

Mandate of the Special Rapporteur on the independence of judges and lawyers

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the draft law on "The Bar and Practice of Law", which includes a number of provisions that could jeopardise the free and independent exercise of the legal profession and the capacity of the national bar association to defend the interests of their members and the independence of the legal profession in general.

According to the information received:

On 6 September 2018, the President of Ukraine presented the draft law on "The Bar and Practice of Law" (Bill No. 9055). The draft law defines the legal framework for the organisation and operation of the Bar and the exercise of the legal profession in Ukraine. The draft law would replace, if adopted, the current Law "On the Bar and Advocacy" (Law No. 5076-VI), adopted on 5 July 2012.

The law includes, inter alia, provisions on the admission to the legal profession; the rights, duties and professional responsibilities of lawyers; suspension and termination of the license to practice law; disciplinary proceedings and sanctions; composition and functions of the bar association and its subsidiary bodies; membership fees and financial autonomy; and final and transitional provisions.

Before explaining my concerns on this draft law, I wish to remind your Excellency's Government that the right to have access to a lawyer constitutes an integral part of the right to a fair trial. Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which Ukraine ratified on 12 November 1973. Article 14, para. 3 (b) and (d), of the Covenant lists, among the procedural guarantees available to persons charged with a criminal offence, the right to communicate with a lawyer of their choice, the right to have adequate time and facilities for the preparation of their defence and the right to defend themselves in person or through legal assistance of their own choosing.

In its General Comment No. 32 (2007), the Human Rights Committee considered that the right to communicate with a counsel of one's own choosing is an important element of the guarantee of a fair trial and an application of the principle of equality of arms. The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their

communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter (CCPR/C/GC/32, paras. 32 and 34).

Several international and regional human rights treaties ratified or acceded to by Ukraine, for instance the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ratified by Ukraine on 11 September 1997, include the right to be assisted by a lawyer of one's own choosing among the minimum guarantees due to every person charged with a criminal offence.

This right has also been proclaimed in a large number of United Nations legal instruments, including the Basic Principles on the Role of Lawyers, which represent the most comprehensive international normative framework aimed at safeguarding the right of access to legal assistance and the independent functioning of the legal profession.

In order for legal assistance to be effective, it has to be carried out independently. That is recognized in the preamble to the Basic Principles, which states that the adequate protection of the human rights and fundamental freedoms requires that "all persons have effective access to legal services provided by an independent legal profession".

Since the establishment of the mandate, several Special Rapporteurs have highlighted the fact that professional associations of lawyers have a fundamental role to play in promoting and protecting the independence and the integrity of the legal profession and safeguarding the professional interests of lawyers (see A/71/348, paras. 30–33 and 80–88; and A/64/181, paras. 19–27).

In a recent report I submitted to the General Assembly in October 2018, I stressed that bar associations have a crucial role to play in a democratic society to enable the free and independent exercise of the legal profession and to ensure access to justice and the protection of human rights, in particular due process and fair trial guarantees. They protect individual members of the legal profession, particularly in situations where they are not able to adequately defend themselves; elaborate and implement requirements and procedures to gain access to the legal profession; develop codes of professional conduct; and handle disciplinary proceedings against lawyers. Professional associations of lawyers also cooperate with State institutions in providing legal aid services to poor and disadvantaged persons and legal education and training to lawyers throughout their careers (A/73/365).

In light of the above-mentioned standards, I am concerned that several provisions of the draft law could be inconsistent with the obligations of Ukraine under human rights norms and standards.

Independence of the bar association

Article 2, para. 1, of the draft Law provides that “the Ukrainian Bar Association is a non-State self-governing institute” that aims to ensure the protection of its members and the independence of the legal profession.

This is an important acknowledgement of the crucial role bar associations play in protecting the interests of their members and the independence of the legal profession. In the report I referred to above, I stressed that “the best guarantee of independence is a self-governing body, understood as an organization independent from the State or other national institutions” (A/73/365, para. 26). In practice, that means that the bar association should be able to set its own rules and regulations, make its own decisions free from external influence, represent its members’ interests and be able to sustain itself. That entails the profession’s right to set up bodies to oversee compliance with such regulations, through the power to admit, discipline and disbar.

In this report, I also note that State involvement in the regulation of the legal profession varies greatly (A/73/365, para. 24). While not all kinds of external intervention jeopardize the independence of the bar association, I consider that in the present case the allegedly limited participation of the national bar association in the development of the draft law on the legal profession and the alleged failure to address the legitimate concerns raised by the bar representatives on issues relating to access to the legal profession and disciplinary proceedings may in itself be regarded as a violation of the independence of the bar association.

Access to the legal profession

Article 6 of the draft law sets out the conditions that should be fulfilled for the admission to the legal profession. These include the completion of at least two-year experience in the field of law after completion of higher legal education. Para. 3 of article 6, which did not appear in the previous law on the organisation of the legal profession, introduces some limits to the kind of work experience required to become a member of the bar. It provides that ‘experience in the field of law’ only includes working experience “as an intern attorney and/or as a judge or prosecutor.”

This provision is, in my view, unnecessary. The rationale of conditions for the access to the legal profession is that of ensuring that members of the bar have the necessary personal, professional and technical competences to provide legal assistance to their clients. Such competences – it is worth stressing – will be assessed during the course of the qualification examination that candidates organised by the High Qualifications Commission of the Bar Association in accordance with article 9, para. 3, of the draft law.

Limiting the relevant to working experience to a professional experience in a law firm or a court would in practice prevent candidates working as lecturers or professors in a law department of an academic institution, as notaries, or as legal advisers in the legal department of a public organisation (e.g. a Ministry), a non-governmental organisation or a private company from obtaining the licence to practice law and becoming members of

the bar association. This would result in an unreasonable limitation of the right of qualified candidates to have access to the legal profession.

As stated in my report on bar associations, I am of the view that the legal profession is best placed to determine admission requirements and procedures and should thus be responsible for administering examinations and granting professional certificates (A/73/365, para. 56). While States are free to set quality standards and establish monitoring and evaluation mechanisms to ensure the quality of legal service providers, access to the legal profession must be open to everyone who meets the required criteria, and no discrimination regarding entry to the profession may take place on any grounds.

As to the documents to be submitted to the High Qualifications Commission of the Bar pursuant to article 8, para. 2, of the draft law, I cannot but notice that only candidates who have previously worked as trainees in a law firm are in a position to submit the recommendation from a qualified lawyer referred to under numeral 6). For this reason, I believe that this declaration should not be included in the necessary documentation, since it would have the effect of preventing candidates who have not previously worked in a law firm from applying.

Incompatibilities in exercising the legal profession

The draft law imposes strict incompatibility rules prohibiting multidisciplinary activities and the simultaneous exercise of the legal profession. In addition to the cases of incompatibility set out in article 7, article 28, para. 3, prevents members of the bar from combining the exercise of the legal profession with any other remunerated activity, except for scientific, teaching or creative activities.

Article 30 of the draft law regulates the exercise of the legal profession in a governmental institution at the central or local level. Lawyers who are employed by the State can provide legal advice and represent their institution before judicial authorities, but must request a suspension of their membership in the bar association in accordance with the procedure set out in article 7, para. 3, of the draft law.

Article 7, para. 3, provides that when a case of incompatibility arises, the lawyers has to submit a request of the suspension from the bar within ten days to the council of advocates of the region in which s/he exercises the legal profession.

There are no clearly established rules as to the existence of incompatibilities in exercising the legal profession. The Basic Principles on the Role of Lawyers, for example, do not identify any profession or activity which is incompatible with the free exercise of the legal profession. They only identify the duties and responsibilities that lawyers have to abide to in the discharge of their professional activities.

The State practice is also varied in this regard. In some countries, members of the bar cannot hold certain types of activities or handle certain matters as these activities are

deemed to be incompatible with the independence of the legal profession, while in others there are no clear-cut incompatibilities in the exercise of the legal profession.

While I acknowledge that it is the prerogative of States to decide whether, and to what extent, some professional activities are incompatible with the exercise of the legal profession, I consider that this provision does not take into account the fact that not all lawyers exercise the legal profession on a full-time basis. Some lawyers only exercise the legal profession when their services are requested, while others provide legal services outside a law firm, for example in a non-governmental organisation or a private company.

Furthermore, practicing lawyers who currently exercise, or are offered in the future, a remunerated activity outside a law firm or an academic or scientific institution would have to choose between continuing exercising the legal profession or accepting the new remunerated activity and renouncing to their activity as lawyers.

The provision in question also risks affecting access to legal services in the country, since several lawyers who do not exercise the legal profession on a full-time basis - for example those practicing in small towns - may be forced to renounce to their membership in the bar in favour of a more stable employment as legal adviser in a private enterprise. The reduction of the number of lawyers available on the market may lead, in turn, to an increase in the cost of legal assistance, which would adversely affect access to justice in the country for people with limited economic means.

Disciplinary proceedings

The draft law contains detailed provisions on disciplinary proceedings against lawyers for alleged breaches of their professional obligations and duties. According to article 38, para. 3, of the draft law, disciplinary proceedings are brought before the disciplinary commission of lawyers of the region in which the lawyer concerned is registered. According to article 59, para. 4, members of the disciplinary commission are elected by secret ballot by a regional conferences of lawyers among members with at least five years of professional experience.

The grounds for professional liability of lawyers are set out in article 39, and include a number of disciplinary offences related to the violation or disregard of a lawyer's professional obligations and duties towards his/her clients or the court.

With regard to the list of disciplinary offences included in para. 2 of article 39, I would like to point out that the breach of an ethical rule contained in the code of ethics cannot in itself constitute a disciplinary offence, given that the main aim of such codes is not that of ensuring accountability of lawyers, but rather that of ensuring that lawyers discharge their professional functions in accordance with predefined ethical standards. Furthermore, I consider that the non-payment of the annual contribution to the bar association cannot be construed as a disciplinary offence and give rise to a disciplinary liability of a lawyer.

Article 41, para. 2, of the draft law identifies the individuals or institutions who can initiate disciplinary proceedings against lawyers. The list includes the prosecutor, or the investigator and the head of the pre-trial investigation body with regard to alleged disciplinary offences committed during the pre-trial investigation.

This provision is problematic. Although disciplinary proceedings are brought before an independent disciplinary commission established by the legal profession, in accordance with the provisions of the Basic Principles (principle 27), enabling other parties to the case to bring disciplinary proceedings against the defendant's lawyer could constitute a breach of the principle of equality of arms, since it may be used by the prosecutor or the court to obtain the removal of a lawyer deemed to be 'problematic' for whatever reason and his or her replacement with a another lawyer, possibly appointed by the State. Furthermore, the very threat of initiating disciplinary proceedings against the defendant's lawyer could constitute a breach of principles 16 (a) and (c) and 17 of the basic Principles, since this may have a chilling effect on the lawyer and adversely impact the free and independent exercise of his/her professional functions.

Equally worrying is the suggested amendment, contained in para. 18.2, letter 12), of section XI of the draft law on final provisions, to article 53 of the Criminal Procedure Code of Ukraine. The aim of this new provision is to enable "an investigator, prosecutor, investigating judge or court [to] engage another defense counsel for a separate procedural act" in any case where the defence lawyer, duly informed in advance, is not able to appear in court within twenty four hours. This proposed amendment may easily be used by the prosecution or the court as an additional tool to replace a 'problematic' defence lawyer under conditions that can be easily fabricated.

Consultation with lawyers and their representative organisations

According to information received, during the development of the draft law, consultation with members of the legal profession – alone and through their professional associations – was limited. Allegedly, only a few representatives of the national bar association were allowed to participate in the consultative process, with the result that their views failed to be taken into account during the drafting stage. Furthermore, it appears that the final draft was made public by the President's office without providing the national bar association any possibility to provide comments on its content.

As mentioned above, the lack of adequate consultation with the legal profession during the law-making process is a source of concern.

Legislation regulating the role and activities of lawyers and the legal profession should aim at enhancing the independence, self-regulation and integrity of the legal profession. The mandate of the Special Rapporteur has stressed on a number of occasions that the legislation concerning the legal profession should be developed by the legal

profession itself. When established by law, the legal profession should be duly consulted at all stages of the legislative process (see A/64/181, para. 53).

In a spirit of co-operation and dialogue, and in line with the mandate entrusted to me by the Human Rights Council, I would like to recommend that your Excellency's Government:

1. reconsider the draft law "On the Bar and Practice of Law" with a view to ensuring its compliance with existing international human rights standards relating to the independence of the legal profession;
2. review, in consultation with the legal profession, the criteria for the admission to the Bar, with a view to developing fair, objective and clearly formulated criteria for the assessment of candidates. Such a review should ensure that all candidates with adequate education and training requirements in the field of law may access to the qualification examination;
3. reconsider the draft provisions on the professional activities deemed to be incompatible with the exercise of the legal profession, in order to take into account the reality of the legal profession in Ukraine and to avoid that their rigid application result in a reduction in the number of legal practitioners available on the market and a corresponding surge in the cost of legal assistance;
4. review the grounds for professional liability of lawyers and the provisions on disciplinary proceedings to ensure their compliance with international and regional standards, particularly those set out in principles 26 to 29 of the Basic Principles on the Role of Lawyers.

I would also like to recommend that such review is carried out in close consultation with practicing lawyers and their professional organisations, so as to ensure that their legitimate expectations and concerns are taken into account and reflected in the text of the law.

Finally, I would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers