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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*



**‘Where there is no independent legal profession there can be no independent judiciary,
no rule of law, no justice, no democracy and no freedom’**

The Hon Michael Kirby AC CMG, Australia

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1. The IBA Task Force on the Independence of the Legal Profession

In February 2015, President of the International Bar Association (IBA), David W Rivkin, convened the Task Force on the Independence of the Legal Profession. The Task Force was formed to study and report on challenges to the independence of the legal profession; lawyers' exercise of their legitimate professional activities; and professional privilege/secretcy.¹

The Task Force started its work by synthesising the legal, policy and historical bases for the independence of the legal profession. It reviewed examples of challenges presented in various jurisdictions and the contributing causes. The Task Force did not attempt to assess the state of 'independence' with respect to specific countries. The Task Force members believe that country-specific assessments would require more detailed and on-the-ground analyses, which are beyond the Task Force's mandate. The Task Force aimed to produce a report that: raises awareness of the importance of independence; provides a set of 'indicia of independence', which can be used by bar associations, practitioners and other stakeholders as a 'self-assessment' tool in assessing the state of the profession's independence in their own jurisdiction; and makes recommendations on what might be done to respond to the challenges and strengthen the profession.

IBA Task Force working group

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- Margery Nicoll, *Australia (Chair of the Bar Issues Commission)*

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¹ Legal professional privilege (as known in common law jurisdictions) or professional secrecy (as known in civil law jurisdictions), protects communications between a professional legal adviser and his or her clients from being disclosed without the permission of the client. There are conceptual differences between the principles of legal professional privilege/professional secrecy, but these are not relevant for the purposes of this report.

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2. Executive summary

It is universally acknowledged that the essence of a modern democracy is observance of the rule of law. The proper functioning of a democratic state is, to a large extent, contingent on the good faith of political leaders and those who administer the government's executive functions. However, a strong, democratic society that observes and upholds the rule of law cannot survive by relying solely on the good faith of those who govern its political institutions. The effective protection of society from potential threats emanating from the abuse of power and the circumvention of basic democratic principles rests on, inter alia, the existence of a system of checks and balances. The independence of the judiciary and the legal profession is a fundamental pillar of this system. In the words of Justice Michael Kirby AC: 'independence is not provided for the benefit or protection of judges or lawyers as such. Nor is it intended to shield them from being held accountable in the performance of their professional duties and to the general law. Instead, its purpose is the protection of the people, affording them an independent legal profession as the bulwark of a free and democratic society.'² Professional independence is both a duty and a privilege, because it serves as a guarantee of due process for the public.

Fundamental democratic principles, such as the separation of powers and the core principle of judicial autonomy, would not have much meaning in the absence of an independent legal profession entrusted with the duty of assisting the courts, acting as 'an instrument in the administration of justice, an officer of the legal system, and a co-minister of justice'.³ A truly independent legal profession can assist society in its efforts to protect and enforce its citizens' legitimate rights against political institutions or intrusions of private parties. The duty of a lawyer, and the duty of the bar as a whole, is to serve the rule of law and the wider public interest. The independence of the legal profession enables lawyers to fulfil this function by acting for the benefit, and in the legitimate interest of, the client and society as a whole, without fear of abusive prosecution, and free from improper influence of any kind. A strong and independent legal profession can also serve as a mechanism for political accountability.

It is perhaps for this reason that 'one of the features of the law that tends to irritate other sources of power is the demand of the law's practitioners – judges and lawyers – for independence'.⁴ Such irritation is sometimes found among those who hold power and wealth, such as politicians, rich and powerful individuals, government officials, and even media editors and their columnists.⁵ Threats to the independence of the profession can – most of the time – be traced back to those who are annoyed at the fact that there is a source of power they cannot control or buy.⁶

Threats to the independence of the profession do not emanate solely from the sphere of politics, where power and wealth are mainly – but not necessarily solely – concentrated. Conflict, war and terrorism can also pose a threat to the independence of lawyers, especially where lawyers undertake

2 The Hon Justice Michael Kirby SC CMG, *Independence of the Legal Profession: Global and Regional Challenges*, Law Council of Australia, 20 March 2005.

3 As expressed by the former President of CCBE, Hans Jürgen Hellwig.

4 See n1 above.

5 *Ibid.*

6 *Ibid.*

the difficult task of representing unpopular individuals, such as former political leaders in post-conflict societies, or suspected terrorists.

The current wave of violent extremism sweeping across the globe has had a profound impact on basic democratic principles and guarantees. The fear of terrorism has made society less sensitive to – and perhaps more tolerant of – restrictions on due process; limitations on human rights guarantees in criminal proceedings; the expansion of security and intelligence measures; and potential abuses of authority in the name of national security. This environment has created challenges to uphold the line between permissible and impermissible infringements on basic human rights, and lawyers' ability to represent their clients without external interference or pressures and without undue encroachment on the principle of legal professional privilege/professional secrecy.

The principle of legal professional privilege/secrecy has come under threat where governments pass legislation that mandates disclosure of confidential client information. Lawyers are often forced to act as 'agents of the state' by disclosing private and confidential client information, sometimes without the permission of their unsuspecting clients.

Threats to the standing of the legal profession, and therefore lawyers' ability to fulfil their role in society, can also come from the media. While the media can act as a watchdog to inform, educate and promote public awareness and accountability, sensationalist and misinformed media commentary can diminish respect and appreciation for the fundamental rule of law principles, and the role of the legal profession in upholding those principles. Where there is a gap in communication between the media and the profession, it can contribute to the erosion of the perception of lawyers' role in society, through portrayals of lawyers in ways that could undermine the credibility and the overall image of the profession.

Whether and to what extent the standing of the profession is also affected by the increasing commercialisation of the legal profession is the subject of fervent debate among legal professionals. At the core of the debate is the question of whether these developments inherently conflict with the core tenets of the profession and, in the absence of appropriate regulatory mechanisms, whether they have the potential to diminish the awareness of special duties of the legal profession and narrow the perception of the lawyer's role in society.

The independence of the legal profession is more than a moral requirement or ethical obligation. It is also a legal obligation, recognised by domestic and international law. In the words of Param Kumaraswamy, former UN Special Rapporteur on the independence of judges and lawyers, the 'general practice of providing independent and impartial justice is accepted by states as a matter of law and constitutes, therefore, an international custom in the sense of Article 38(1)(b) of the Statute of the International Court of Justice.'⁷ In line with this, and with the above considerations in mind, the IBA Task Force on the Independence of the Legal Profession has produced this report, which seeks to raise awareness of the importance of independence; provide a set of indicia aimed at guiding self-assessment of the state of independence; and make a number of recommendations on what might be done to strengthen the profession.

7 E/CN.4/1995/39, para 35, available at <http://hrlibrary.umn.edu/commission/thematic51/39.htm>.

3. Methodology

The Task Force followed a diverse research methodology to identify the key indicators of independence, and subsequently looked at specific examples of the challenges faced by the legal profession in various jurisdictions and the degree to which those indicators are upheld in those jurisdictions. The initial phase of the project focused on efforts to collect survey data from as many jurisdictions as possible. The Task Force established contacts and links through various networks,⁸ and a survey was sent to a number of representatives of bar associations and lawyers around the world.⁹ For practical reasons, it has not been possible to collect survey data from all jurisdictions. To complement the survey findings, the Task Force consulted with a number of experts from various jurisdictions and conducted extensive research into publicly available material, including reports and studies. Where older reports have been referenced, they have been done so merely to illustrate the types of challenges that could be presented, not as a statement of the current state in the relevant jurisdiction.

8 See Appendix I.

9 See Appendix II.

4. Indicators of independence

4.1. What is independence and why is it important?

Independence is generally defined as the absence of influence, coercion or pressure from external factors. In the context of the legal profession the concept of ‘independence’ may have diverse interpretations in different jurisdictions, and it is to be defined flexibly in light of the variance in legal and political systems.¹⁰ It is understood that sociopolitical, cultural and economic factors can have an effect on the concept of independence. Because lawyers around the world work under different circumstances, the indicators identified in this report should be applied in the context of such specific circumstances, and should take into account the various particularities and distinct features that characterise the jurisdiction in question.

There are, nevertheless, a number of widely accepted criteria on which the Task Force based its work. The UN Basic Principles on the Role of Lawyers provides the context for the importance of the independence of the legal profession by identifying certain factors that demonstrate the presence of independence. These include, inter alia, the effective operation of professional associations of lawyers;¹¹ the proper qualification and training of lawyers;¹² the existence of proper disciplinary proceedings;¹³ and the importance of clearly delineated duties and responsibilities of lawyers vis-à-vis their clients.¹⁴

Independence and bar associations

The existence of independent bar associations is crucial for the independence of the profession, as their role is, inter alia, to offer a strong governing structure and leadership; promote the welfare of lawyers; and ensure access to the profession for those who are suitably qualified. Bar associations¹⁵ can become mechanisms for the promotion of, and access to, justice as well as influence laws and regulations through effective advocacy and lobbying. Their role in the professional lives of lawyers is essential, and that is why they must be independent and impartial.

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. Generally, a greater degree of independence is presumed where the relevant professional association is self-governing and free from direct ties with the government or other external entities. However, the way bar associations are set up and operate differs from jurisdiction to jurisdiction, and the effect this

10 See IBA International Principles on Conduct for the Legal Profession, (adopted 28 May 2011), section 1.3, p 14.

11 UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, paras 24-25.

12 *Ibid*, paras 9-11.

13 *Ibid*, paras 26-29.

14 *Ibid*, paras 12-22; see IBA International Principles on Conduct for the Legal Profession (adopted 28 May 2011), para 1.2. The state is under a duty to safeguard important ethical obligations imposed on lawyers by providing for and maintaining an environment where lawyers can exercise their duties of loyalty, confidentiality and independence freely and without undue influence. In addition, lawyers are expected to comprehend, respect and uphold such principles of good practice.

15 This report makes use of the term ‘bar association’ to refer to a general professional organisation of lawyers in a jurisdiction, unless stated otherwise, or in the context of a jurisdiction that distinguishes between bar associations and law societies.

has on the independence of the legal profession varies depending on the broader political and social context in a particular jurisdiction. Some degree of external influence (for example, in the form of governmental regulation) does not necessarily have a negative impact on the independence of the association or the independence of the profession, as long as it does not affect the association's ability to provide lawyers with the proper and necessary tools to uphold the rule of law.

Financial sustainability is also important in ensuring the independence of bar associations. The absence of financial sustainability can affect the operations and effectiveness of bar associations. A review of the relevant literature suggests that in states where 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.¹⁶ 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.

4.2. *What are the indicia of independence?*

The Task Force has identified a set of indicators that, when viewed together and in the context of the social, political, historical and cultural particularities of a given jurisdiction, may be indicative of the degree of independence or lack thereof in a particular jurisdiction. Although, no single indicator alone is sufficient to dictate the presence of independence, or lack thereof. The indicators are:

- Constitutional guarantees of judicial independence;
- The freedom to associate through independent bar associations and organisations;
- Clear and transparent rules on admission to the Bar, disciplinary proceedings and disbarment;
- Protection of legal professional privilege/professional secrecy – the scope of protection, and procedural guarantees;
- Effective independent regulation of the profession;
- Comprehensive legal education and professional training;
- Freedom of choice in representation, including freedom from fear of prosecution in controversial or unpopular cases;
- Ability to uphold the rule of law in situations of heightened national security concerns;
- Ability to respond to political, media or community pressures in times of war, terror or emergency; and
- Ability to adapt and react to business practices and quasi-legal practices without undermining exercise of independent judgment in the best interest of the client.

¹⁶ Issues in relation to the functioning of national bar associations have been reported in jurisdictions with a high poverty level. Examples are reported currently in South Sudan, and have previously been reported in Mozambique and Cambodia, where poverty levels are generally high, according to World Bank statistics. See International Commission of Jurists (ICJ) report, 'South Sudan: Independence of the Legal Profession', available at www.icj.org/cijlcountryprofiles/south-sudan/south-sudan-lawyers/south-sudan-independence-of-the-legal-profession; Mozambique: *Justice sector and the Rule of Law*, Open Society Foundations, p 14, available at [www.unicef.org/mz/cpd/references/21-Mozambique%20Justice%20report%20\(Eng\).pdf](http://www.unicef.org/mz/cpd/references/21-Mozambique%20Justice%20report%20(Eng).pdf); IBAHRI Report, 'Justice versus corruption: Challenges to the independence of the judiciary in Cambodia', pp 65-66, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=fb11e885-5f1d-4c03-9c55-86ff42157ae1; and World Bank statistics on global poverty levels, available at <http://povertydata.worldbank.org/poverty/country/KHM>.

4.2.1. CONSTITUTIONAL GUARANTEES OF JUDICIAL INDEPENDENCE

Judicial independence is the concept that the judiciary should be separate from the other branches of government, and should not be subject to improper influence by the other branches of government or by any private or partisan interests. Judicial independence is safeguarded by a number of international and regional instruments,¹⁷ and is an essential component of the rule of law. In many jurisdictions, judicial independence is a constitutional guarantee.

The independence of judges ensures that those who appear before them are confident that their cases will be decided fairly and in accordance with the law. This, in turn, ensures that lawyers can represent their clients knowing that justice is delivered in a fair and objective manner by a judiciary that is impartial and unaffected by external pressures. As the UN Special Rapporteur on the independence of judges and lawyers, Monica Pinto emphasised: ‘nowadays the independence of the judiciary is considered integral to the protection of human rights and to the enforcement of the rule of law’.¹⁸

Judicial independence ensures that lawyers are able to carry out their duties in a free and secure environment, where they are able to ensure access to justice and provide their clients with intelligent, impartial and objective advice. An impartial and independent judiciary is more likely to be tolerant and responsive to criticism, which means that lawyers are able to freely criticise the judiciary, without fear of retaliation, whether in the form of prosecution by the government or unfavourable judicial decisions. An independent judiciary also acts as a check on the independence of lawyers, and vice versa. Thus, the relationship between judicial independence and the independence of lawyers is one of mutual reliance and co-dependence.

How does the lack of an independent judiciary affect the independence of lawyers?

The way judicial systems are set up differs from jurisdiction to jurisdiction, but the lack of an independent judiciary would be a matter of concern in most situations, regardless of the structure of the particular judicial system. The extent to which the degree of independence of the judiciary affects the independence of the legal profession, however, varies depending on the circumstances.

For example, in the context of transitional justice in jurisdictions emerging from war and conflict, the judiciary is often an important factor in the midst of ongoing negotiations and struggles of political forces, and has to deal with criminal activity and corruption (both internal and external) carried over from a previous administration or regime. Some judiciaries in transitional societies are not perceived as independent, because of their affiliation with a previously oppressive regime. Such issues have been

17 See United Nations Basic Principles on the Independence of the Judiciary at www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx; the Bangalore Principles of Judicial Conduct at www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf; Art 14 of the International Covenant on Civil and Political Rights at www.ohchr.org/en/professionalinterest/pages/ccpr.aspx; Art 6 of the European Convention on Human Rights at www.echr.coe.int/Documents/Convention_ENG.pdf; Art 10 of the Universal Declaration of Human Rights at www.un.org/en/universal-declaration-human-rights/; Art 8 of the American Convention on Human Rights; Art 7 of the African Charter on Human and Peoples’ Rights; Arts 12, 13 and 16 of the Arab Charter on Human Rights; Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary at www.legislationline.org/documents/action/popup/id/7739; various reports by the Special Rapporteur on the Independence of Judges and Lawyers at www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx; and the Bangalore Principles of Judicial Conduct 2002 at www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Bangalore_principles_EN.pdf.

18 Report of the Special Rapporteur on the Independence of Judges and Lawyers, Human Rights Council, Thirty-second session, 5 April 2016, A/HRC/32/34, para 18, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/34.

reported in Kosovo,¹⁹ Libya²⁰ and Myanmar,²¹ for example, where there have been reports of judicial corruption and an overall lack of independence.²² The lack of judicial independence in such contexts makes it less likely that lawyers will respect and value the concept of independence, let alone fight to uphold it.

The absence of an independent judiciary can also be problematic in other contexts. Excessive governmental control of the judiciary²³ can make the legal profession less willing to challenge the government or undertake controversial or sensitive cases that may not sit well with a current political institution. In situations where a sitting government has the power to elect the majority of judges,²⁴ or is a main source of funding for the judiciary,²⁵ there is a higher probability that judges could become more vulnerable to politicisation and improper influence. Public attacks by political figures against the judiciary,²⁶ as well as the threat of judicial persecution²⁷ or intimidation²⁸ can further undermine judicial independence; in turn undermining the lawyers' ability or willingness to undertake certain cases or represent certain clients.²⁹

19 The most recent EU Progress Report on Kosovo outlined that 'judicial structures are still prone to political interference' and that more needs to be done to fight the 'endemic corruption'. See EU, Kosovo Progress Report, pp 4-5 and 10, available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_kosovo.pdf. For further information on the state of independence of the judiciary in Kosovo, see 'Uncharted Transition: the 'Integration' of the Justice System in Kosovo: A briefing paper', available at <http://tinyurl.com/hx8jyr3>.

20 Libya's judiciary has suffered in the wake of the revolution, the overthrow of the Gaddafi regime, and ongoing efforts to rebuild the Libyan justice system. Significant popular distrust of the judiciary has been a post-revolutionary issue in Libya, which is mainly rooted in the perceived prevalence of corruption in the judiciary. See Full ILAC Rule of Law Assessment: Libya 2013, available at www.ilacnet.org/publications.

21 See 'Right to Counsel: The Independence of Lawyers in Myanmar', available at www.burmalibrary.org/docs16/ICJ-MYANMAR-Right-to-Counsel-en-red.pdf. Apart from assessing the independence of the legal profession in Myanmar, the ICJ report briefly outlines the main issues that arise as a result of not having a fully independent judiciary. One of the factors is corruption. Lawyers have repeatedly told the ICJ that some judges condition favourable decisions on bribes. Thus, lawyers who are providing legal aid or taking cases on a pro bono basis often find themselves having to provide payment to a judge out of their own pockets to have a chance of success. It has also been reported that pleadings submitted by poor clients without representation are often dismissed outright.

22 It is important to note that such issues are commonly reported in most countries emerging from conflict, and are not limited to the examples mentioned above.

23 See IBAHRI Report 'Still under threat: the independence of the judiciary and the rule of law in Hungary', October 2015, p 29, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=93e2c33c-71e5-4ab5-89a7-299f5c5752ce. Following reforms in Hungary's Fundamental Law, the Constitutional Court's membership was increased to 15 judges, with a mandate of 12 years. Judges are appointed by a committee comprised mostly of government representatives. The nominating committee, therefore, comprises a majority of government representatives. The IBAHRI Report notes that this means that a sitting majority government may elect all the judges with no contribution by the opposition. In addition, see IBAHRI Report 'A Crisis of Legitimacy', April 2013, p 19, available to download at www.ibanet.org/Document/Default.aspx?DocumentUid=F4E48C69-F851-459E-8681-2E5FC50C61BC. The 18th Amendment of the Sri Lankan Constitution grants the president an almost unrestricted right to select all judges of the Supreme Court and Court of Appeal, rendering the superior judiciary highly vulnerable to politicisation.

24 *Ibid.*

25 The IBA Task Force heard from the president of the Malaysian Bar, Steven Thiru, who informed it that the judiciary is dependent on the executive for funding.

26 President Recep Tayyip Erdoğan, following a decision of the Turkish Constitutional Court in February 2016 that the detention of two journalists was an unconstitutional violation of rights to liberty and security and freedom of expression, stated that he 'does not accept' and 'will not abide by' the ruling of the Constitutional Court. Such comments undermine the principle of separation of powers and the independence of the judiciary, and run counter to international standards and obligations of Turkey, including under article 6 of the European Convention on Human Rights, article 14 of the ICCPR and the UN Basic Principles on the Independence of the Judiciary, which stipulates in Principle 1 that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. See 'Turkey: The Judicial System in Peril, A Briefing Report', International Commission of Jurists, p 10, available at <http://tinyurl.com/zfnh4dh>.

27 Judicial persecution in Angola, Africa, has led to unfair convictions of a number of human rights defenders. For the full article, see 'Conviction and sentencing of Angolan activists a travesty of justice' at www.icj.org/conviction-and-sentencing-of-angolan-activists-a-travesty-of-justice. In addition, reports suggest that the practice of unduly sanctioning, intimidating and removing judges is becoming a matter of growing concern in a large number of Latin American jurisdictions. See 'A Double-Edged Sword: Judicial Independence and Accountability in Latin America', by Jessica Walsh, IBAHRI thematic paper no 5, April 2016, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=e29c1628-96d0-4eaf-a6ae-d25dfdbf6721.

28 Occurrences of direct or indirect intimidation against judges have been reported in jurisdictions such as Russia (www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13267&LangID=E); Sri Lanka (www.ibanet.org/Article/Detail.aspx?ArticleUid=2260F7C7-CC74-47B5-AD29-8B34F40B2488 at p 21); Guinea Bissau (http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/34/Add.1 at para 37); and various jurisdictions in Latin America (www.ibanet.org/Article/Detail.aspx?ArticleUid=66c7dc26-ec91-4300-8d09-4aae2d3147f0).

29 See UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at para 16. This is further discussed in section 4.2.5. 'Freedom of choice in representation, including freedom from fear of prosecution in controversial or unpopular cases' of this Report.

Factors such as poverty and the existence of a negative public perception can also have considerable impact on the independence of the judiciary, and, consequently, on the ability of the legal profession to fulfil its role in society. If the judiciary is not properly and adequately remunerated for its services,³⁰ judges can become more susceptible to external influence and corruption. In jurisdictions where the judiciary is more politicised or more likely to succumb to financial pressure, individual lawyers can, in turn, be forced to resort to measures such as bribing and improperly influencing judges in an effort to win cases.³¹ In states where corruption is sanctioned by a general culture of impunity that originates from the highest levels of power, maintaining the independence of the legal profession becomes an almost impossible task.

Addressing the relevant threats

The maintenance of judicial independence requires continuous efforts and monitoring by state institutions. In most jurisdictions, these efforts run parallel to the work of civil society actors who operate and maintain independent assessment mechanisms.

A large number of state constitutions contain various provisions on the protection of judicial independence,³² which means judges can seek protection from the courts when their independence is threatened. Various reports and studies suggest that many countries in Asia, Africa, Eastern Europe and Latin America have undergone significant changes to enhance judicial independence and accountability.³³ In an attempt to fight corruption in the judiciary and ensure judicial independence, governments have enacted laws to increase the salaries of judges³⁴ and limit the influence of the executive.³⁵ In addition, introducing new recruitment examinations for judges, as well as judicial training programmes,³⁶ has formed part of reforms to enhance the independence of judges in some jurisdictions. Other important reforms include the strengthening of case management and court administration;³⁷ the enactment of laws criminalising the acceptance or solicitation of bribes;³⁸ the introduction of open and oral judicial proceedings;³⁹ the enactment of laws that mandate the

30 For example, publicly available information suggests that the justice sector in the Central African Republic has a severe lack of funds, with a budget representing only 0.15 per cent of the overall public budget. This has resulted in numerous consequences, including widespread impunity and corruption. Justice no longer fulfils its role to protect citizens and guarantee their rights, and is widely mistrusted by the population. See 'The state of justice in the Central African Republic', *Avocats Sans Frontières*, available at www.asf.be/blog/2015/08/27/the-state-of-justice-in-the-central-african-republic.

31 The bribing of judges by lawyers and others, including politicians and laypeople, as well as general corruption or risk of corruption, has been reported to various degrees and in various circumstances in the past, in countries including Bangladesh, Cambodia, Chile, Costa Rica, Croatia, the Czech Republic, Egypt, Georgia, Ghana, Guatemala, India, Israel, Kenya, Mexico, Mongolia, Morocco, Nepal, Niger, Pakistan, Palestine, Panama, Papua New Guinea, Paraguay, the Philippines, Romania, South Africa, Sri Lanka, Turkey, the UK and Zambia. For full findings, see Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, pp 181–236, available at <http://tinyurl.com/jjcv4ly>. Note that a number of the countries have since taken steps to address various issues in relation to judicial corruption and independence, which could range from minor issues, to major issues affecting the judiciary and the legal profession in general.

32 For example, Article III of the US Constitution provides that 'the judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office'. Other constitutions that expressly safeguard judicial independence include the Canadian and Australian constitutions.

33 See 'International trends – strengthening judicial independence and accountability', Heike Gramckow, deputy director, International Programs, National Center for State Courts, available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/judicial/id/256>; see also n30 above, Transparency International, *Global Corruption Report 2007*.

34 For example, as part of reforms in Algeria, the government increased judges' salaries to help them avoid the temptations of corruption. *Ibid*, Transparency International, *Global Corruption Report 2007*, p 173.

35 *Ibid*.

36 *Ibid* p 176. Pursuant to reforms in Azerbaijan, the government introduced new recruitment examinations, as well as judicial training programmes.

37 *Ibid* 'Bangladesh: Justice in disarray', p 179.

38 *Ibid* 'Corruption in the judiciary of Cambodia', p 186.

39 *Ibid* 'Chile's partial success', p 187.

publishing of all verdicts and schedules;⁴⁰ and the introduction of tougher rules on disqualification of judges.⁴¹

Threat indicators

- Lack of constitutionally guaranteed independence of the judiciary;
- A weakened judicial system and judiciary in transitional and post-conflict societies;
- Allegations and occurrences of judicial bribing;
- The existence of national legislation that prohibits the public and lawyers from criticising and/or challenging the judiciary;
- Excessive governmental control of the judiciary; and
- Inadequate remuneration for judges.

4.2.2. CLEAR AND COHERENT REGULATION OF THE LEGAL PROFESSION

4.2.2.1. The freedom to associate through independent bar associations and organisations

The freedom to associate through independent bar associations and organisations refers to the ability of lawyers to exercise their right to freedom of association through organisations established with the aim of educating, informing and bringing lawyers closer together.⁴²

The ability to associate through independent bar associations and organisations enables lawyers to:

- 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.

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. 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 programs organised and led by bar associations, or programmes established

40 *Ibid* 'Croatia: Still in transition', p 196.

41 *Ibid* 'Israel's Supreme Court: still making up its own mind', p 219.

42 The rights to freedom of peaceful assembly and of association are enshrined in a number of international and regional human rights instruments, from the Universal Declaration of Human Rights (Article 20(1)) to the International Covenant on Civil and Political Rights (Articles 21 and 22) at www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. Such protections also exist in a number of regional human rights instruments, such as the African Charter on Human and Peoples' Rights (Articles 10 and 11) at www.achpr.org/instruments/achpr; the American Convention on Human Rights (Article 11) at www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm; and the Charter of Fundamental Rights of the European Union (Article 12) at http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

with the aim of driving law reform.⁴³ In addition, a review of the relevant literature indicates that a great number of bar associations offer training and continuing legal education seminars and conferences, sponsor networking events and provide career development resources such as access to job boards and publications.⁴⁴ Some bar associations even offer their members confidential counselling and mentoring.⁴⁵

By exercising the right to free association through independent bar associations or other non-governmental organisations (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.⁴⁶

What could happen if lawyers are not able to associate freely through independent bar associations and organisations?

In jurisdictions where the freedom to associate is limited, 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. 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.⁴⁷ Where the profession is unable to exercise its right to associate freely, or where that right is restricted, lawyers become more vulnerable to abuse and risk losing their independence.⁴⁸ Restrictions on the right to associate can impact funding opportunities available for bar associations and other non-governmental organisations.⁴⁹ In addition, the existence of onerous laws and regulations that

43 For example, bar associations in Australia, the UK and the US are involved in programs aimed at driving law reform. See 'Understanding Bar Associations and their Roles and Responsibilities', prepared by New Perimeter, DLA Piper's Global Pro Bono Initiative and the IBAHRI, p 9, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=35A5E6BB-275E-4636-95B7-EB4D2AD5EBBF.

44 *Ibid*, p 11.

45 *Ibid*. A review of the relevant literature indicates this is the case in Australia, the UK and the US.

46 For example, Lawyers for Human Rights of Swaziland, an NGO based in Swaziland, has litigated against the government at the African Commission. The organisation filed a complaint against the government, alleging that the Swazi people, in particular political parties in general and their members who desire to put in place a government of their choice through a multi-party system, have since 12 April 1973 suffered irreparable harm as a result of the denial of free political activity and the banning of political parties to lawfully and effectively contest elections. The Federation of Law Societies in Canada recently litigated against the government in a matter relating to the constitutionality of a law which infringed on the principle of professional secrecy. See ICJ country profiles, Swaziland, available at <http://tinyurl.com/z74co9y>; Communication 414/12 – *Lawyers for Human Rights (Swaziland) v The Kingdom of Swaziland*, ACmHPR, July 24, 2013, Summary of Complaint, available at <http://caselaw.ihrc.org/doc/414.12/view/en/#facts>; and *Canada (A.G) v Federation of Law Societies*, 2015 SCC 7, [2015] 1 S.C.R. 401.

47 For example, Amnesty International reports that a Bill currently being considered by the Mauritanian Parliament proposes changes that will dramatically undermine the right to freedom of association in Mauritania. In addition, a law that was passed in China in April 2016 has introduced onerous regulatory requirements on overseas not-for-profit organisations wishing to operate in China, and brings their activities under the control of the Ministry of Public Security. The Foreign NGO Law, which will come into force on 1 January 2017, requires foreign NGOs to be sponsored by a government-approved Chinese partner and to register with the Public Security Bureau. The law significantly increases police control over the activity of NGOs, granting the police extensive powers to enter the domestic premises of overseas-based NGOs, seize documents and scrutinise finances without judicial oversight. It further empowers the police to detain office personnel for up to 15 days if activities are perceived to threaten national security or national interests. This significantly disrupts funding opportunities for local NGOs, including any organisations where lawyers assemble and associate. See 'Mauritania: New law compromises right to freedom of association', Amnesty International, available at www.amnesty.org/en/latest/news/2016/06/mauritanie-une-nouvelle-loi-compromet-l'exercice-du-droit-a-la-liberte-d'association; 'China passes law imposing security controls on foreign NGOs', *The Guardian*, 28 April 2016, available at www.theguardian.com/world/2016/apr/28/china-passes-law-imposing-security-controls-on-foreign-ngos.

48 For example, according to data collected by the ICJ, many lawyers in Myanmar were members of independent bar associations or other groups of lawyers that did not have any official, government-mandated functions, but provided an outlet for lawyers to communicate and coordinate with each other. Between 1988 and 2011, some groups, such as the Yangon Bar Association, were forced through government intimidation and interference to abandon most of their activities for more than two decades. Lawyers in Myanmar habitually faced intimidation, obstructions that impeded their ability to offer legal representation, and politically motivated disbarments. Today, the government has dramatically lessened its harassment of independent bar associations and, in 2016, the first independent bar association was set up in Myanmar. See ICJ, country profiles, Myanmar, available at www.icj.org/cijlcountryprofiles/myanmar-introduction/lawyers/non-interference-with-the-work-of-individual-lawyers.

49 For example, the ICJ reports that despite the fact that the Venezuelan Constitution guarantees freedom of association, bar associations in Venezuela have experienced different forms of improper interference with their organisation and funding. See ICJ, country profiles, Venezuela, available at www.icj.org/cijlcountryprofiles/venezuela/venezuela-lawyers/venezuela-lawyers-freedom-of-expression-and-association.

limit the purpose and context within which associations can be established, or laws imposing severe punishment on associations and other independent organisations,⁵⁰ can deter lawyers from forming professional or other associations.

Addressing the relevant threats

The ways in which lawyers assemble and associate vary among different jurisdictions. In most jurisdictions this is done through independent bar associations and, to a lesser degree, through other NGOs.⁵¹ Some bar associations expressly forbid any government, union or political leaders from holding leadership positions within a bar association.⁵² Independent bar associations are usually not-for-profit organisations with a set mission, reflecting and promoting the goals set in the UN Basic Principles on the Role of Lawyers.⁵³

Threat indicators

- Legislative attempts by government to restrict the rights of lawyers to join independent NGOs.
- Legislative attempts by government to restrict the structure, aim and scope of permissible activities by NGOs.

4.2.2.2. Clear and transparent rules on admission to the Bar, disciplinary proceedings and disbarment

Clear and transparent rules on admission, disciplinary proceedings and disbarment refers to rules that are comprehensible and accessible, so that those who are subject to the rules are able to easily access them, understand their meaning and appreciate the implications of violating them.

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 functional 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.

50 For example, a 2014 report prepared by Lawyers for Justice in Libya highlighted that the law in the jurisdiction permits the use of the death penalty for those who support or join organisations that are deemed 'illegal'. Libyan law outlaws the establishment of any organisation that engages in 'any activity based on a political ideology contrary to the principles of the 1969 Al-Fateh Revolution'. For full report, see Lawyers for Justice in Libya, 'Stakeholder Report to the United Nations Human Rights Council Universal Periodic Review: Libya The Rights to Freedom of Expression, Association and Assembly in Libya Submitted by Lawyers for Justice in Libya (LFJL) October 2014', available at www.libyanjustice.org/downloads/sawti-lawyers-for-justice-in-libya-libya-upr.pdf.

51 For example, one such NGO is Lawyers for Lawyers at www.lawyersforlawyers.nl.

52 For example, the Malaysian Bar Council strictly forbids any government, union or political leader from holding leadership positions in the bar association. See n43 above.

53 See Principle 24 of the UN Principles on the Role of Lawyers.

What could happen if there are no clear and transparent rules on admission to the Bar, disciplinary proceedings and disbarment?

Unclear rules on admission increase the risk of arbitrary refusals of those seeking to enter the profession and limiting entry to certain groups based on their affiliation or socioeconomic status. Unclear requirements also undermine the quality of legal representation and negatively impact on the independence of lawyers.⁵⁴ 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.⁵⁵

Addressing the relevant threats

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.⁵⁶ When information on disciplinary and disbarment orders is made widely available, it increases public 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.

54 For example, the ICJ has reported that the lack of an operational legal framework for the legal profession in South Sudan has had a negative impact on lawyers' independence. Among other things, prior to the 2014 conflict, there were no clear, coherent and uniform norms for accessing the profession, which risked undermining the quality of the services delivered. See ICJ, country profiles, South Sudan, available at www.icj.org/cijlcountryprofiles/south-sudan.

55 Cases of alleged arbitrary disbarment or targeted disciplinary proceedings against lawyers have been reported in, inter alia, Azerbaijan, the Republic of Korea, Kyrgyzstan, the Philippines and Ukraine. Independent research conducted by the ICJ indicates that there has been a general pattern of unfair disbarments and the pursuance of disciplinary proceedings on the basis of spurious grounds in CIS countries. See 'Azerbaijan: ICJ calls for respect of lawyer's freedom of expression in disbarment case', 10 May 2016, available at www.icj.org/azerbaijan-icj-calls-for-respect-of-lawyers-freedom-of-expression-in-disbarment-case; HRC Communication Report A/HRC/29/50 and HRC Communication Report A/HRC/31/79, both available at www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx; 'Ukraine: lawyer Andriy Vishnevsky wrongfully disbarred for exercising freedom of expression', 2 October 2015, available at www.icj.org/ukraine-lawyer-andriy-visnevsky-wrongfully-disbarred-for-exercising-freedom-of-expression; 'Ukraine: Conflict, Disbarments, and Suspensions in the Legal Profession', available at <http://icj2.wpengine.com/wp-content/uploads/2014/02/Ukraine-Conflict-Disbarments-And-Suspensions-In-The-Legal-Profession-ENG-Interactive11.pdf>; 'Disciplinary action against lawyers in CIS countries: analysis of international law and standards', 19 June 2013, available at www.icj.org/disciplinary-action-against-lawyers-in-cis-countries-analysis-of-international-law-and-standards; 'Kyrgyz Republic: ICJ welcomes judicial decision to drop disciplinary charges against lawyers', 13 September 2013, available at www.icj.org/kyrgyz-republic-icj-welcomes-judicial-decision-to-drop-disciplinary-charges-against-lawyers.

56 This is the case in some states. Examples include, but are not limited to, the Czech Republic, Denmark, Greece, Malaysia and Norway. For information on whether a state's regulatory body publishes information on disciplinary orders, visit the corresponding bar association's official website. See Council of Bars and Law Societies of Europe (CCBE) Summary of Disciplinary Proceedings and Contact Points, available at www.ibanet.org/Document/Default.aspx?DocumentUid=C075EC3A-3A31-4801-A390-2C70E0C25C63; Malaysian Bar Council, available at www.malaysianbar.org.my/disciplinary_orders.

Threat indicators

- Vague regulations on admission.
- 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.
- Frequent reports of arbitrary disbarments or targeted disciplinary proceedings.

4.2.2.3. Protection of legal professional privilege/professional secrecy – the scope of protection, limitations and procedural guarantees

Within the lawyer–client relationship, professional privilege/secrecy⁵⁷ is a privilege that ensures that information exchanged between the client and their lawyer is kept confidential. The privilege applies to written and oral communications.

The principle of professional privilege/secrecy helps foster communication and trust between clients and their legal advisers. The principle ensures that those seeking legal advice will do so without fear that third parties will pry into private conversations between them and their legal advisers. The principle also protects lawyers from prosecution for failure to divulge confidential information, or attempts by the government to gain access to attorney-client communications, and enables lawyers to fearlessly protect their clients' interests. Principle 4 of the IBA International Principles on Conduct of the Legal Profession states that: '[a] lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.'⁵⁸

What could happen if respect for the principle of legal professional privilege/secrecy is weak or does not exist?

Where respect for the principle of legal professional privilege/secrecy is weak or does not exist, the ability of the legal profession to render impartial and objective advice is compromised. Where communications between legal professionals and their clients are not properly safeguarded and third parties such as the government can access them, the bond of trust between clients and their legal advisers can be damaged, dissuading people from seeking legal advice.

Threats to the principle of legal professional privilege/secrecy can be direct or indirect. Direct threats to the principle have arisen in situations where governments have forced lawyers to testify against their clients in court, and where the authorities have conducted searches and seizures of confidential

57 See n1 above.

58 See IBA International Principles on Conduct of the Legal Profession, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=bc99fd2c-d253-4bfe-a3b9-c13f196d9e60. Also, see Principle 23 of the UN Basic Principles on the Role of Lawyers, available at www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx.

data in contravention of the principle.⁵⁹ Lawyers who have resisted governmental efforts to breach the principle of legal professional privilege/professional secrecy have faced criminal prosecution,⁶⁰ or have been subjected to humiliating practices and detention,⁶¹ as well as threats of disbarment.⁶² Attempts to confiscate privileged material and private communications between a lawyer and their client have been reported in the context of lawyer-client communications in criminal matters.⁶³ Such attempts, if not carried out properly and under the law, could violate a defendant's right to a fair trial under international law, and undermine the efforts of defence counsel to provide independent and impartial advice.

Indirect threats to the principle arise where lawyers are, for example, required by law to submit to the court a copy of the lawyer-client agreement regarding remuneration,⁶⁴ or where the jurisdiction has laws requiring lawyers to disclose confidential client information to the authorities, in context of governmental or regulatory objectives, where lawyers are forced to act as 'agents of the state'.⁶⁵ For example, to prevent money laundering and maintain the integrity of the profession, most jurisdictions require lawyers to divulge certain client information to the authorities, often without the client's knowledge and consent, in situations where client due diligence requirements are not

59 In our discussions with representatives from the Ukrainian National Bar Association, we were informed that the government in Ukraine has attacked the principle of professional secrecy by forcing lawyers to testify against their clients and confiscating privileged material. The Ukrainian National Bar Association has reported numerous cases of search and seizure in which international, European and national standards were not complied with. Searches were carried out without the presence of the relevant lawyer(s) and without the presence of a representative of the relevant Regional Bar Council, as foreseen by the Law of Ukraine 'On the Bar and Practice of Law'. Furthermore, investigating authorities in some cases seized all documents and electronic data in a law firm – shared by different lawyers – although the search warrant was issued only in the name of one lawyer. Moreover, requests by clients who wished their lawyers to be present during the search were disregarded by the authorities. In addition, in numerous cases lawyers have been summoned to testify against their clients, in contravention of national and European principles. For further information see CCBE letter to acting Prosecutor General of Ukraine, available at <http://unba.org.ua/assets/uploads/news/advocatura/2016.04.07-letter-%20to-prosecutor-general.pdf>; and 'Violation of Attorneys' Professional Rights and Guarantees in Ukraine in the period of 2013-2016', Report adopted by the Bar Council of Ukraine on 26 February 2016, Ukrainian National Bar Association, available at <http://en.unba.org.ua/activity/news/1224-news.html>.

60 For example, a Russian lawyer who refused to testify against his client has been vindicated by the court. See www.advocatenvooradvocaten.nl/10317/russian-federation-court-interrogation-of-lawyer-illegal.

61 Recent reports by the IBAHRI indicate that a Venezuelan lawyer, Juan Carlos Gutiérrez, asserted that his ability to represent his client Leopoldo López had been impeded by unjustifiable restrictions imposed on his communications with him. He further told the IBAHRI that legal professional privilege had been compromised at Ramo Verde prison by the military authorities recording all meetings between him and his client; reading, and sometimes withholding, their lawyer-client documentation without permission; photographing him without consent; and accessing and scrutinising information on his mobile phone. Gutiérrez was a victim of several humiliating practices carried out by the military authorities at the Ramo Verde prison where his client has been detained since February 2014. These included: invasive body searches; verbal and physical attacks; strip searches; intrusive and inappropriate touching; and the deprivation of personal belongings. See www.ibanet.org/Article/NewDetail.aspx?ArticleUid=6127d428-ff18-4765-9767-2de1a17b7cf5.

62 On 24 July 2015, lawyer Snezhanna Kim met with one of her clients in a detention facility in Kostanay, Kazakhstan. On this visit, she was harassed by officers of the facility. During Snezhanna Kim's meeting with her client, an officer of the detention facility came into the room and demanded to read the notes that Kim made during the meeting. The lawyer's notebook was laying on the table, and before she had a chance to take it away, the officer began reading the notes in it. Lawyers in Kazakhstan who deal with sensitive cases have been subjected to harassment or disbarment on improper grounds. See Lawyers for Lawyers press release, available at <http://tinyurl.com/z3vo7ea>.

63 For example, on 25 March 2013, the High Court of Zimbabwe granted Beatrice Mtetwa bail during a bail appeal hearing held in Harare. On Sunday 17 March 2013, Zimbabwean police arrested Mtetwa, on allegations of 'obstructing or defeating the course of justice'. Mtetwa was arrested while attempting to provide legal assistance to Thabani Mpofu, director of research and development in the Office of the Zimbabwean Prime Minister, Morgan Tsvangirai, who was arrested on the same day. Mtetwa's mobile phone, containing privileged attorney-client communication, was confiscated. See www.advocatenvooradvocaten.nl/7768/zimbabwe-beatrice-mtetwa-released-on-bail. For more examples, see IBAHRI Report 'Human Rights Lawyers and Defenders in Syria: A Watershed for the Rule of Law', pp 35-36, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=f6227b68-9dd4-4eb0-8d93-727ac974d4f2; IBAHRI Report, 'Strengthening the Rule of Law: Challenges and Opportunities for the Georgian Bar', p 47, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=200adf6b-f93c-46a3-a479-fca18ccd61eb; IBAHRI Report, 'Azerbaijan: Freedom of Expression on Trial', p 30, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=e1192b49-6a7c-410d-a833-a17f5fd4bcbb; IBAHRI Report, 'A Tale of Two Cities – The Legal Profession in China', p 12, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=2a7c616d-85b6-4576-bf5b-bb6f41dd40bf; IBAHRI Report, 'The Rule of Law, Democracy and the Legal Profession in the Afghan Context: Challenges and Opportunities', p 16, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=85ac71e3-e13e-43bd-8c97-48ac526a8d23.

64 Proposals for the introduction of such requirements were reported in the past in Poland, but have since then been withdrawn. See IBAHRI Report 'Justice Under Siege: a report on the rule of law in Poland', pp 76-77, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=d5609a5f-dbf8-4e2f-bcae-f579a99b7847.

65 The American Bar Association has highlighted that agencies such as the Consumer Financial Protection Bureau, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of the Controller of the Currency and the Department of Housing and Urban Development still have policies in place that seek to compel entities to disclose certain privileged information. See American Bar Association submission at the Opening of the Legal Year 2015 in London.

satisfied.

Some jurisdictions have ‘tipping-off’ prohibitions, preventing lawyers from disclosing to their client or any third party that they have shared confidential client information with the authorities.⁶⁶

This prevents lawyers from being candid with their clients, and could undermine the lawyer-client relationship, especially where the prohibition applies in circumstances relating to the disclosure of sensitive data that could affect the client’s fundamental human rights.

While the fight against improper or illegal transactions and dealings is an important government objective, governments often tread a delicate line between protecting society from such harms and infringing on citizens’ basic rights. The current global trend of legislative reform – driven by, inter alia, the threat of terrorism, the destructive effects of war and migration and the subsequent need to enhance national security – is a major threat to the principle of legal professional privilege/secretary. In the past ten years, governments around the world have: enacted stricter legislation on data retention; attempted to galvanise unorthodox investigatory methods; and enhanced the powers of police and regulatory bodies that infringe on or abrogate the legal professional privilege/secretary.⁶⁷ In the wake of the Panama papers scandal,⁶⁸ governments around the world have pushed for tighter regulation and greater transparency in the ownership of incorporated firms around the world,⁶⁹ a move that could potentially endanger the principle of legal professional privilege/secretary.

Addressing the relevant threats

Governments need to be vigilant in ensuring that legislation adopted to protect governmental interests does not unnecessarily infringe on the principle of legal professional privilege/secretary. Striking the right balance between governmental objectives aimed at protecting society from illegal activities, such as money laundering and corruption, and the need to safeguard the principle of legal professional privilege/secretary, is a challenging task.

In jurisdictions where basic human rights, such as the right to a fair trial and the right to counsel,

66 Such jurisdictions include Albania, Algeria, Egypt, Ireland, Luxembourg, Spain and Sri Lanka. For a full list of jurisdictions, see the IBA Global Chart, Anti-Money Laundering Forum, available at www.anti-moneylaundering.org/globalchart.aspx.

67 Responses to our survey demonstrate that in Australia, for example, the questioning and detention warrant of the Australian Security Intelligence Organisation (ASIO) is an extraordinary power that allows the authorities to question an individual for up to 24 hours, and detain them for up to a week, without being suspected of any involvement in terrorism. These powers abrogate the principle of professional secrecy/privilege, as all communication between the detainee and their lawyer must be monitored. In addition, the government in Hungary has passed legislation that forces lawyers to disclose documents and electronic data containing information subject to professional secrecy to certain government agencies, breaching procedural guarantees and repealing any rights to appeal or judicial review. Furthermore, the principle of attorney-client privilege/professional secrecy is also under threat in Poland, due to newly-proposed measures of government surveillance. The proposed legislation provides that all communication, including privileged communication between lawyers and their clients, may be accessed by State authorities. The Task Force was also informed about a draft Bill that is currently being debated in the UK Parliament. The so-called Investigatory Powers Bill could undermine the principle of professional secrecy in the UK, as it aims to expand the powers of data retention authorities, which could monitor private and confidential correspondence, including correspondence between lawyers and their clients. The Bill has not yet been passed, and those concerned of the implications have tabled reforms to the final draft.

68 The Panama Papers scandal refers to a huge leak of documents that occurred in April 2016, which lifted the lid on how a number of individuals and companies, including rich and powerful individuals, use tax havens to hide their wealth. The files were leaked from Panamanian law firm Mossack Fonseca. The files demonstrated how Mossack Fonseca clients were able to allegedly launder money, dodge sanctions and avoid tax.

69 For example, calls for greater transparency were made by, inter alia, US President Barack Obama, German Chancellor Angela Merkel and former British Prime Minister David Cameron. Proposed measures include, among others, the implementation of legislation against ‘inversions’, when companies change their headquarters to another country. In addition, finance ministers from Britain, France, Germany, Italy and Spain, agreed in a G20 meeting in Washington, DC, in April 2016 to exchange information on beneficial ownership registration. Other proposed measures include the introduction of legislation making companies criminally liable if employees aid tax evasion. See ‘UK and European allies plan to deal “hammer blow” to tax evasion’, *The Guardian*, 15 April 2016, available at <http://tinyurl.com/jpj8j2f>; ‘Panama Papers reaction’, *BBC News*, 5 April 2016, available at www.bbc.com/news/live/business-35944316; ‘Hit by Panama row, David Cameron announces new tax evasion law in 2016’, *Business Insider*, 11 April 2016, available at www.businessinsider.com/r-hit-by-panama-row-uks-merkel-announces-new-tax-evasion-law-in-2016-2016-4.

are guaranteed by the constitution, legislation that infringes on the principle of legal professional privilege/professional secrecy can be challenged in the courts. In a recent Canadian case, the Federation of Law Societies of Canada commenced a constitutional challenge to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, as they applied to the legal profession, on the basis that they violated sections 7⁷⁰ and 8⁷¹ of the Canadian constitution. The Supreme Court of Canada held that ‘[i]t should be recognized as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients’ causes’.⁷² The importance of the principle was further highlighted by the Court, which stressed that ‘[t]he duty is fundamental to the solicitor-client relationship and how the state and the citizen interact in legal matters. The lawyer’s duty of commitment to the client’s cause is essential to maintaining confidence in the integrity of the administration of justice.’⁷³ While the Court affirmed the importance of attorney-client privilege, it also went on to note that this privilege is not absolute. A lawyer cannot just ignore his or her client’s actions, if those actions are illegal or serve to encourage or incite illegal and dangerous conduct.

Threat indicators

- Intrusive or onerous legislation that forces lawyers to breach the principle of lawyer-client confidentiality.
- High incidence of reports of such breaches, particularly in situations where they occur without the knowledge and consent of the client, or in the context of criminal trials.
- The existence and enforcement of criminal sanctions against lawyers who fail to disclose confidential client information.
- The existence of tipping-off prohibitions.

4.2.3. CLEARLY DEFINED SCOPE OF PERMISSIBLE INTERVENTIONS FROM THE EXECUTIVE BRANCH

4.2.3.1. Effective, independent regulation of the profession

Effective independent regulation in this context refers to self-regulation or self-governance. 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. 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. Effective self-regulation can be achieved in many different ways, and through the use of different regulatory arrangements, varying from pure self-regulation to some form of co-regulatory arrangement. For the purposes of this report, self-

70 Section 7 of the Canadian Charter of Rights and Freedoms states that: ‘[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.’

71 Section 8 of the Canadian Charter of Rights and Freedoms states that: ‘[e]veryone has the right to be secure against unreasonable search or seizure.’

72 *Canada (AG) v Federation of Law Societies*, 2015 SCC 7, [2015] 1 S.C.R. 401.

73 *Ibid.*

regulation or self-governance refers to the profession's ability to set and enforce its own regulations, free from influence, as far as possible. This entails the profession's right to set its own rules and regulations and set up bodies to oversee compliance with such regulations, through the power to admit, discipline and disbar.

The right to self-governance in the legal profession 'is at the heart of the independence of the bar'.⁷⁴ Self-regulating bodies comprising 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. Self-regulation, however, 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.

The mere fact that there is external involvement in the regulatory scheme does not necessarily threaten the independence of the profession,⁷⁵ as long as 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 consider not only the degree of self-regulation as correlative to the independence of the legal profession, but also examine the impact it has on the ability of lawyers to carry out their duties in an independent and impartial manner. That said, where there is some executive control over the regulatory process, the risk of infringements on lawyers' professional independence is greater.

What are the effects on independence where the profession is not self-regulated or less self-regulated?

A review of the relevant literature and survey data indicates that there is a correlation between self-regulation and independence. The complete lack of self-regulation can have a negative impact on the independence of lawyers, especially in jurisdictions where 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

74 G Mackenzie, 'Lawyer Discipline and the Independence of the Bar: Can Lawyers Still Govern Themselves?' (1990), 24 Gazette 319 at 320. See also Article 24, UN Basic Principles on the Role of Lawyers; 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).

75 For example, all lawyers in England and Wales are regulated by approved regulators. Approved regulators are independent bodies that supervise lawyers. Solicitors in England and Wales are regulated and disciplined by the Solicitors' Regulation Authority (SRA), which is one of many approved regulators. The SRA is an independent body funded by members' fees. The SRA is regulated and overseen by an additional regulator, the Legal Services Board (LSB). The LSB is sponsored by the Ministry of Justice, and is funded by a levy on the approved regulators of the profession, and its members are appointed by the Lord Chancellor, who is a member of the Cabinet. All LSB appointments have to be made in consultation with the Lord Chief Justice. In addition, survey responses indicate that members of the Bar in Finland are also subjected to the supervision of the Chancellor of Justice of Finland, a Finnish government official supervising authorities such as cabinet ministers and public officials. The Chancellor has an independent right to initiate investigations in cases of perceived failure of a member to act in compliance with the Code of Conduct or the law. The Chancellor of Justice also has the right to appeal decisions by the Disciplinary Board. Our research has not revealed whether such arrangements have had a negative impact on the ability of lawyers to carry out their duties, and to date, we have not been informed of any such instances.

serving their members.⁷⁶ In jurisdictions where reports of unlawful prosecutions, imprisonment of lawyers and instances of arbitrary disbarments have been reported, the profession is predominantly regulated by the government, as opposed to being independently regulated. For example, the profession is predominantly or exclusively regulated by the government in states such as the People's Republic of China, Kyrgyzstan, Oman, Qatar, Saudi Arabia, Taiwan, Tajikistan, the UAE and Vietnam.⁷⁷ Incidents of human rights violations, such as persecution by the government, unlawful prosecution, imprisonment or arbitrary disbarment of lawyers, have been reported in states such as China,⁷⁸ Oman,⁷⁹ Saudi Arabia,⁸⁰ Tajikistan⁸¹ and Vietnam.⁸² Recent 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 will effectively deprive the profession of its ability to regulate itself.⁸³ 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.⁸⁴ There is a link between the level of third-party control over the regulatory process and the risk of arbitrary disbarments. Occurrences of arbitrary disbarment have been reported in, inter alia, China,⁸⁵ and Russia⁸⁶ but less often in states where the authority to grant or revoke professional licenses vests outside the independent board or bar association in the jurisdiction.

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 'Syria – Human Rights Lawyers and Defenders in Syria: A Watershed for the Rule of Law', IBAHRI 2011, pp 6 and 32, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=f31793c1-2fb7-449e-9f4e-6af14f332262.

77 See IBA Legal Regulators' Directory, available at www.ibanet.org/IBA_Regulation_Directory_Home.aspx.

78 China's latest crackdown of lawyers in 2015 has been termed 'unprecedented'. See 'China's latest crackdown of lawyers is unprecedented, human rights monitors say, ABA Journal, 1 February 2016, at <http://tinyurl.com/hftwfq5>. Lawyers in the past have also been threatened with disbarment where they have undertaken cases that the government has found objectionable. See 'China: Rights Lawyers Face Disbarment Threats', Human Rights Watch, 30 May 2008 at www.hrw.org/news/2008/05/30/china-rights-lawyers-face-disbarment-threats.

79 A string of arrests of activists, writers, lawyers and bloggers has been reported in the past in Oman, in an effort to curb the activities of human rights activists. See www.amnesty.org.uk/press-releases/oman-activist-arrests-threaten-freedom-expression.

80 Human rights lawyers have been unlawfully imprisoned and punished for exercising their freedom of expression. See Amnesty International, Saudi Arabia: Waleed Abu al-Khair Starts Hunger Strike (UA 98/14), available at www.amnestyusa.org/get-involved/take-action-now/saudi-arabia-waleed-abu-al-khair-starts-hunger-strike-ua-9814.

81 See 'UN statement: judicial accountability, attacks on lawyers', ICJ, 16 June 2016, available at www.icj.org/un-statement-judicial-accountability-attacks-on-lawyers.

82 For example, Huynh Van Dong, a Vietnamese human rights lawyer who has taken up cases of several religious and pro-democracy activists, has often denounced violations of the right to a fair trial and has claimed the innocence of his clients. Dong had been continually subjected to intimidation and harassment from the authorities and the police because of his professional activities. He had also been subjected to unfair disbarment proceedings, after which he was officially disbarred. See 'IBAHRI calls for independent inquiry into disbarment of Vietnamese lawyer Huynh Van Dong', 24 October 2011, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=51540ed6-4e30-4e9a-8b04-c0a53ca95a18.

83 The government of Malaysia has proposed amendments to the Legal Profession Act 1976, which are due to be tabled in parliament in October 2016. We understand that the following are the proposed amendments to the LPA 1976: (a) Government to appoint two members of the Bar to sit on the Bar Council to 'represent the government'; (b) the increase of the quorum requirement for all general meetings of the Malaysian Bar and State Bars to 25 per cent of the membership; (c) a complete overhaul of the process of electing the members of the Bar Council; (d) the division of 'elected members' of the Bar Council; (e) the direct election of office bearer; (f) the disqualification of State Bar Chairs and immediate past vice-presidents from election as an office bearer; and (g) the Minister in charge of legal affairs will be empowered to determine the electoral rules and regulations of the Malaysian Bar. For more information, please see the Open Letter sent to the Malaysian government by the president of the German Federal Bar, available at <http://tinyurl.com/hodasgf>.

84 As revealed by survey responses.

85 For example, see '2 Chinese Lawyers Are Facing Disbarment for Defending Falun Gong', *New York Times*, 21 April 2010, at www.nytimes.com/2010/04/22/world/asia/22beijing.html?_r=0.

86 There have been complaints that some of the regional chambers have used their powers to disbar lawyers in an arbitrary manner. See 'Towards a Stronger Legal Profession In the Russian Federation', ICJ Mission Report 2015, p 18, available at <http://tinyurl.com/h49ayrn>.

Addressing the relevant threats

State practice on regulation of the profession varies depending on the jurisdiction in question, and what works in one state may not work in another. Governments must strike a balance between complete self-regulation and complete governmental control, but the way governments will tip the scale depends on a number of factors. In some states the government has adopted a system of pure self-regulation,⁸⁷ whereas others have chosen mixed approaches. Where a mixed approach is utilised, direct involvement of the profession is retained while there is some form of state involvement through varying models of co-regulation.⁸⁸ This could help alleviate concerns voiced by those who are sceptical of total self-regulation, and can contribute to the establishment of a more balanced regulatory system. Co-regulation can also increase the influence the profession has on the promulgation of the rules and regulations that govern lawyers, through the introduction of regulatory systems that allow the profession to cooperate with the government in issuing the relevant rules.⁸⁹ Other jurisdictions regulate lawyers at the state level, without preventing lawyers from taking a part in regulating themselves.⁹⁰ Even when the appointment of regulators and members of the disciplinary committees is done by the government, sometimes those appointed are not compensated for their services, to ensure that their duties will be carried out in an independent manner, and will not be affected by external considerations such as financial remuneration.⁹¹

Threat indicators

- The existence of a regulatory framework that is predominantly or exclusively made up of government-appointed members.
- The existence of a regulatory framework that is funded by the executive.
- High incidence of reports of arbitrary disbarments and targeted disciplinary measures.
- Legislative attempts by the government to strip away the power of the profession to regulate itself.

4.2.4. COMPREHENSIVE LEGAL EDUCATION AND PROFESSIONAL TRAINING

Comprehensive legal education and professional training refers to appropriate, all-rounded, targeted education and training for those seeking to enter the legal profession.

87 Survey responses indicate that this is the preferred approach in Japan, for example.

88 For example, responses to the Task Force's survey indicate that the legal profession in Australia, through the various law societies and bar associations in each state, sets the conduct and ethical standards by which lawyers must abide. In most states it is the legal professional organisation that will issue practising certificates and ensure continued adherence to the various standards required to maintain a valid practising certificate. The state and territory governments generally appoint independent complaints and discipline handling bodies to assess claims of improper conduct by lawyers.

89 For example, survey responses revealed that the profession in Hungary is co-regulated. The relevant legislation provides broad regulatory power to the Hungarian Bar Association to issue its own Regulations, which according to the relevant Kuria case law, are considered legislative acts. The regulations that are adopted by the Full Meeting of the Hungarian Bar Association must be reviewed by the Minister of Justice for the purposes of promulgation. The Minister can either promulgate the rules or challenge the regulation before the courts. The latter option has never been used by the Minister in Hungary, but it is a limitation on the power of the profession to legislate.

90 For example, attorneys and the practice of the legal profession in the US state of New York are regulated at the state level and generally not by the federal government. The New York State Board of Law Examiners has the power to licence attorneys to practise law in New York and operates under the auspices of the New York State Court of Appeals. Professional discipline is delivered by the Grievance Committees, which are made up of mostly lawyers and lay people who are appointed by the Appellate Division.

91 For example, members of the Grievance Committees in the US state of New York are not remunerated for their services. It is not within the scope of this report to evaluate whether such practice has a positive or negative effect on the independence of the 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 all-rounded education and training ensures 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.

How does the lack of comprehensive legal education and training affect the independence of the legal profession?

There is a correlation between the lack of comprehensive legal education and training, and a weakened state of independence in a jurisdiction. In states where the legal educational system is weak or ineffective, graduates are generally ill-prepared to practise law after completing their studies.⁹² 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 where 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.⁹³ In jurisdictions where legal education and continued professional development is wanting,⁹⁴ issues such as waning respect for an independent and impartial judiciary;⁹⁵ occurrences of political interference with prosecutorial functions;⁹⁶ and an overall lack of respect for the rights of lawyers⁹⁷ have been reported. 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.

Addressing the relevant threats

The UN Basic Principles on the Role of Lawyers call for the imposition of a duty on governments, educational institutions and bar associations to ensure that lawyers receive appropriate education and training.⁹⁸ Former UN Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, has recommended that ongoing legal education should be mandatory at all levels and stages

92 Country reports prepared by the ICJ indicate that in Myanmar, for example, the weakened educational system has contributed to the lack of competence that characterises a large number of members of the legal profession. In addition, this has contributed to a weakened state of independence in the jurisdiction. Additional findings by the ICJ demonstrate that the Bar Council in Myanmar is perceived as lacking independence. For more details, see International Commission of Jurists, 'Myanmar: Independence of the legal profession', available at www.icj.org/cijlcountryprofiles/myanmar-introduction/lawyers/independence-of-the-legal-profession; and 'Myanmar: Legal Education', available at www.icj.org/cijlcountryprofiles/myanmar-introduction/legal-education.

93 For example, the current legislation in Ukraine provides that anyone, even a person without legal education, can provide advice and legal representation, except in criminal cases. Representation by non-lawyers could mean unsatisfactory legal representation, additional work for the courts and erroneous judgments. Bad legal precedents affect not only the parties involved in the specific matter, but also influence matters of principle dealt with by the courts. See letter to the President of Ukraine by the CCBE, available at www.ccbe.eu/fileadmin/user_upload/document/PECO_Portal/CCBE_-_Petro_Poroshenko_President.pdf. In addition, lawyers that do not receive appropriate legal education and training are less equipped to deal with ethical challenges that arise in the context of representation and provision of legal advice.

94 This could be due to a variety of factors, such as lack of resources, war, transition or political instability.

95 Research conducted by the International Commission of Jurists indicates that such issues have been reported in countries including South Sudan (www.icj.org/cijlcountryprofiles/south-sudan) and Libya (www.icj.org/libya-an-independent-and-accountable-judiciary-is-key-to-a-successful-transition).

96 *Ibid.*

97 For example, ICJ reports indicate that in Swaziland, lawyers' freedom of expression is not always respected, and concerns have been raised regarding the implementation of disciplinary proceedings. The emphasis of training has been on commercial law, at the expense of human rights education. See www.icj.org/cijlcountryprofiles/swaziland/swaziland-introduction. The Law Society has expressed the view that graduates lack technical competence when they join the legal profession.

98 See principle 9 of the UN Basic Principles on the Role of Lawyers, and standards 2-4 of the IBA Standards for the Independence of the Legal Profession.

of the profession.⁹⁹ The UN Basic Principles on the Role of Lawyers also call for governments to take appropriate measures to provide opportunities, as well as guarantee appropriate training for law students from minority groups.¹⁰⁰ Legal education must be open and accessible to all individuals with the proper qualifications, and no one shall be denied such opportunity by reason of race, colour, sex, religion, political or other opinion, nationality, linguistic or social origin, property, income, birth or status.¹⁰¹

A number of jurisdictions already require academic and vocational stages of training before admission to practise as a lawyer. In jurisdictions where the criteria for admission are set high, those who wish to qualify and practise as lawyers must undergo extensive training and pass a set of exams to ensure that those who enter the profession are capable of providing competent advice and representation. A large number of governments also place emphasis on the training of graduate lawyers on ethics and compliance.¹⁰²

Threat indicators

- Lack of financial resources for the purposes of education and training.
- No educational admission standards, or very low admission standards.
- High incidence of reports of bribing for the purposes of obtaining educational or professional qualifications, and to secure admission to academic or vocational courses.

4.2.5. FREEDOM OF CHOICE IN REPRESENTATION, INCLUDING FREEDOM FROM FEAR OF PROSECUTION IN CONTROVERSIAL OR UNPOPULAR CASES

A lawyer's independence is partly contingent on the *freedom of choice* in representation, including freedom from fear or prosecution in controversial or unpopular cases.¹⁰³ The efficient and predictable application of justice, which is a basic tenet of the rule of law, depends to a large extent on the ability of lawyers to represent unpopular clients, or clients who are critical of, or even hostile to, the government – even in controversial and scandalous cases. To deny the freedom of choice in the context of legal representation poses a threat not only to the independence of the legal profession, but also to the human rights of those who are represented,¹⁰⁴ and offends core principles of the rule of law, such as the principle of equality before the law, and the protection of human rights. In line with the above, it is crucial that lawyers be able to perform their duties in an environment that is free from coercion, governmental and societal pressure, and fear of prosecution and persecution, whether by the government or by non-governmental actors. Lawyers should be free to represent their clients without undue hindrance, and should be subject to no discrimination whatsoever.

99 See Gabriela Knaul, *Advance report on the global thematic study on human rights education and training of legal professionals*, UN Doc A/HRC/20/20 (2012), para 112.

100 See principle 11 of the UN Basic Principles on the Role of Lawyers.

101 Article 7 of the Draft Universal Declaration on the Independence of Justice, available at <http://tinyurl.com/jl33g9k>.

102 Many jurisdictions require aspiring lawyers to sit and pass ethics exams, to ensure that they have a good understanding of the profession's ethical duties and obligations. They include, inter alia, Brazil, Cyprus, France, Georgia, Monaco, the UK and all US states.

103 UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para 16.

104 Lack of an independent legal profession poses a threat to basic human rights, such as the right to a fair trial, protected by Article 14 of the International Covenant on Civil and Political Rights.

The freedom of choice in representation also includes the freedom to express opinions and to openly discuss matters that are of public importance and/or relevant to the representation of clients, even when such opinions or discussions are critical of the government, the judiciary or any private party or organisation that may be involved or affected by such matters. The freedom of expression is protected by international law¹⁰⁵ and applies to everyone, including lawyers.

How do limitations to lawyers' freedom of choice in representation affect the profession?

Limitations on lawyers' freedom of choice in representation can take various forms and can have varying degrees of impact on independence. The Task Force has identified a list of the most commonly reported limitations to lawyers' freedom of choice in the context of legal representation, as well as the most commonly reported and prevalent issues associated with such limitations.

Limitations to a lawyer's freedom of choice in representation may occur in the form of open and notorious persecution by the government,¹⁰⁶ often in an attempt to prevent lawyers from undertaking certain cases that the government finds objectionable. Lawyers have been arrested¹⁰⁷ and arbitrarily detained¹⁰⁸ on politically motivated charges, as well as fallen victim to harassment by the authorities.¹⁰⁹ Limitations on the freedom of choice in representation can also arise when governments pass legislation that directly or indirectly limits that right, such as by criminalising the act of publicly criticising the judiciary,¹¹⁰ which significantly limits lawyers in terms of what cases they can undertake, as some cases may require legal representatives to resort to public criticism of the judiciary or the government.

Limitations on lawyers' freedom of choice in representation could also come from private actors, such as the public or the press. Relevant reports suggest that a negative perception of lawyers, perpetuated by the association of lawyers with their clients, could have an impact on a lawyer's decision on whether to represent certain clients. There have been reports of lawyers being exposed to physical

105 See 'Article 19 ICCPR; General Comment No 10: Freedom of expression (Art 19). 29/06/1983 CCPR General Comment No 10 (General Comments)', available at www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf.

106 Various reports indicate that the Chinese Government has intimidated, arrested, detained and orchestrated enforced disappearance of 228 Chinese lawyers, lawyers' family members, support staff, human rights and legal activists in a sweeping crackdown that began in July 2015. For further details, see 'City Bar Voices Grave Concern over Treatment of Rights Lawyers in China', New York City Bar, 10 August 2015, available at www.nycbar.org/media-listing/media/detail/city-bar-voices-grave-concern-over-treatment-of-rights-lawyers-in-china. See also 'China cracks down on lawyers and activists', 19 July 2015, *Al Jazeera*, available at www.aljazeera.com/news/2015/07/china-crackdown-lawyers-activists-150719112829794.html; 'China: latest information on crackdown against lawyers and activists', 31 July 2015, Amnesty International, available at www.amnesty.org/en/press-releases/2015/07/china-list-of-lawyers-and-activists-targeted.

107 On 16 March 2016, nine human rights lawyers known for their work in representing minority groups and people accused of terrorism and crimes against the state were arrested in police raids on their homes in Turkey. Police forces also attacked the lawyers who were representing their detained colleagues during a press conference on the steps of the courtroom on 17 March 2016. The police action was witnessed by members of an international delegation of trial observers, including lawyers from the UK. In addition, the recent military coup attempt in Turkey prompted the government to resort to extreme measures against political opponents, including a number of judges and lawyers. See 'International Law breached, as Turkish lawyers arrested', 22 March 2016, The Bar Council of England and Wales, available at <http://tinyurl.com/zdb8g8h>; and 'Lawyers Under Attack: Message from the IBA President', 28 July 2016, available at <http://tinyurl.com/hu3zxt>.

108 A Malaysian lawyer was detained in October 2015, after being arrested over his involvement in efforts to expose a scandal rocking the government of Prime Minister Najib Razak. The lawyer was arrested under a tough domestic security law that allows detention for up to a month without trial. See 'Detained Malaysian lawyer starts hunger strike amid PM finance scandal', 9 October 2015, *The Guardian*, available at www.theguardian.com/world/2015/oct/09/detained-malaysian-lawyer-starts-hunger-strike-amid-pm-finance-scandal.

109 In May 2016, Tajik authorities arrested and detained a number of lawyers on politically motivated charges. See 'Tajikistan: Free Human Rights Lawyers', 4 May 2016, Human Rights Watch, available at www.hrw.org/news/2016/05/04/tajikistan-free-human-rights-lawyers.

110 Public sources indicate that in October 2014, three lawyers were jailed in Saudi Arabia for publicly criticising the judiciary on Twitter. The lawyers had criticised the judiciary for wrongfully convicting defendants and releasing corrupt people. The lawyers were convicted of 'disobeying the ruler' and 'slandering the judicial system'. See 'Saudi Arabia: Lawyers jailed for judiciary criticism', 28 October 2014, *BBC News*, available at www.bbc.co.uk/news/world-middle-east-29797087.

violence,¹¹¹ death threats¹¹² and even the risk of murder.¹¹³ As a result of the above, lawyers around the world are often forced to decline representation due to external factors that risk undermining their independence.¹¹⁴

Addressing the relevant threats

Strong legal and constitutional safeguards on freedom of expression can thwart governmental attempts to enact legislation that restricts the profession's right to freedom of expression, or apply existing legislation in an overly restrictive manner.¹¹⁵ Also, the work of private and non-governmental actors becomes crucial in this context, as a number of NGOs,¹¹⁶ including bar associations, focus their efforts on ensuring that lawyers are protected in the course of exercising their duties. To avoid or minimise the negative effects of public pressure, governments and bar associations should aim to improve the profession's relations with the media, as this can help overcome negative perceptions in the eyes of the public by improving the overall image of the profession.

Threat indicators

- Incidents of violence, harassment and intimidation of lawyers.
- Legislative attempts to limit the freedom of expression and freedom of association.
- Arbitrary arrests and detention of lawyers.
- Open and notorious attacks against lawyers by private actors and the public.

4.2.6. ABILITY TO UPHOLD THE RULE OF LAW IN SITUATIONS OF HEIGHTENED NATIONAL SECURITY CONCERNS

The ability to uphold the rule of law in situations of heightened national security concerns refers to the ability of lawyers to carry out their legitimate duties in line with due process, respect for human rights and the rule of law, without undue governmental infringements such as sweeping anti-

111 See n106 above.

112 Amnesty International has reported that a lawyer representing alleged Gaddafi soldiers and loyalists in Libya described intimidation from armed men present inside prosecution offices and courts during investigations and hearings. 'They told me inside the courtroom, "if they walk free, you will pay the price". I also got several anonymous calls telling me "leave the case, or face consequences".' See ILAC Rule of Law Assessment Report: Libya 2013, p 62, available at www.ilacnet.org/publications.

113 For example, in March 2016, a lawyer representing two alleged Russian terrorists in Ukraine was found dead, prompting fears he was killed to stop the facts of the case from being made public. In addition, a suicide bomber attacked a group of lawyers gathered in Quetta, Pakistan, in August 2016, leading to the death of 74 people, most of them lawyers. See 'Lawyer representing alleged Russian terrorists in Ukraine found dead', 27 March 2016, *The Telegraph*, available at www.telegraph.co.uk/news/2016/03/27/lawyer-representing-alleged-russian-terrorists-in-ukraine-found/; 'An entire generation of a city's lawyers was killed in Pakistan', *The Washington Post*, 9 August 2016, available at www.washingtonpost.com/news/worldviews/wp/2016/08/09/an-entire-generation-of-a-citys-lawyers-was-killed-in-pakistan/.

114 For example, survey responses indicate that lawyers in India can be limited in the clients that they may represent by several resolutions passed by the various Bar Councils in India, including those forbidding lawyers from representing the accused in heinous crimes, such as rape; and, in the aftermath of clashes with the police, forbidding the lawyers to represent accused police officers. Several lawyers in India have been told to distance themselves from controversial cases due to fear of being associated with the clients they represent. Moreover, the Mumbai Metropolitan Magistrate Court's Bar Association passed several resolutions in the aftermath of the 26/11 terrorist attack and the 1993 Mumbai bomb blasts, which prohibited members of the Mumbai Metropolitan Magistrate Court's Bar Association from representing the accused.

115 For example, in *Morice v France*, the Grand Chamber of the European Court of Human Rights ruled that a lawyer's conviction for defamation of two investigative judges was in violation of Article 10 (freedom of expression) of the European Convention of Human Rights. The Grand Chamber emphasized that lawyers should be able to draw the public's attention to potential shortcomings in the justice system. See *Morice v France*, Application no 29369/10, Judgment, 23 April 2015, available at <https://lovdata.no/static/EMDN/emd-2010-029369-2.pdf>.

116 For example, Lawyers for Lawyers is an NGO that provides support to oppressed lawyers and lawyer's organisations. The organisation provides such support by drawing the attention of international legal and political institutions and organisations and the relevant authorities of the country in which the particular lawyer is based, to the position of threatened lawyers throughout the world. It also organises fact-finding or observation missions and letter-writing actions. See Lawyers for Lawyers at www.advocatenvooradvocaten.nl/about-us.

terrorism or surveillance legislation.

How can the ability to uphold the rule of law be compromised in situations of heightened national security concerns?

There has been a global surge in the implementation of anti-terrorism legislation and surveillance measures in response to the rise of extremism and terrorism across many jurisdictions. It is questionable, however, whether the relevant legislation strikes the appropriate balance between protecting national security interests and suspects' basic human rights.¹¹⁷ Anti-terrorism and surveillance legislation that undermines the principle of legal professional privilege/secretcy can severely compromise the ability of lawyers to perform their role effectively, as surveillance of private lawyer-client communications could prevent lawyers from being candid with their clients, and undermine their ability to render independent and impartial legal advice. Examples of onerous anti-terrorism and surveillance measures that could hinder the ability of lawyers to carry out their duties include, inter alia, the introduction of 'terrorist organisation lists', which often include prominent civil rights defender organisations;¹¹⁸ legislation permitting the authorities to put private communications between lawyers and their clients under surveillance;¹¹⁹ or authorising the use of surveillance methods by prosecutorial authorities.¹²⁰ In addition, where such legislation is passed in the midst of general unrest and political instability, it can, in certain circumstances, be used to justify

117 This trend was recently observed in, inter alia, Tunisia, where new counterterrorism law grants security forces broad and vague monitoring and surveillance powers, extends incommunicado detention from six to up to 15 days for terrorism suspects, and permits courts to close hearings to the public and allow witnesses to remain anonymous to the defendants. In addition, recent reports suggest that US defence attorneys were denied clearance when visiting their clients at Guantanamo Bay. See 'Tunisia: Counterterror Law Endangers Rights', Human Rights Watch, 31 July 2016, available at www.hrw.org/news/2015/07/31/tunisia-counterterror-law-endangers-rights; 'Guantánamo security clearance denied to lawyers of cooperating witness', *The Guardian*, 8 September 2015, available at <http://tinyurl.com/jv47nof>.

118 For example, on 15 November 2014, the Government of the United Arab Emirates issued a list of groups that it has designated as 'terrorist organisations' under an anti-terrorism law issued by President Sheikh Khalifa Bin Zayed Al Nahyan in August. Once listed as a terrorist organisation, those accused of any engagement, collaboration or communication with or support to these groups will risk being prosecuted pursuant to the overly broad terrorism definition of the law. The law punishes communication with a terrorist organisation with life imprisonment or the death penalty. The list contains 85 organisations, some of which have expressed alarm at their arbitrary inclusion on the list. The organisations include: the International Union of Muslim Scholars; Islamic Relief, a UK-based international aid agency; the Council on American-Islamic Relations, the largest Muslim civil rights and advocacy organisation in the US; and the Muslim Association of Britain. Reportedly, the Governments of Norway and the UK have asked the United Arab Emirates for clarification. See ICJ, 'News: E-bulletin on counter-terrorism & human rights – no. 88', December 2014, available at www.icj.org/november-icj-e-bulletin-on-counter-terrorism-and-human-rights-no-88/#a4.

119 For example, government documents declassified in November 2014, reveal that the UK Government Communications Headquarters (GCHQ), MI5 and MI6 had given a green light to their employees to put communications of lawyers with their clients under surveillance, as well as 'journalists and others deemed to work in "sensitive professions" handling confidential information'. The documents were released pursuant to litigation brought by Libyan families that alleged to have been subject to CIA renditions with the complicity of the UK. According to *The Intercept*, 'in at least one case legally privileged material that was covertly intercepted by a British agency may have been used to the government's advantage in legal cases'. Recently published documents provided by former NSA agent and whistleblower Edward Snowden revealed that UK companies, including Vodafone, 'have helped GCHQ dramatically scale-up the volume of internet data it collects from undersea cables'. On 14 November, the Special Immigration Appeals Commission considered the possibility of abuse of process in one of its cases, but did not find a violation in the specific case because any potential violation of the lawyer-client privilege would not have affected the material that was relied on in the judicial procedure. In addition, reports indicate that large-scale surveillance in the US has created concerns about lawyers' ability to meet their professional responsibilities to maintain confidentiality of information related to their clients. See ICJ, 'News: E-bulletin on counter-terrorism & human rights – no. 88', December 2014, available at www.icj.org/november-icj-e-bulletin-on-counter-terrorism-and-human-rights-no-88/#d3; 'With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy', Human Rights Watch, available at www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and.

120 For example, on 25 May 2016, the French Senate approved the law reinforcing the fight against organised crime, terrorism and their financing and improving the effectiveness and the guarantees of the criminal procedure, following earlier approval by the National Assembly of the compromise text to come out of a joint committee. The law extends police and judicial powers, and includes measures that are reminiscent of those taken under the state of emergency. Under the law, police and prosecutors now have access to electronic surveillance technology that previously was only available to the intelligence agencies, and prosecutors were given some new powers similar to those of investigative judges, including the ability to tap phones and use hidden cameras. See ICJ, 'News: E-bulletin on counter-terrorism & human rights – no. 102', June 2016, available at www.icj.org/icj-e-bulletin-on-counter-terrorism-and-human-rights-no-102/#c5.

attacks against lawyers and human rights activists.¹²¹ This is particularly prevalent in jurisdictions where lawyers are a vulnerable or targeted group in society.

Addressing the relevant threats

To safeguard the ability of the profession to maintain the rule of law and act in the public interest in situations of heightened national security concerns, governments must ensure that anti-terrorism and surveillance legislation is in line with basic principles of the rule of law; that it doesn't unnecessarily infringe on basic human rights; and that it complies with principles of international law. Many governments have signed and ratified international and regional instruments aimed at consolidating efforts against the global outbreak of terrorism. Such instruments contain provisions limiting the negative effects of domestic anti-terrorism legislation, usually through provisions that impose a duty on signatory states to comply with international human rights principles. For example, the Council of Europe Convention on the Prevention of Terrorism contains a provision that requires parties to implement and apply the offence of 'indirect incitement of terrorism' in a way that is compatible with the right to Freedom of Expression.¹²² Similarly, the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance contains a provision ensuring that 'any person deprived of his freedom through the application of this Convention shall enjoy the legal guarantees of due process'.¹²³ Other regional instruments aimed at combatting terrorism have also called for respect for due process rights in the context of applying the provisions at the national level.¹²⁴

Threat indicators

- The enactment of vague and imprecise anti-terrorism legislation, which permits for wide and expansive definitions of the term 'terrorist', 'act of terrorism' and/or other terms that define liability.¹²⁵
- Reports of alleged harassment and intimidation of lawyers in the context of investigations carried out under anti-terrorism legislation.
- Legislation that allows for expansive surveillance, including surveillance of private communications between lawyer and client, as well as the confiscation of private and confidential work product in the context of legal advice, representation or court proceedings.

121 For example, on 9 May 2016, three UN human rights experts (the Special Rapporteurs on the situation of human rights defenders; on freedom of opinion and expression; and on the rights to freedom of peaceful assembly and of association) urged the Egyptian Government to stop its oppressive response towards human rights advocates, reporting a crackdown on protesters, journalists, lawyers and human rights defenders in recent years by conducting mass arrests, using aggressive force and invading people's privacy. The experts also expressed concern over security provisions and counterterrorism legislation that impedes fundamental rights, which undermine 'not only public debate and fundamental rights, but security and long-term stability'. See ICJ, 'News: E-bulletin on counter-terrorism & human rights', available at www.icj.org/icj-e-bulletin-on-counter-terrorism-and-human-rights-no-102/#a1.

122 Article 12 of the Council of Europe Convention on the Prevention of Terrorism (CECPT) requires parties to implement and apply the offence in a way that is compatible with the right to freedom of expression as recognised in international law.

123 See Article 4 of the Convention.

124 See Article 7(3) of the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 1999; and article VIII of the ASEAN Convention on Counter Terrorism.

125 Vague anti-terrorism legislation could be applied widely, and in some circumstances, those who are linked in any way with suspected terrorists, even those who defend them or simply express any views in support of such persons, could be charged under terrorist legislation. Overly vague or broad definitions of terrorism may be used by states as a means to cover peaceful acts, to discriminate against particular individuals or groups or to limit any sort of political opposition. See Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/28/28, 19 December 2014.

4.2.7. ETHICAL FACTORS

4.2.7.1. Ability to respond to political/media/community pressures in times of war/terror/emergency

War in itself can cause entire states to descend into chaos, lawlessness and anarchy, leaving a country vulnerable and susceptible to injustice and violations of the rule of law. A strong and independent legal profession can ensure that the harms and devastating effects of war on the rule of law are mitigated to the greatest extent possible in the circumstances. An independent legal profession can play a pivotal role during times of war and conflict, as well as in post-conflict societies, where the difficult exercise of implementing transitional justice is often complicated by factors such as the lack of a political structure, the lack of an impartial judiciary, and the general feelings of fear, contempt, anger and confusion that characterise post-conflict societies.

Issues that commonly arise in societies torn by conflict and in the context of post-conflict transition include, inter alia, the intimidation of lawyers;¹²⁶ the failure of lawyers to appear in court and their withdrawal in the midst of ongoing criminal trials;¹²⁷ and the lack of appropriate facilities and access to legal documents.¹²⁸

The threat of terrorism and the occurrence of national emergencies naturally imbue society with feelings of panic, fear and a sense of urgency, which then form the basis for the implementation of emergency legislation and the introduction of various measures aimed at ensuring national security, as seen above. Societal, political and media pressures are more prevalent during times of emergency, when national security is under threat. The role of lawyers in this context is crucial, as an independent profession can serve as the guardian of the rule of law in situations where popular opinion – swayed by media or political propaganda – is unable or unwilling to ensure political accountability and respect for the rule of law.

The effects of media, community and political pressures on the independence of the legal profession in times of war/terror/emergency

Political, societal and, in some circumstances, media pressure in times of war, terror and emergency can have a profound impact on the independence of the profession. Lawyers can find themselves the target of attacks by politicians, simply because carrying out their duties might not sit well with the contemporary opinions of society or the current views of a political establishment. In addition, the profession's failure to cooperate with the media and establish a strong and resilient working relationship could lead to inaccurate reporting, which could further undermine the profession's reputation. This is not to say that public criticism of lawyers and the profession in general is harmful, or that it should be limited in order to preserve the independence of the profession. The profession can be subject to criticism and remain independent. Values such as the freedom of expression and

126 There have been reports of lawyer intimidation in the context of post-conflict transition in Cambodia. For a full analysis, see Lawyers, Conflict & Transition, Transitional Justice Challenges Facing Lawyers in Cambodia, June 2015, p 12, available at <http://tinyurl.com/hazeydz>.

127 The withdrawals of lawyers, as well as a failure to appear in court, were commonly reported occurrences during the Libya regime trials, where Saif Al Islam Qaddafi, Abdullah Al Senussi and others were tried for war crimes and crimes against humanity. A number of lawyers often failed to appear in court, others withdrew, while others never showed up for any court sessions. The reasons behind such withdrawals and disappearances remain unknown. For a full analysis, see Mark Ellis, 'Trial of the Libyan regime – An investigation into international fair trial standards', IBA, November 2015, available at www.ibanet.org/Article/Detail.aspx?ArticleUId=759f1431-4e10-450d-998e-21349fd8bf26

128 *Ibid.*

freedom of the press are key components of the rule of law, and public criticism of the profession – either by the media, politicians or society in general – is a natural and desirable occurrence in a democratic society.

However, excessive attacks on lawyers by the government or powerful political figures can undermine the credibility of the profession and damage the bond of trust between society and lawyers, and ultimately undermine the profession's ability to serve its role in society. By virtue of their position, politicians have the power to influence society and their attacks can have a negative impact on the legal profession and its ability to carry out its duties. There have been recent reports of powerful political figures openly attacking lawyers for undertaking politically sensitive cases¹²⁹ or causes the government generally finds objectionable.¹³⁰ It is crucial that lawyers are able to carry out their duties without fear of being publicly scorned, and without fear that their actions will lead to legislative reforms that could restrict access to justice for those who need it the most, such as war crime victims and victims of unlawful killings, no matter how unsettling and uncomfortable the process might be for the government.

The media plays an important role in educating and informing society. It has the power to shape public opinion during times of war, terror and emergency, and can become the conduit through which the public views and evaluates the legal profession's actions. Media outlets could contribute to negative public perception of lawyers – especially in relation to lawyers who undertake the difficult task of defending unpopular individuals – if they fail to inform the public of the ethical and legal framework that governs the responsibilities of lawyers vis-à-vis their clients, their opponents and the public.

Addressing the relevant threats

Bar associations can help 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.¹³¹ In addition, bar associations that receive adequate resourcing can do more to educate the profession, the media and the public on the importance of the role of lawyers in society, and the pressing need for an independent legal profession.

Threat indicators

- Negative political, societal and even media propaganda in times of war, terror and emergency.
- Frequent public attacks against the profession by prominent political figures.

129 According to public reports, former British Prime Minister, David Cameron, has openly criticized several law firms who have undertaken the representation of victims of alleged abuse and unlawful killing in the hands of British soldiers. According to public sources, Mr Cameron called such claims 'spurious' and 'fabricated'. Mr Cameron also allegedly tasked the National Security Council with devising a plan to 'stamp out this industry' including cracking down on 'no win, no fee' schemes, and further restrictions on legal aid, including requiring that claimants have lived in Britain for a year. Leading lawyers in the industry have expressed concern over the former Prime Minister's comments and plans to further restrict legal aid by arguing that such comments set 'a very dangerous precedent'. It has also been argued that it is for the courts to decide whether the claims are spurious and unfounded. For a full article on this matter, please see <http://tinyurl.com/zefgpp4>.

130 Attacks against lawyers could range from direct persecution and physical attacks to statements aimed at undermining the profession in the eyes of the public. The recent military coup attempt in Turkey, for example, has led to a sweeping crackdown on lawyers and judges who are regarded as hostile to the Erdogan regime. See 'Arrests of Turkish judges prompts fears over checks and balances', *Financial Times*, 17 July 2016, available at www.ft.com/content/79f72260-4c3c-11e6-88c5-db83e98a590a#axzz4IGJStSM.

131 For example, the Canadian Bar Association has provided advice and training on how to deal with the media. See 'A lawyer's guide to dealing with the media', Canadian Bar Association, available at <http://tinyurl.com/glqbjxu>.

- Negative public opinion of the legal profession, and a general tendency by the public to associate lawyers with their clients, corruption, dishonesty and greed.
- Lack of effective communication and collaboration between the media and the legal profession, which could lead to misinformation about the role of lawyers in society, and consequently inaccurate reporting.

4.2.7.2. Ability to adapt and react to business practices and quasi-legal practices without undermining exercise of independent judgment in the best interest of the client

The growing commercialisation of law firms and the proliferation of alternative services providers and quasi-legal practices with alternative ownership models has sparked fervent debate among legal professionals. At the core of the debate is the question of whether these developments inherently conflict with the core tenets of the profession.

Some take the view that the growing commercialisation of the profession poses a threat to traditional values and ethical principles because of, *inter alia*, its focus on profit. Others hold the view that the legal profession has always involved commercial enterprise, hence the focus on making a profit and ‘earning a living’ in itself is not a threat to lawyers’ independence and ability to exercise their judgment in the best interest of their clients. As the Chief Justice of the Federal Court of Australia, James Leslie Bain Allsop AO stated: ‘[n]o society, such as ours, whose substantial wealth is generated by commercial enterprise, can function with a legal profession of salaried public service lawyers only driven by the altruistic desire for social good’.¹³²

Increased commercialisation is a development in a number of jurisdictions. Pressures associated with the increased commercialisation of the profession, such as the prioritisation of the need to make profit, reach target goals and retain lucrative clients, are more likely to present threats to lawyer’s independence and exercise of their independent judgment, especially in situations where lawyers are unregulated and do not have to adhere to a set of ethical standards.¹³³ Such problems could also arise in jurisdictions where the law has been slow in adapting to such changes and where, as a result, regulatory and disciplinary measures reflecting such changes have not yet been enacted.¹³⁴

Those who view commercialisation as a threat point to the need to retain ‘profitable’ clients, or the desire to avoid undertaking cases against such clients, as affecting decisions of lawyers and law firms on whether or not to undertake certain cases,¹³⁵ consequently having a negative impact on the independence of lawyers. Others, however, see a decision not to undertake certain cases against profitable or influential clients as driven by personal or professional preferences, and not by external factors.

132 Chief Justice James Allsop, ‘Professionalism and commercialism – conflict or harmony in modern legal practice?’ (Speech to the Australian Academy of Law 2009 Symposium Series, 5 May 2009).

133 For example, survey responses received from Ukraine indicate that business and commercial lawyers in Ukraine are unregulated.

134 Survey responses received from Hungary demonstrate that the legal profession in the country has been slow in adapting to the changes brought about by commercialisation. This has caused difficulties for disciplinary bodies in the country, as the existing ethical rules have not been amended to reflect new developments in the way legal services are rendered. Survey responses from Poland indicate that some have expressed concerns over the increased commercialisation of the profession in the jurisdiction due to the perceived potential to undermine respect for professional ethics. According to survey data from Poland, this could result from the lack of efficient training on ethical standards within the business context, as well as the result of inefficient disciplinary proceedings.

135 For example, the Task Force was informed that in Sweden, law firms are often hesitant to undertake cases against big banks.

The proliferation of alternative ownership models, where non-lawyers acquire ownership rights in firms, is also viewed by some as posing a threat to the independence of the legal profession.¹³⁶ This view is based on concerns that non-lawyers may not fully appreciate the need to adhere to professional ethical rules and that proliferation of such ownership can contribute to the erosion of ethical principles and core professional values.¹³⁷

The potential impact of commercialisation

Commercialisation is not a threat to the independence of lawyers, per se, but rather a factor that can contribute to the erosion of professional standards and ethics if circumstances permit. As stated by Chief Justice James Allsop, regulators must find a way to ensure that: ‘our profession has the structural features to permit a degree of commercialism commensurate with the profession meeting the challenges of the growth of national and transnational legal practice without detracting from the underlying essential elements of the goodwill of that “business market” – the faithful administration of justice based on the faithful adherence to professional standards and ethics and to the required fiduciary fidelity.’¹³⁸

136 The Task Force held a roundtable discussion in Barcelona, during the IBA 2016 Mid-Year Meetings, where legal professionals from various jurisdictions discussed, inter alia, the proliferation of alternative ownership models.

137 *Ibid.*

138 See n131 above.

5. What can be done to support and strengthen the legal profession?

5.1. Education of lawyers

Proper and continuous education and training of the legal profession is the first step towards ensuring the establishment of a robust, independent and reliable legal profession. Education raises awareness about the role of lawyers in society, as well as explaining the importance of their professional duties and ethical obligations in protecting the independence of the legal profession. Bar associations should endeavour to organise seminars and training sessions on current developments in the law, ensuring that the profession is kept up-to-date with both national and international current affairs and legal developments. In turn, governments should ensure that adequate funding is made available for academic institutions, to enable them to provide law students with a comprehensive overview of the legal system and the practice of law.

5.2. Overcoming negative perception in the eyes of the public

A strong, independent legal profession requires the support and trust of governments and the public. This trust is threatened where there is a negative perception of lawyers. The Task Force's research indicates that the public often associates lawyers with corruption, lying, deceit, excessive wealth and a lavish lifestyle.¹³⁹ Overcoming the public's negative perceptions of the profession is a challenging and complex task, mainly because it requires governments and bar associations to work on changing deeply ingrained feelings and opinions held – often nurtured and developed over a long period of time. Governments and bar associations are called upon to undertake the difficult task of restoring the profession's image where it has been damaged, and fostering communication and trust between clients and their lawyers. To successfully achieve this, governments must collaborate with bar associations in a manner that is comprehensible to the general public and the media.

5.3. Adequate resourcing for bar associations

Adequate resourcing for bar associations ensures that lawyers receive the appropriate level of training and continuous development education, and can benefit from programmes and sessions that are aimed at providing them with the right tools to face the challenges associated with legal work. In addition, adequate resourcing ensures that the Bars are able to participate in the public debate, act as watchdogs of human rights and participate in public interest cases. Governments should ensure that laws restricting the rights of NGOs are in line with international law principles and do not limit opportunities for funding. Bar associations should distribute available funding on projects that aim to address pressing current issues or challenges faced by the legal profession in each jurisdiction.

¹³⁹ Responses to our survey questionnaire indicated that in a number of jurisdictions, public trust in the profession is weak or in decline. In some jurisdictions, there is also a general feeling of distrust in the criminal justice system, particularly in prosecutors.

6. Conclusion

There is no greater issue affecting the legal profession worldwide than the manifold threats to its independence. Without independence, lawyers are left exposed to disciplinary proceedings, arbitrary disbarment, physical violence, persecution and even death. Lawyers around the world have been targeted by governments and by private actors simply for acting in the public interest or for undertaking cases or causes that some, including the government, find objectionable.

This must not be allowed to prevent lawyers from their duties as protectors of basic human rights. This report has outlined the importance of the independence of the legal profession by identifying and analysing the ‘indicia of independence’ and the threats that confront them. By identifying and responding to these threats, bar associations can provide the best protection for a democratic society through a strong, functioning legal system.

6.1. Next steps

This report notes how the legal profession may be strengthened and supported through increased education, the overcoming of negative perceptions and adequate resourcing for bar associations. The Task Force has compiled a checklist from the findings in this report to assist bar associations in assessing their own state of independence. All bar associations are encouraged to complete the checklist and to reflect on the course of action that may be required to overcome threats to Bar and lawyer independence. The Task Force hopes that this will encourage and facilitate additional work on the independence of the profession, both nationally and internationally. The Task Force further recommends that the IBA undertake specific in-country assessments, on the basis of the self-assessment tool developed by the Task Force.

7. References

7.1. Self-assessment checklist

The 'self-assessment checklist' has been prepared by the Task Force for the purpose of assessing the state of independence in a jurisdiction. Bar associations are encouraged to use the checklist in conjunction with the report on independence, and in the context of the social, cultural, political and economic background in their jurisdiction. The checklist looks at common threats which may negatively affect the 'indicators of independence' outlined in the report.

Check the box where it applies to your jurisdiction

- 1. Lack of constitutionally guaranteed independence of the judiciary.
- 2. A weakened judicial system and judiciary in transitional and post-conflict societies.
- 3. Allegations and occurrences of judicial bribing.
- 4. The existence of national legislation that prohibits the public and lawyers from criticising and/or challenging the judiciary.
- 5. Excessive governmental control of the judiciary.
- 6. Inadequate remuneration for judges.
- 7. Legislative attempts by the government to restrict the rights of lawyers to join independent NGOs.
- 8. Legislative attempts by the government to restrict the structure, aim and scope of permissible activities by NGOs.
- 9. Vague regulations on admission.
- 10. Vague regulations on disciplinary proceedings and disbarment.
- 11. The lack of publicly available information on the process of disbarment and disciplinary proceedings.
- 12. The lack of publicly available disciplinary orders.
- 13. Frequent reports of arbitrary disbarments or targeted disciplinary proceedings.
- 14. Intrusive or onerous legislation that forces lawyers to breach the principle of lawyer-client confidentiality.
- 15. High incidence of reports of such breaches, particularly in situations where they occur without the knowledge and consent of the client, or in the context of criminal trials.
- 16. The existence and enforcement of criminal sanctions against lawyers who fail to disclose confidential client information.

- 17. The existence of tipping-off prohibitions.
- 18. Lack of financial resources for the purposes of education and training.
- 19. No educational admission standards, or very low admission standards.
- 20. High incidence of reports of bribing for the purposes of obtaining educational or professional qualifications, and to secure admission to academic or vocational courses.
- 21. High incidence of allegations of violence, harassment and intimidation of lawyers.
- 22. War, conflict and political instability.
- 23. Legislative attempts to limit freedom of expression and freedom of association.
- 24. Arbitrary arrests and detention of lawyers.
- 25. Open and notorious attacks against lawyers by private actors and the public.
- 26. The existence of vague and imprecise anti-terrorism legislation, which permits wide and expansive definitions of the terms ‘terrorist’, ‘act of terrorism’ and other terms that define liability or the scope of protection of basic human rights.¹⁴⁰
- 27. Frequent reports of alleged harassment and intimidation of lawyers in the context of investigations carried out under anti-terrorism legislation.
- 28. Surveillance of private communications between lawyer and client or confiscation of private and confidential work product in the context of legal advice, representation or court proceedings.
- 29. Negative political, societal or media propaganda in times of war, terror or emergency.
- 30. Frequent public attacks against the profession by prominent political figures.
- 31. Negative public opinion of the legal profession, and a general tendency by the public to associate lawyers with their clients, corruption, dishonesty and greed.
- 32. Lack of effective communication and collaboration between the media and the legal profession, which could lead to misinformation about the role of lawyers in society, and consequently inaccurate reporting.
- 33. The rise of unregulated alternative ownership models, where ownership rests in the hands of non-lawyers or other unregulated professionals.
- 34. The proliferation of new categories of unregulated legal professionals who provide legal services.

¹⁴⁰ Vague anti-terrorism legislation could be applied widely, and in some circumstances, those who are linked in any way with suspected terrorists, even those who defend them or simply express any views in support of such persons, could be charged under terrorist legislation. See n124 above.

8. Appendices

8.1. Appendix I: Participating jurisdictions and Task Force consultations

The Task Force prepared a list of questions in a survey that concentrated on the indicia of independence. The Task Force received responses to survey questions from the following jurisdictions: Argentina, Australia, Brazil, Canada, England and Wales, Finland, Germany, Hungary, India, Japan, Mexico, Nigeria, Poland, Russia, Sweden, Ukraine and the US.

In addition, the Task Force:

- Conducted a dedicated roundtable for Bar Leaders in Barcelona on 25 May 2016 to discuss the proposed indicia of independence as part of the IBA Bar Leaders' Conference;
- Consulted with lawyers and representatives from bar associations at the IBA PPID Open Forum on 27 May 2016;
- Addressed a roundtable of Bar leaders at a dedicated gathering in Kuala Lumpur, prior to the Opening of the Legal Year in January 2016;
- Consulted with Bar leaders at roundtable discussions at the Opening of the Legal Year of England and Wales, and received responses to our survey questions in October 2015;
- Developed strong links with the Union of Iranian Bar Associations following a presentation in Tehran in July 2015;
- Developed links with the Presidents of Law Associations in Asia, at a session held in Goa in 2015; and
- Consulted with participants at the South Pacific Lawyers' Association conference in Brisbane in September 2015.

Furthermore, the Task Force established links with the UN Special Rapporteur on the Independence of Judges and Lawyers, and held meetings with IBAHRI lawyers and consultants who work closely with the UN Special Rapporteur on a project aimed at identifying modern threats to the legal profession.

8.2. Appendix II: Survey questionnaire

Key indicators of independence in the legal profession

The following survey was distributed to bar associations and individual lawyers from different states, with a view to identifying the most commonly reported threats to independence.

Individual legal professionals

1. Is there prejudice (direct or systemic) against women lawyers, or lawyers who are members of minorities?

2. Are lawyers free to join independent professional organisations?
3. How independent are disciplinary procedures for lawyers? How do the rules for disbarment function? Are there appropriate procedures in line with natural justice in cases of alleged malpractice?
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?
5. Correspondingly, is representation of unpopular clients (such as a person accused of terrorism offences) permitted?
6. What is the public perception of the profession regarding administration of justice?

Bar associations and the broader legal system

7. What is the level of unification of the legal profession?
8. Is the profession able to independently regulate itself? What is the standard of independent regulatory procedures? Are there other external influences (eg, government)?
9. What is the strength of the principles of legal professional privilege/secretcy? What is the scope of these principles? How do they hold up in cases of terrorism or emergency, etc?
10. How does the legal system respond to political/media/community pressure in times of war/terror/emergency? For example, how does the system respond where there is pressure 'to interpret the law in the government's favour; to secure convictions or uphold administrative detentions; to refrain from challenging the constitutionality of questionable legislation'?
11. Is the rule of law maintained even in circumstances of heightened security concerns?
12. What effect has the influence of business practices and the advent of quasi-legal processes had on the legal profession? How quickly has the profession acted to address the challenges faced in a more business-orientated legal climate?