées par cette problématique
- forme les avocats intervenants au pénal dans des cas de détention, par le biais, notamment, de la publication d'un Vademecum.

7. Avez-vous connaissance de cas de menaces ou représailles (fermeture, sanctions, accusations verbales) contre une association indépendante d'avocats après qu'elle ait discuté ou pris une position active sur des questions touchant à l'Etat de droit et/ou les droits de l'homme ?

Nous n'avons pas connaissance de tel cas à Genève.

- Merci de décrire les principaux cas et situations, quand et comment cela s'est passé, et la situation actuelle.
- Un mécanisme de protection a-t-il été utilisé pour protéger l'association ? Merci d'indiquer l'impact de ce recours.

8. En général, comment évaluez-vous :

8.1. Le niveau d'indépendance de l'organe régulateur de la profession juridique dans votre pays ?

0 1 2 3 4 5 6 7 8 9 10

8.2. Le niveau d'indépendance des associations d'avocats dans votre pays ?

0 1 2 3 4 5 6 7 8 9 10

8.3. Le niveau de protection des avocats par les autorités quand sujets à une interférence illégale dans l'exercice de leur profession ?

0 1 2 3 4 5 6 7 8 9 10

8.4. Le niveau de protection des avocats par les associations du barreau quand soumis à une interférence illégale dans l'exercice de leur profession ?

0 1 2 3 4 5 6 7 8 9 10

Merci.



Human Rights
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INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

Questionnaire on the Role, Composition and Functions of Bar Associations

Submissions should be sent electronically and no later than **26 May 2018** to
Helene Ramos dos Santos, IBAHRI UN Senior Legal Consultant (helene.santos@int-bar.org)

ZAMBIA

Respondent's name and email address:

1. Please indicate whether the legal profession is regulated, in your country, by:

- a professional association of lawyers
- a court
- the Government
- an independent or delegated authority
- a mixed system

Please describe briefly the system in place (as relevant at national/regional/local levels).

It's national (Law Association of Zambia)

2. Where a professional association of lawyers plays a role in the **regulation** of the legal profession:

2.1. Please provide:

the exact name of the association: Law Association of Zambia

the legal basis for its establishment (act of parliament): Established by the THE LAW ASSOCIATION OF ZAMBIA ACT in 1973, now Chapter 31 of the Laws of Zambia.

whether it is established as an ‘independent’¹ and self-governing association in the law:

Yes No Legal reference: S.10 (2)

- Please describe briefly the composition, and appointment and renewal processes of the executive body of the association; and the role of the Executive, Legislative or Judiciary powers in relation to the establishment and functioning of this association (please mention who is overseeing the establishment and functioning of the association, if the association is not independent)

The members of the Council shall be members of the Association and shall be elected by the Association in general meeting (Law Association Act) (S (10(2))).

For the proper management of the affairs of the Association there shall be an executive committee (herein referred to as ‘the Council’) consisting of a President, a Vice-President, a secretary and a treasurer (herein referred to as ‘officers’) and not more than 12 other persons. (Law Association Act) (S(10)1).

d) Whether the membership of the association is mandatory to practise law:

Yes No Legal reference: Legal Practitioners Act
(But only for those in private practice)

- 2.2. Please provide the legal basis (name/date/latest review/reference) and describe briefly the current practice regarding the role of the association in:

The **admission process** to the legal profession, the licensing of lawyers and renewal of practicing certificates.

See sections 13 and 35, Legal Practitioner Act. It shall be the duty of the Association to issue, in accordance with the provisions of this Part, certificates in the prescribed form authorising the practitioners named therein to practise as advocates (Legal Practitioner Act).

The **free access to the profession** for all persons having the requisite professional competence, without discrimination of any kind, and assistance to new entrants into the profession.

- Please mention the specific measures adopted for minorities and foreign lawyers.

The imposition and monitoring of **continuous legal education** or training requirements.

- Is education on the **ethical duties of lawyers** **human rights**
and/or **fundamental freedoms** provided? Yes

See S.4 (d) purpose of the associations is to ‘to promote the education of lawyers at all stages and levels, with particular emphasis on the broadening of such education’; (Law Association Act)

The promulgation of a **code of conduct/rules of conduct** for the legal profession.

¹ Is independent and self-governing an association whose council or other executive body is freely elected by all the members without interference of any kind by any other body or person.

- Please refer to the provisions of the code/rules incorporating regional² and international standards on the legal profession, including the Basic Principles on the Role of Lawyers.

Disciplinary processes against lawyers.

- Please mention when disciplinary proceedings are brought before an impartial disciplinary committee established by the legal profession, or before an independent statutory authority.

Part 2 4(1) There is a disciplinary committee which is made up of (1) the Attorney-General and the Solicitor-General; and (2) five practitioners (hereinafter referred to as nominated members) being members of and nominated by the Association, and appointed by the Minister.

The provision of **legal aid** for groups whose need for legal services is not met.

- Please mention the specific measures taken (eg, compulsory pro bono legal services).

The **protection** granted to the legal profession.

2.3. Please mention how the association is being financed.

- Members pay annual subscription fees

2.4. If the association encounters obstacles/challenges in fulfilling its functions, please mention the obstacles encountered. None

2.5. If the association has no mandate to fulfil objectives that you think **should** be within the scope of its mandate, please state them and indicate the reasons for your response. None

3. Please provide the **legal safeguards** in your country:

3.1. Against unlawful interferences from the authorities in the work of lawyers;

3.2. Protecting the freedom of association of lawyers; and

3.3. Ensuring the security of lawyers threatened as a result of discharging their functions (including travelling abroad, communicating with their clients, statements made in or outside a court of law in the course of representing their clients).

The Law Association of Zambia Act and Legal Practitioners Act are adequate for lawyers in Zambia to work.

4. Please provide reference to **authoritative case law** (case name and citation if reported) related to the freedom of association of the legal profession in your country.

We have not had such a decision yet perhaps owing to the fact that legal practitioners are free to practise.

² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003: Recommendation Rec(2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer (Council of Europe).

5. Please list independent associations of the legal profession in charge of **professional representation** in your country.

There is only one: the Law Association of Zambia.

6. Please describe when an independent association of lawyers is responsible for, and has actively engaged in:

- 6.1. The **protection of individual lawyers** from any form of intimidation, hindrance, harassment or improper interference in the exercise of their functions.

In 2017, the Law Association of Zambia decided to defend one of its members, Nchima Nchito, when he was charged with the offence of impersonation. The criminal charge arose from a civil matter in which shareholders of one of Zambia's privately owned newspaper, the Post Newspaper, was placed in liquidation. Some of the directors and shareholders of the Post Newspapers Limited later appointed Nchito to represent them in a related matter. Subsequently, Nchito was charged with impersonation essentially on the ground that he was purporting to represent the Post Newspapers Limited or its shareholders when he had not been so appointed by the provisional liquidator of the Post Newspapers Limited.

The Law Association of Zambia (LAZ) took up the defence of Nchito pursuant to section 4 (n) of the Law Association of Zambia Act, which stipulates that part of the objects of LAZ are 'to represent, protect and assist members of the legal profession in regard to their conditions of practice, remuneration and otherwise'. The Council of LAZ took up the matter as it was of the view that the criminal charges raised against Nchito were a threat to the independence of the legal profession especially that the law in Zambia permits directors of a company to use the name of the company in liquidation to litigate against the liquidator or receiver of a company.

The case was eventually withdrawn by the complainant.

- Is the association promptly informed? Yes
- Does the association have procedures in place to respond to attacks on lawyers (rapid response mechanisms/other)? If no procedures exist, how do associations respond? Please provide concrete examples.

No specific procedures exist but members of the LAZ have unlimited access to the LAZ Secretariat and Council members. Communication to the Secretariat or Council members is done through conventional means such as telephone calls (via mobile phones or landlines, WhatsApp, SMS) and through ordinary correspondence or electronic mail.

- 6.2. The **promotion and protection of the role of lawyers in society and their independence** (For instance, has the association raised awareness about the role of lawyers? addressed barriers arising from political/media/community pressure after their involvement in controversial or unpopular cases or cases in which lawyers are prevented from appearing in court on behalf of a client? Has the association reacted in cases in which they face

pressure to interpret the law in the government's favour; or refrain from challenging the constitutionality of questionable legislation?).

LAZ does raise awareness of the role of lawyers and LAZ itself through press statements and on its website.

In the past two years, LAZ did come under a lot of attacks from the ruling party and its members for coming to the defence of the judiciary and for calling on the President to act in accordance with the Constitution, especially after the Constitution of Zambia was amended. When the term of parliament came to an end, a question arose in the public domain as to whether cabinet ministers were supposed to vacate their cabinet positions. LAZ held the view that they were obliged to but the Republican president held the contrary view. LAZ decided to take the matter to the Constitutional Court and LAZ was subsequently accused of being anti-government. The Constitutional Court eventually rendered its decision in favour of LAZ.

6.3. The **adoption of laws, policies and strategies relating to the administration of justice.**

Please provide concrete examples.

Various comments on issues effecting the legal profession/judiciary

In the recent past, LAZ came to the defence of the Constitutional Court when the Republican president and his special assistant for press made adverse comments publicly against the judges of the Constitutional Court which in LAZ's view amounted to intimidating the judges to rule in favour of the Republican President in a matter in which some opposition political parties commenced a matter in the Constitutional Court asking the Court to determine whether the incumbent Republican president, President Lungu was eligible to contest the presidential elections in 2021.

6.4. The drafting of **new laws and legal debates in general.** Please provide concrete examples.

As part of its statutory mandate, LAZ is often called upon to make submissions to parliament on any proposed legislation and LAZ does so whenever called upon.

More particularly and perhaps more importantly, prior to the amendments to the Republican Constitution, LAZ made submissions to parliament on what it considered to be the most suitable way of adopting the new Constitution of Zambia or the mode of amending it. LAZ also actively participated in the debates on the referendum that was held alongside the 2016 presidential and general elections and whose main objective was to amend the Bill of Rights as set out in the Republican Constitution. LAZ supported the referendum question and held a series of public debates on the advantages of the referendum passing. LAZ also appeared on both the public and private radio and television stations in support of the Referendum.

7. Do you know of any case where an independent association of lawyers has faced **threats or reprisal** (eg, closure, sanctions, verbal accusations) after discussing or taking an active position on issues affecting the rule of law and/or human rights?

- Please, describe what have been the most relevant cases and situations, when it occurred and what is the ongoing situation regarding that case(s).
- Was any protection mechanism used in protection of the association? What impact did it have?

In March 2017, one of the members of parliament belonging to the ruling party published a bill called the Law Society's Bill, which he intended to take to parliament. One of the objects of the bill was to repeal the Law Association of Zambia Act and consequently LAZ. The bill was also intended to allow for the formation of various Law Societies in Zambia.

Members of LAZ who also support the ruling party were ostensibly in favour of the bill but the majority of LAZ members did not support the bill as they perceived it as a means to fragment the legal profession and LAZ in particular.

The publishing of the bill came after members of the ruling party had accused LAZ of being anti-government and the ruling party for taking positions on the rule of law and constitutionalism, which positions were unpopular with the ruling party and the government.

No protection mechanism per se was used in protection of LAZ. However, the LAZ Council took measures to raise awareness on the importance of maintaining LAZ in its current form and the adverse effects that the bill would have on the regulation of the legal profession and its independence.

LAZ also appointed a committee to spearhead efforts to dissuade the mover of the bill from presenting the Bill in Parliament.

The bill was eventually albeit quietly and unofficially abandoned by the member of parliament and the bill never got to the floor of parliament.

8. In general, how would you rate:

8.1. The level of independence of the regulatory body of the legal profession in your country?

0 1 2 3 4 5 6 7 8 9 10

8.2. The level of independence of the associations of lawyers in your country?

0 1 2 3 4 5 6 7 8 9 10

8.3. The level of protection of lawyers by the authorities when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

8.4. The level of protection of lawyers by bar associations/law societies when subjected to unlawful interference in the exercise of their profession?

0 1 2 3 4 5 6 7 8 9 10

Thank you.



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