

Benchmarking Bar Associations



Nusrat Chagtai



the global voice of
the legal profession®

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Foreword

From ancient times, societies have developed mechanisms to settle disputes and deliver justice. In modern societies, the right to justice is a human right itself and also an essential means for the realisation of other rights.

Legal professionals are central to ensuring an effective justice system. It is as difficult to conceive a world without judges as it is to conceive justice without lawyers.

The legal profession provides access to justice, assists in the exercise of the right to justice and works towards the realisation of the right to a fair trial. These rights are universally recognised human rights to which all human beings are entitled.

Professional associations of lawyers should help in ensuring that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics. Thus, a self-governing and independent bar is key to the protection of the rule of law and human rights.

Lawyers are entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and to protect their professional integrity. These are all essential in achieving a competent and independent legal profession.

Moreover, admission to the legal profession should avoid biases and distinctions close to discrimination. Law practitioners should be trained in international human rights law. They should benefit regularly from continuous legal education. In performing all these functions, bar associations are essential.

Benchmarking Bar Associations is an important resource for practitioners, bar associations and law societies. It brings us benchmarks and provides a set of learned references and standards to guide legal professionals in the task of building an independent and effective bar association. It has been written in the light of international legal rules and principles on the right to justice embodied in international human rights treaties and customary law. Particular reference is made throughout the book

to the United Nations Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990.

This book has been researched and written by Nusrat Chagtai, a qualified solicitor and human rights lawyer who was an IBA Legal Specialist, working with the Malawi Law Society in 2006 and 2007. The writing of the book has been overseen by Norville Connolly and Phillip Tahmindjis.

Through eight chapters, Chagtai considers the establishment of bar associations, their governance and functioning, financial responsibilities, membership services, regulation, rule of law and access to justice, international work and relations, and monitoring and evaluation. In each chapter, she provides explanation of each requirement and its sources is provided, as well as empirical data on the problems and solutions found in different countries.

The book elaborates on self-governing bars as crucial to the protection of justice and the rule of law, as well as for access to justice. For a bar to self-govern 'it should be able to make its own decisions, using clear and transparent structures and procedures, to represent its members' interest and to sustain itself'. Democratic standards are fostered by bar associations and also enforced within them: 'For a bar to function efficiently and effectively, there must be strong and clear governance and leadership structures in place, published and available for the membership to scrutinise'. The book further stresses that bar associations should be at the origin of codes of ethics and of their implementation.

Benchmarking Bar Associations is an extremely helpful tool for law practitioners and professional organisations around the world. It can serve to assist bars in attaining important objectives that can ensure a society based on the rule of law that guarantees access to justice and rights for all.

Mónica Pinto

UN Special Rapporteur on the Independence of Judges and Lawyers
Dean, University of Buenos Aires, Law School

Introduction

In 2003, the International Bar Association (IBA) and the Open Society Initiative for Southern Africa (OSISA) undertook an innovative project to strengthen local bar associations, particularly those in developing countries. The publication of *Benchmarking Bar Associations: A Guide for Bar Associations and Law Societies in Developing Countries* was premised on the notion that bar associations can and should play a central role in protecting and strengthening the rule of law. The book was organised as a compendium of practical advice for nascent professional law organisations.

Bar associations are natural guardians of an independent judiciary. It is thus important that members of the Bar use their voice to defend civil liberties and stand against any attempts by government to subvert the principles of justice. When judges come under attack, the legal profession becomes a key bastion of defence. Indeed, the Preamble of the UN Basic Principles on the Role of Lawyers states:

‘Lawyers in protecting the rights of their clients and in promoting the cause of justice shall seek to uphold human rights and fundamental freedoms recognised by national and international law.’

In the best of contexts this is a challenging task. Bar associations need guidance and support to fulfil their mandate, particularly in developing countries. Moreover, to maintain effectiveness and authority, they must carefully maintain the independence of their own associations. An association that becomes subverted by the state, or co-opted by political jockeying, loses social esteem and public capital while failing in the cause of justice. As stated in the first edition of the *Benchmarking* book:

‘The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.’ⁱ

Thus, Bars’ independence cannot be compromised. Members of the Bar must not be unduly influenced by third parties, nor should they appear

ⁱ *Attorney General of Canada et al, Law Society of British Columbia et al*, [1982] 2 S.C.R. 307 pp 335-336.

in any way dependent on an outside entity. In either instance the bar association's legitimacy would be seriously eroded. As was clearly stated in the original *Benchmarking* book, a bar association must "uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour".

Cambodia offers a good example of the challenges involved when a bar association loses its way. As the only body mandated to regulate the legal profession in Cambodia, it abused its status by insisting that the Bar had ultimate control over defence counsel appearing before the Extraordinary Chambers in the Courts of Cambodia (ECCC), including international lawyers. The Association held firm in this position, declaring that only attorneys approved and licensed by the Cambodian Bar would be permitted to appear before the Court and that foreign lawyers would not have full rights to defend clients in court. It went so far as to state that the Defence Office of the ECCC was considered to be 'illegal' because it was outside the control of the Cambodian Bar.

The Cambodian Bar Association also took the extraordinary position that foreign lawyers appearing before the new war crimes court must pay a fee for the privilege. Under the Bar's proposal, foreign lawyers would have been required to pay a US\$500 application fee to the Cambodian Bar. If selected to represent a client, a lawyer would have to pay an additional US\$2,000 plus US\$200 a month in membership dues. All fees would go to the Bar Association.ⁱⁱ In the end, the Bar agreed to charge a flat fee of US\$500.

Furthermore, the Cambodian Bar accused the IBA of violating national law by proposing a training programme for Cambodian defence attorneys without the Bar's approval. In the end, the IBA cancelled its programme. In a press release dated 24 November 2006, speaking on behalf of the IBA, I stated:

'The Cambodian Bar has issued instructions forbidding lawyers from attending a training programme planned by the International Bar Association (IBA) and the Office of the Extraordinary Chambers in the Courts of Cambodia (ECCC). The Bar's President, Ky Tech, has publicly threatened that "measures" will be taken against any

ii Discussion with Cambodian Bar representatives (November 2006).

attendee, and against the IBA's international participants. The IBA has also refused to accept the Bar's demands for control of selection of participants and speakers. The prohibition by the Cambodian Bar is part of a wider scheme of opposition to obstruct the operation of the Tribunal. In consequence, the IBA has cancelled the programme.

The Bar's actions represent a disturbing development in the functioning of international justice, placing obstacles in the path of bringing those accused of international crimes to trial. The IBA's programme was intended to improve the quality of legal services and the administration of justice in Cambodia, and help educate and inform the Cambodian public about international justice. It is unacceptable that the Cambodian Bar, which should share these objectives, is seeking to frustrate them in this way.ⁱⁱⁱ

In media interviews, I repeatedly noted that the Cambodian Bar was putting up barriers to international justice. Bar associations should embrace accountability and justice, not attempt to impede it.^{iv}

The original edition of the *Benchmarking* book established clear guidelines to assist bar associations in a variety of areas from financial responsibility to procedural and substantive evaluation. The success of that publication has now led to the release of a second edition. In this new edition, the IBA has significantly expanded the areas of guidance on topics such as membership services, representation, ethics, disciplinary and complaints procedures, and the implementation of continuing legal education standards.

Even more importantly, the IBA encourages Bars to systematically monitor, champion and educate the public on human rights issues. The IBA also suggests that bar associations promote access to representation and legal aid. Pro bono service is no longer viewed as ancillary but as an essential part of a lawyer's professional responsibility.

iii IBA, 'Press Release: Cambodian Bar issued instructions forbidding lawyers from attending a training programme planned by IBA and ECCC' (4 November 2006).

iv 'Bar fees last KRT hurdle', *Phnom Penh Post* (23 March 2007), available at www.phnompenhpost.com/national/bar-fees-last-krt-hurdle.

Bars across the globe, but particularly in post-conflict environments, are now widely seen to play a role in strengthening and supporting international justice. It has become a responsibility, not a choice, and often requires partnering with domestic, regional and international organisations. Thus, in this new edition there is an entire chapter devoted to the need for bar associations to support the implementation of the Rome Statute, the governing legal document of the International Criminal Court (ICC).

The IBA hopes that this second edition, like its predecessor, will help new bar associations – particularly in developing countries – in supporting their members, but also in strengthening the rule of law within the broader society. It is an endeavour that all lawyers can be proud to support.

Mark Ellis
Executive Director
International Bar Association

Chapter 1: Establishment

1.1 Introduction

The fundamental characteristics, objectives and functions that bar associations and law societies ('Bars') must strive to attain, stem from the importance of the legal profession within society. These fundamentals are also reflected in a range of international and regional norms. In particular, the United Nations Basic Principles for the Independence of the Legal Profession (UN Basic Principles) provide essential guidance with regard to the establishment and functioning of Bars.¹ While not 'hard' sources of international law, the UN Basic Principles are cited in international jurisprudence, including the European Court of Human Rights (ECtHR), and the UN Human Rights Committee (UNHRC). The latter has applied the UN Basic Principles almost as an extension of Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

UN Basic Principle 24 provides that:

'Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.'

In the process of forming a self-governing Bar, there are certain fundamentals that need to be considered – for instance, the principle of independence, which is essential to a Bar's ability to fulfil its role within society. This Chapter considers the importance and meaning of an independent Bar, and the requirements necessary for its establishment.

¹ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990. Available at www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx. This and all other URLs last accessed 12 June 2016.

1.2 Independence

‘The independence of the bar from the State in all its pervasive manifestations is one of the hallmarks of a free society...’²

‘[A]dequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.’³

An independent Bar is thus key to the protection of the rule of law and human rights. Central to independence is the ability to self-regulate and self-govern without undue interference. Self-regulation includes maintaining professional standards through continuing legal education (CLE); production and dissemination of a code of ethics; discipline of members; and enforcement of entry requirements. It is, however, important to note that many Bars may not regulate (that is, in terms of disciplining members) themselves, but may instead have another independent body responsible for this task. Where this is the case, the Bar’s independence is not necessarily undermined, provided that the regulatory body is also truly independent and not in some way under the influence or control of the state.⁴

For a Bar to self-govern, it should be able to make its own decisions using clear and transparent structures and procedures, as well as represent its members’ interests and sustain itself. However, all too often, and particularly in the context of developing Bars, the legal profession faces interference – especially from the executive arm of the state, where governments may not respect the rule of law. Such interference can undermine a Bar’s independence, thereby impeding its ability to uphold the rule of law and human rights.

2 *Attorney General of Canada et al v Law Society of British Columbia et al* [1982] 2 SCR 307, 335–336.

3 UN Basic Principles, Preamble, para 9.

4 Models of regulation are discussed in more detail in Chapter 5. It should be noted that while all Bars must be independent, some may both self-regulate and represent, while others may have an independent body regulating aspects, such as discipline. For example, the Solicitors Regulation Authority in England and Wales regulates members of the law society.

At the most basic level, Bars should not be in a position where their very existence depends on the whim of the state. For example, the UN Special Rapporteur on the Independence of Judges and Lawyers sent a communication to the Government of Equatorial Guinea in response to the Minister of Justice and Religion's issuance of a resolution dissolving the bar association. In its place, the resolution created a general council of lawyers, chaired by the Minister, that was to be responsible for the preparation of a new statute to regulate the activities of lawyers and the holding of new council elections.⁵ It follows that one of the fundamentals to ensuring the independence of lawyers is to allow them to work freely without being obliged to obtain clearance or permission from the executive arm of government.

In 2002, the Government of Ireland attempted to introduce regulatory reform through the Legal Services Regulation Bill, which would have had the effect of undermining the legal profession's independence. The Law Society of Ireland successfully challenged the Bill through an international campaign, on the basis that it represented 'a real and dangerous threat to the continued existence of an independent legal profession in Ireland, with incalculable consequences for such fundamental democratic principles as the separation of powers, access to justice and the rule of law.'⁶

Nor should the executive be responsible for issuing licences to practise, as confirmed by the UNHRC in relation to Belarus when it noted with concern:

'[T]he adoption of the Presidential Decree on the Activities of Lawyers and Notaries of 3 May 1997, which [gave] competence to the Ministry of Justice for licensing lawyers and oblige[d] them,

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

6 Details of the proposed reforms in the Bill are outlined in Ken Murphy, 'This is a blueprint for Government control of the legal profession' (thejournal.ie, 2 February 2012), available at www.thejournal.ie/readme/column-'this-is-a-blueprint-for-government-control-of-the-legal-profession'-343423-Feb2012.

in order to be able to practise, to be members of a centralised collegium controlled by the Ministry, thus undermining the independence of lawyers.’⁷

The UNHRC further stressed: ‘[T]he independence of the judiciary and the legal profession is essential for a sound administration of justice and for the maintenance of democracy and the rule of law,’ and urged the State Party ‘to take all appropriate measures, including review of the Constitution and the laws in order to ensure that judges and lawyers are independent of any political or other external pressure.’⁸

Even where legislation guaranteeing independence is in place, the reality may be quite different. For example, Russia’s Federal Act on Legal Practice and the Bar secures independence of the legal profession by providing lawyers with a strong set of rights. However, in 2014 the UN Special Rapporteur on the Independence of Judges and Lawyers expressed concern over the fact that the Act had not always been implemented or respected. There had been attempts by the executive to modify the legislation, which would have the effect of restricting independence. And a representative of the respective federal or regional Ministry of Justice sits on each qualification board and has responsibility for the registration of lawyers.⁹ Accordingly, the Special Rapporteur highlighted that the legal profession may be conditioned or controlled by the executive branch:

‘The fact that the registration of lawyers is the responsibility of the executive is of concern and is inconsistent with the Basic Principles on the Role of Lawyers. Indeed, while lawyers are not expected to be impartial in the same way as judges, they must be as free from external pressures and interference as judges. When lawyers cannot freely and independently discharge their duties, the door is opened for both private and public actors who seek to

7 GAOR, Fifty-Third Session 1998 ‘Report of the Human Rights Committee’ UN Doc GAOR A/53/40, para 150.

8 *Ibid.*

9 UNHRC, Twenty-Sixth Session 30 April 2014 ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers: Mission to the Russian Federation’ (30 April 2014) A/HRC/26/32/Add.1, paras 76–78.

influence or control judicial proceedings to pressure lawyers and interfere in their work.¹⁰

The Special Rapporteur recommended that responsibility for the registration of lawyers be transferred from the Ministry of Justice to the legal profession itself, and that qualification boards should be comprised of legal professionals only. It was further recommended that representatives of all government entities, including the Ministry of Justice, be excluded from participating.¹¹

Moreover, pursuant to UN Basic Principle 16, governments have a positive duty to ensure lawyers are able to perform their professional functions without intimidation, hindrance or improper interference. Such interference may take the form of direct attacks. For example, the International Bar Association's Human Rights Institute (IBAHRI) has expressed concerns about death threats and physical attacks against lawyers in Mexico, the targeting of lawyers in Venezuela, and the disappearance, detention and torture of lawyers in China.¹²

10 *Ibid.*, para 78.

11 *Ibid.*, para 135.

12 'IBAHRI concerned that death threats against Mexican lawyer, Alba Cruz, remain uninvestigated' (News Release, IBAHRI 3 June 2010), available at www.ibanet.org/Article/Detail.aspx?ArticleUid=6bf0956a-a764-4c54-9b7c-0e53b244ba93; IBAHRI, *The Criminal Trial of Venezuelan Lawyer José Amalio Graterol* (IBAHRI 2013) available at www.ibanet.org/Article/Detail.aspx?ArticleUid=d6d70307-d68c-4517-9fe9-0782fd43a2a8; 'IBAHRI concerned by harassment of lawyer Juan Carlos Gutiérrez in Venezuela' (News Release, IBAHRI 5 May 2016), available at www.ibanet.org/Article/NewDetail.aspx?ArticleUid=6127d428-ff18-4765-9767-2de1a17b7cf5; 'IBAHRI urges China to uphold lawyers' rights and implement UN recommendations to eradicate torture' (News Release, IBAHRI 21 December 2015), available at www.ibanet.org/Article/Detail.aspx?ArticleUid=a7eda494-10bd-482d-877e-bdd61a54dc87. Similarly, lawyers in Zimbabwe have been attacked for representing opposition members. For example, on 11 March 2007, while enquiring on the whereabouts of arrested clients who were legitimate opposition leaders in Zimbabwe belonging to the Movement for Democratic Change, lawyer Harrison Nkomo was assaulted with a baton by police officers and warned not to return to the police station. See The Law Society of Zimbabwe, 'Self-Regulation at the Crossroads: Attacks on Lawyers and the Independence of the Legal Profession in Zimbabwe: A Report of the Law Society of Zimbabwe with collaborative effort from the Zimbabwean Lawyers for Human Rights' (The Law Society of Zimbabwe 2007), pp 11–17.

With regard to China, the UN Committee Against Torture expressed that it was:

‘[D]eeply concerned about the unprecedented detention and interrogation of reportedly more than 200 lawyers and activists since 9 July 2015 [...]. This reported crackdown on human rights lawyers follows a series of other reported escalating abuses on lawyers for carrying out their professional responsibilities, particularly on cases involving government accountability [...]. Such abuses include detention on suspicion of broadly defined charges, such as ‘picking quarrels and provoking trouble’ and ill-treatment and torture while in detention. Other interferences with the legal profession have been reportedly, the refusal of annual re-registration, the revocation of lawyers’ licences, and evictions from courtrooms on questionable grounds...’

The Committee further expressed concern that these abuses and restrictions may deter lawyers from raising reports of torture in their clients’ defence for fear of reprisals, thus weakening the safeguards of the rule of law that are necessary for the effective protection against torture.¹³

Harassment of lawyers may also take the form of negative media campaigning. In Zimbabwe, there has been a state-sponsored media campaign against lawyers for some time. For example, on 6 August 2006, the state-run *The Sunday Mail* ran an opinion piece titled ‘Lawyers’ body fights for return of Rhodesia’.¹⁴ *The Sunday Mail* and *The Herald* – another state-run newspaper – published articles alleging that the Law Society of Zimbabwe had been working with the European Union (EU) and the British Government to circumvent a state ban on election observers from the EU. One lead article alleged that the Law Society was asking law firms to observe the elections on behalf of the EU and quoted the Minister of Justice as saying:

‘It has come to my knowledge that the Law Society of Zimbabwe leadership has turned the society into a political party to the extent

¹³ Committee Against Torture, Forty-first Session 3–21 November 2008 ‘Concluding Observations on the Fifth Periodic Report of China’ (3 February 2006) CAT/C/CHN/CO/5, paras 18–19.

¹⁴ *Self-Regulation at the Crossroads*, pp 11–17.

of soliciting from British and other foreign governments funds to engage in active politics [...]. I will no longer treat them as a professional society, but a political opposition party.¹⁵

Another worrying example can be found in the United States, where, during a radio interview in 2007, the Deputy Assistant Secretary of Defense for Detainee Affairs at the US Department of Defense encouraged US companies to refrain from using the legal services of law firms involved in representing Guantánamo Bay detainees.¹⁶ The remarks aimed, ultimately, to intimidate lawyers who were promoting the rule of law and human rights, and justly defending the rights of detainees to the presumption of innocence, a fair trial, and the right to counsel, for example. Such statements made by individuals representing the government undermines these fundamental rights and further interferes with the rights of lawyers to perform their professional functions without hindrance, threats or improper interference.

The independence of Bars may also be undermined in more subtle ways – for instance, through the withdrawal of business. In the past, the President of the Malawi Law Society had complained of what he termed ‘white-collar harassment’. Successive governments had been suspected of withdrawing their legal business from lawyers perceived to sympathise with the opposition, as a way of penalising them. Similarly, perceived affiliation to the government in power appeared to be a criterion for deciding which lawyers in private practice were hired to act on behalf of the government.¹⁷

Bars have also been warned against the threat to independence from increased commercialisation of the profession and the practice of law.¹⁸

It is fundamental that Bars ensure the independence of the legal profession by working to remain free from any influences and supporting lawyers who may be subject to attacks, intimidation or harassment.

15 *Ibid.*

16 Neil Lewis, ‘Official attacks top law firms over detainees’ (*New York Times*, 13 January 2007); Josh White, ‘U.S. official apologizes for Guantanamo remarks’ (*The Washington Post*, 17 January 2007).

17 Fidelis Edge Kanyongolo, ‘Malawi: Justice Sector and the Rule of Law’ (AfriMap and OSISA Review, Open Society Foundation 2006), available at www.opensocietyfoundations.org/sites/default/files/malawi_20060912.pdf.

18 ECOSOC, Fifty-Second Session 24 November 1995 ‘Report of the Secretary-General on the status of the Convention against torture’ (24 November 1996) UN Doc E/CN.4/1996/34, para 98.

Developing Bars will often need to consider how to ensure independence from the executive arm of the state. Ultimately, to be truly independent, Bars must not only be free to highlight issues around access to justice and rule of law, but to also be seen campaigning against governments who fail to promote or provide these. Otherwise they are either not allowed to be independent, or have allowed themselves to be part of a government policy not to adhere to the rule of law or provide proper access to justice.

This book deals with benchmarks that aim to strengthen Bars so that they can ensure their independence through a variety of means. This includes building their capacity and that of their members, and seeking assistance from other organisations and Bars at domestic, national and international levels.

1.3 Governing legislation

The Preamble to the UN Basic Principles requires that the role of lawyers be respected and taken into account by governments:

‘[W]ithin the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general.’

For a Bar association to fulfil its role within society, it must be recognised by law so that its status, objectives and functions are clear to all. Its recognition in law also ensures that its duties and responsibilities can be enforced if necessary.

Ideally, and is the case in most jurisdictions, a Bar is established through primary legislation.¹⁹ Many will also draft a constituent document, such as a constitution or a charter or deed of foundation – for instance, the Royal Charter of the Law Society of England and Wales. Looking at legislation governing Bars in various jurisdictions, examples of the areas commonly dealt with through both primary and secondary legislation, are as follows:

19 For example: Law Society of Kenya Act (Chapter 19 of the Laws of Kenya); Legal Education and Legal Practitioners Act 1965 (Malawi); Legal Practitioners Act 1964 (Swaziland); Law Society Act (Cap 276) (Uganda); Advocates Law 2007 (Afghanistan); Advocates and Solicitors Ordinance 1947 repealed by the Legal Profession Act 1976 (Malaysia). They are normally established as a body corporate.

- **Aims and objectives of the Bar.** This is discussed further when considering a Bar's vision and objectives, but working to promote the rule of law, human rights and access to justice should be at the forefront.
- **Qualifications and procedure for admission** of legal practitioners and issuing of practising certificates.
- **Duties and functions of members**, including duties towards clients, the courts, other lawyers and officers of the court, the Bar and to the public in general.
- **Disciplinary mechanisms and procedures**, situations when disciplinary action can be taken, and types of action that can be taken against members, such as suspension, striking off and requirement to reimburse or compensate.
- **Subscription fees** (often the legislation may state that the amount is to be determined by the Bar and subsidiary rules or regulations may deal with this) and date for payment (legislation often provides that a Bar will not recommend a practitioner for renewal of the practising certificate unless subscription fees have been paid).
- **Remuneration of lawyers.** Primary legislation may govern how this is determined and the procedure for disputes, but secondary legislation may be used to set out the amounts and other rules governing costs.
- **Structure of the Bar.** That is, executive or council, general membership, subcommittees and their respective duties.
- **Internal accountability.** For example, timing and procedure for general, annual, special or extraordinary meetings; procedure for elections of executive or council members, as well as any disciplinary body and subcommittees (specifying secret ballot where appropriate); and auditing of the Bar's accounts.
- **Powers of the Bar**, such as the ability to raise or borrow money, and to acquire, hold and dispose of property, as well as derive income from such property.

- **CLE and training.** This may be done in conjunction with a body responsible for legal education, such as a Council for Legal Education, and in some jurisdictions, this may be governed by separate legislation.²⁰

Case study: Afghanistan

In December 2007, the Advocates Law was passed and came into force in March 2008. Under the new law, the Ministry of Justice had an obligation to take the necessary steps to establish the bar association within three months after entry into force.

The law also provided that the Bar would gain legal status only after the by-laws of the Bar's General Assembly (the Bar's Annual General Meeting – AGM) were approved, and an ad hoc committee was established to produce an initial draft of the by-laws and to organise the first AGM.

The draft by-laws provided a framework for organisational structure, disciplinary mechanisms and running procedures. But it was also critical that they reflected the needs of the Afghan lawyers, to ensure their approval and achieve legitimacy. The drafting process therefore involved extensive consultation, providing lawyers with an opportunity to contribute.

Each law office in Afghanistan circulated the draft by-laws among its lawyers and lawyers in the provinces, dividing responsibility for each province between them. Completed questionnaires representing the views of 250 lawyers from across the country (of which more than half were already registered) were returned to the Ministry of Justice and consolidated into a final draft. Following this consultation process, the IBA hosted several roundtable discussions with law offices and private lawyers to discuss the drafted by-laws.

Following approval of the by-laws at the AGM, elections of the first Leadership Council and Monitoring Board (the Bar's disciplinary

20 For example, the Legal Education and Legal Practitioners Act 1967 provides for a Council of Legal Education that has responsibility for the Law Faculty of Malawi. However, in Zambia, there is a separate statute: The Zambia Institute of Advanced Legal Education Act 1996, which governs the Zambia Institute of Advanced Legal Education.

committee) were held. Candidates were asked to present their qualifications on the basis of the newly approved by-laws. Lists were then drawn up and a secret ballot took place. This process was conducted in full view of those present at the AGM and took three days to complete. On the fourth day, after run-off elections for selected positions, the leadership was finally elected. After four years of persistence and hard work, the Afghanistan Independent Bar Association was born.²¹

1.4 Vision, mission and objectives

The aims and objectives of Bars should be clearly set out in the governing legislation and in its constitution or charter. Bars should also have a clear vision and mission – that is, the ultimate goals that define their main purpose – and should ensure all their objectives, and therefore activities, are geared towards realising that vision. For example, the Law Society of England and Wales clearly states its vision as follows:

‘We want to be valued and trusted as a vital partner to represent, promote and support solicitors while upholding the rule of law, legal independence, ethical values, and the principle of justice for all.’

There is a common theme running through the visions and objectives of Bars across the world: that is, the promotion of democratic principles such as the rule of law and human rights, and the upholding of justice and the integrity of the legal profession. For example:

1.4.1. *Justice and the rule of law*

To uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour (Malaysia); to uphold the rule of law (Australia), safeguard and advance the rule of law, the administration of justice, the constitution and laws;

21 For further information, see www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Afghanistan.aspx and the Afghanistan Independent Bar Association’s website at www.aiba.af/english.

strive towards the achievement of a system of law that is fair, just and equitable, certain and free from unfair discrimination (South Africa); improving access to legal services and/or playing a philanthropic role in the community-at-large (majority of member Bars of the American Bar Association); protecting fundamental human rights and realising social justice (Japan).

1.4.2. Status of the legal profession

Maintain and enhance the prestige and status and dignity of the legal profession (Swaziland) and independence and impartiality (Angola), as well as, objectivity; uphold and encourage the practise of law, and promote and facilitate access to the profession (South Africa).

1.4.3. Representing and assisting members

Represent generally the views of the profession and deal with all matters relating to the interests of the profession and to protect those interests (Swaziland); represent, protect and assist legal practitioners as regards conditions of practice and otherwise (Kenya); safeguard the rights, privileges and interests of advocates (India); promote the common interests of members of the profession and welfare of the profession, having regard to the broader interests of the public (South Africa); afford pecuniary and other assistance to members or former members of the Bar and to their wives, widows, children and other dependants who are in need of such assistance (Malaysia); providing support, advice and guidance on areas of practice and management, tailored to members' individual needs, supporting equality, diversity and inclusion within the legal profession, campaigning on legal issues of importance to members and the public (England and Wales).

1.4.4. Regulation

Regulate the legal profession and provide for effective control of the professional conduct of practitioners and promote uniform practice and discipline (Swaziland); maintain and improve standards of conduct and learning of the legal profession (Uganda, Kenya, Malaysia); lay down standards of professional conduct and etiquette for advocates

and entertain and determine cases of misconduct (Pakistan); act as the approved regulator, ensuring regulation is fair and proportionate while protecting the public (England and Wales); govern matters relating to the guidance, liaison and supervision of all attorneys and bar associations in order to maintain their dignity (Japan).

1.4.5. Education

Encourage the study of law (Swaziland); arrange and promote continuing professional development (CPD), and undertake the occasional publication of transactions and other papers (Australia); engage in formal or informal activities designed to foster and extend the study of law and for the benefit of both members, or others interested in the legal profession (Malawi); promote legal education and CLE, practical legal training and research (South Africa); encourage the study and development of customary legal systems and their application in practice and to seek harmonisation and where appropriate integration of those systems (South Africa); to promote access to the knowledge and application of the law and contribute to the development of a culture of law (Angola); promote the highest quality of legal education (USA).

1.4.6. Law reform

Initiate and promote reforms and improvements in any branch of the law, administration of justice, practice of law and formulation of justice (Swaziland); where requested to do so, express views on matters affecting legislation and the administration and practise of law (Malaysia); consider changes in law, practice and procedure where necessary (South Africa); undertake consultation activities with organs participating in legislative processes (Angola).

1.4.7. Networking and cooperation

In the interests of society, to cooperate with other societies or bodies of person as it may deem fit (Swaziland); assist government and the courts in all matters affecting legislation and the administration and practice of law (Kenya); strengthen collaboration with government, the judiciary, and legislature on all matters affecting legislation, human rights, the

rule of law, good governance and administration of law, and to promote networking, collaboration of local and international stakeholders and the legal fraternity by building links and exchanging experiences (Uganda); promote good relations and social intercourse among members, and between members and other persons concerned in the administration of justice; encourage and establish and maintain good relations with professional bodies of the legal profession in other countries and participate in activities of any local or international association and become a member (Malaysia).

1.4.8. Assisting the public

Organise legal aid for the poor (India); protect and assist members of the public in matters touching, ancillary or incidental to the law (Kenya, Malawi, Malaysia, Uganda); make provision for or assist in the promotion of a scheme whereby impecunious persons may be represented and establish a compensation fund (Malaysia); provide, where deemed appropriate, voluntary services in the interests of the public and promote legal aid and accessibility of all to the law and the courts (South Africa).

1.5 Ability to manage affairs

To ensure true independence, a Bar must be able to sustain itself. Of course, it may often be necessary to obtain funding from outside the legal profession – such as from donor organisations or sponsors – but Bars should always ensure that, where this is the case, its independence is not compromised. Bar associations should be particularly cautious of receiving government funding, as such support may be aimed at keeping the Bar close and uncritical of the state machinery. For example, there are cases where executive members of the Bar receive well-paid work from the government.²² Such cases should be avoided due to the risk of influence and interference in the work of the legal profession.

If possible, Bars should do their best to obtain funding from other sources. In Malawi, although the Law Society is a statutory body and eligible for state funding, it had been reluctant to take advantage of this because

²² See n 17 above, Kanyongolo 2006.

it did not want to create a perception of dependency on the state and so undermine its independence. Although the receipt of government funds does not necessarily result in a lack of independence, there is nonetheless a potential for – and at the very least, an appearance of – state interference. In this area, the IBAHRI has expressed concern over government funding of the Angolan Bar.²³

As well as financial sustainability, Bars must ensure they have sufficient resources and adequately trained staff so that they can manage their own affairs and carry out their functions. It is also important for Bars to ensure capacity for review of their governing legislation, as well as make subsidiary rules and regulations in relation to any of its objectives and functions. For example, it may be necessary from time to time for Bars to introduce or amend rules in relation to, among other things, practice licences and admissions, accounts' certificates, professional conduct issues and CLE requirements. Bars should be able to do this without hindrance.

However, there is no need for complete disengagement from governments, and in fact both have an obligation to work together to promote, for example, access to justice and human rights for the public, as well as education and training for the profession. But in working together, Bars should exercise caution and ensure the right balance is reached so as not to compromise independence. For example, when the IBAHRI was facilitating the creation of the Law Society of Swaziland, it had no money to rent, let alone buy, its own premises. Consequently, the High Court allowed it to use two rooms in a (government-maintained) High Court building. Bars should be careful in situations such as this, which could potentially open the door to interference.

Independence is always an issue of balance. Indeed, the UN Basic Principles provide, in several provisions, for cooperation between Bars and the government, which is discussed in more detail in section 6.5.²⁴

23 IBAHRI, 'Angola: Promoting Justice Post-Conflict' (IBAHRI 2003b), available at www.ibanet.org/Document/Default.aspx?DocumentUid=8ee32437-024f-45c6-9c71-8a9c68d9b921. The IBAHRI found that the Bar received funding from the Angolan government and the delegation visiting Angola was left with the impression that the Bar felt some government pressure.

24 In particular, see UN Basic Principles 2–5, 7–9, 10, 11, 16, 22 and 25.

Chapter 2: Governance and Functioning

2.1. Governance and leadership structure

For a Bar to function efficiently and effectively, there must be strong and clear governance and leadership structures in place, published and available for the membership to scrutinise. Aside from ensuring that it is efficiently and transparently run, it also ensures independence and accountability. Most Bars that are active will have some sort of structure.

Common structures include:

- **an executive** or **council** – a selected number of individuals democratically elected to make key decisions, which are approved by the general membership;
- **committees**, which exercise delegated powers to deal with specific areas (some Bars may have a policy committee to deal with key policy decisions, while in others, the executive body may have responsibility for these);
- **secretariat** – staff and an office dealing with day-to-day activities;
- **general meetings** or **general assemblies** – a means by which general membership can input into and endorse key decisions; and
- **internal elections**, which ensure participation and accountability.

The following sections look at how structures within Bars may work, as well as setting out the minimum requirements necessary for them to function, and to ensure independence and accountability.

2.1.1. *Executive body*

Bars require an executive body, such as a council or executive committee, to take responsibility for key policy decisions and the overall direction of the Bar. The governing body should be provided for in the governing legislation and/or constituent document, specifying its formation, composition and functions.

COMPOSITION AND SELECTION

The executive body of a Bar must be free from interference – particularly from the state – to fulfil its role in upholding the rule of law. For example, the African Commission decided on this issue with regard to the situation in Nigeria when the Legal Practitioners (Amendment) Decree 1993 established a new governing body of the Nigerian Bar Association: the Body of Benchers. Of this, only 31 of the 128 members were nominees of the Bar Association, while the remainder were nominated by government. The African Commission found that the Body of Benchers was ‘dominated by representatives of the government’ and that, as ‘an association of lawyers legally independent of the government, the Nigerian Bar Association should be able to choose its own governing body’.²⁵

Most importantly, the selection process for members of the executive body must be democratic, ensuring the Bar’s independence, as required by UN Basic Principle 24: ‘The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.’

Related to the issue of elections of members of the executive body, Bars need to decide whether members may run for more than one term. For example, the Malawi Law Society allows for executive committee members to run for a second term, something that has proved to be instrumental in carrying out important projects. In conversations with the President of the Law Society of Swaziland, the President recommended that a second term is central to ensuring that projects and activities are taken forward, particularly for Bars that are building their capacity. This may not be necessary in more developed Bars. For example, in Germany, the term of office for members of the council is four years.

Bars must also determine the size of the council or executive committee, and while this will usually depend on the size of the actual Bar, it should be of a size that allows for regular meetings and efficient decision-making. A council or executive that is too large may hinder this.

²⁵ Civil Liberties Organisation (in respect of the Nigerian Bar Association), Nigeria, 22 March 1995, Decision ACHPR 101/93.

FUNCTIONS AND PROCEDURES

The executive body's functions must be clearly defined. Most obvious is its predominant role in respect of key policy decisions (though in some Bars, this may be delegated to a policy committee).

Governing legislation must also provide for how frequently the executive body should meet, as well as the quorum necessary for such meetings. For example, the Constitution for the Law Society of South Africa provides that the council shall hold an AGM at such a place and time to be determined by the council, and shall hold no fewer than five additional meetings during the year.²⁶

Importantly, the executive body must also be representative of its membership, particularly in the case of federal systems and their respective Bars. In fact, in larger federal states, where it is geographically difficult for all members to attend meetings, forms of electronic attendance can be provided for in procedures for the meeting of executive members to counter challenges in ensuring proper representation in the Bar's executive body.

Case study: Canada

The Canadian Bar Association (CBA) is governed by an annually elected president, a past president, board of directors and executive. It has a structure that includes a national council that meets twice a year to make policy decisions, a finance committee that is accountable to the board of directors, and 17 standing committees covering a wide range of areas, including access to justice, equality and professional development. Special committees and task forces are also appointed as necessary. Policy decisions are made by the national council, which includes some 500 members representing various levels of the association.

The immediate past president chairs the council. The 232 voting members of the national council elect the second vice-president and the treasurer. On the advice of the nominating committee, it

elects members of the standing committees. It also appoints editorial boards on the advice of the communications committee, along with special committees and task forces on the advice of the President.

The council initiates and passes resolutions, rules and regulations. It approves the strategic and operational plans, the annual budget and membership fees, as recommended by the board of directors. The council can call special meetings and receive reports from the board of directors, the finance committee, sections and forums, standing and special committees, editorial boards, task forces and branch presidents. It can also refer matters requiring inquiry and report to any section.

Twenty-five voting members of the council constitute a quorum and there is a special quorum of 100 council members for by-law amendments. Transcripts are maintained for each council meeting.²⁷

2.1.2. Secretariat

To effectively and efficiently serve the legal profession and the public, a Bar must have a secretariat – that is, office space and staff – to implement the policies of the executive body, and ensure the Bar continues to work towards fulfilling its aims and objectives. The secretariat is essential to a fully functioning legal profession. It can, among other things:

- take charge of administrative functions;
- process applications and renewals of practising licences or certificates;
- regularly network with other organisations and individuals;
- take charge of budgeting, accounting and managing of funds (in conjunction with the executive, particularly the treasurer);
- respond to and refer complaints received from the public;
- organise meetings, take and circulate minutes;
- ensure all members are kept abreast of important developments;

²⁷ www.cba.org/Who-We-Are/Governance.

- deal with general correspondence;
- serve as a point of contact for the public;
- provide a mobilisation and meeting point for lawyers and administer members' social and welfare activities; and
- serve as a home for important legal resources through a properly resourced reference library.

Larger Bars tend to have secretariats that are usually staffed by a number of full-time legal and administrative personnel to carry out the day-to-day management of affairs. However, smaller Bars, which may be struggling to meet the demands of the legal profession, may have an insufficiently staffed secretariat or none at all, and may therefore rely on members of the council and other committees' members to voluntarily carry out the necessary functions.

Yet an expectation that Bars can fulfil their functions without a secretariat is unrealistic. Council and committee members will typically have their own busy law practices to manage and Bar business may often be conducted only when they have spare time. For example, in the past, the Law Society of Lesotho has recognised, as part of its strategic plan, that a major setback to the Society's successful operations was the fact that it carried out its functions through member volunteerism, and that the pressure of work in its own legal practices was given priority over that of the Law Society.²⁸ The Malawi Law Society experienced similar problems and a dramatic change occurred when an executive director (ED), based at a new secretariat, was recruited.²⁹

An office space and minimum staff for a secretariat is key for a Bar to function effectively. Initially, this may mean being based at the offices of another organisation or institution.

28 The Law Society of Lesotho, Strategic Plan 2006 to 2009.

29 IBAHRI, 'Capacity Building of the Malawi Law Society: Report on the Implementation of Phase 2 of the Project, 3 February 2006 to 3 August 2006' (unpublished, IBAHRI 2006); and IBAHRI, 'Capacity Building of the Malawi Law Society: Report on the Implementation of Phase 3 of the Project' (unpublished, IBAHRI 2007), which both illustrate the increased activity of the Law Society following recruitment of the ED.

2.1.3. Recruitment of staff

Bars will not fulfil their potential if they rely solely on the volunteerism of members. Accordingly, it is important to consider the recruitment of staff, as well as their training, qualifications and role within the Secretariat. Importantly, Bars must ensure that employees are offered contracts of employment with clear terms and conditions, and which accord with national legislation. They must also budget for staff recruitment, and be prepared to justify this to the general membership as a core component of a fully functioning Bar. This section sets out the ideal minimum of secretariat staff – though of course it may take Bars some time to reach this optimum. Particular roles are therefore addressed in order of priority.

EXECUTIVE DIRECTOR

Recruitment of an ED (or executive secretary or executive officer) is essential for overseeing the day-to-day work of the secretariat. Bars will need to ensure that the ED recruited has the appropriate experience for the role and, if not, it should provide relevant training as soon as possible. As the ED will be responsible for managing the implementation of policies and decisions of the executive, Bars should look for an individual that, as a minimum, has:

- management skills to manage and supervise the office and other staff, as well as manage and supervise projects that the Bar may undertake;
- skills in accounting to manage or supervise the production of a budget and annual accounts, manage expenditure and possibly also to account to donors. Even where an accountant is recruited, it is important for the ED to understand basic accounts so that they can ensure that the Bar's finances are being dealt with adequately;
- legal knowledge and experience to keep members abreast of developments; network with other relevant organisations and institutions; and possibly work to develop rule of law-related projects and proposals;
- communication skills (both oral and written), which are key to ensuring

that the ED can liaise with council and committee members, take care of correspondence, liaise with other organisations effectively, and if necessary, write for a website or newsletter that the Bar may run; and

- basic computer skills, essential for conducting online research, maintaining email contact with members and other organisations, producing correspondence and other documents, and producing spreadsheets as necessary.

The role of the ED will vary depending on the size of the Bar, other staff at the secretariat, and how active existing committees are. For example, where there is no administrative support – such as a secretary – the ED will have a greater administrative function (typing and filing, etc). Or where, for example, there is a newsletter and an active editorial or publications committee exists, the ED will not need to supervise or write the newsletter. And where a Bar can afford to recruit an accountant, the ED’s accounting skills need not be as important.

It should be noted, however, that the ED need not necessarily be a lawyer. For example, past EDs of the Law Association of Zambia have included a paralegal – who had many years of practical legal experience but never qualified as a lawyer – and the Association now requires that the ED have a degree in public or business administration.³⁰ Similarly, the Chief Executive Officer of the Law Society of Scotland is not a qualified lawyer, which is quite common with more established Bars. This works well where the ED is primarily managing the day-to-day running of the secretariat, while the Bar works through its various committees. However, in Malawi, the first ED of the Law Society, who was recruited in 2005 through the IBAHRI’s capacity-building project, was a junior lawyer. This was helpful for liaising with other organisations in the area of access to justice and the rule of law.³¹ Nonetheless, he also had to undertake mostly administrative functions, which may be frustrating for a qualified lawyer.

30 Interview with Chief Executive Officer during the Malawi Law Society’s visit to Zambia to meet with the Law Association of Zambia as part of the IBAHRI capacity-building project (Zambia, February 2007); vacancy announcement on the Law Association of Zambia’s website for ED (Law Association of Zambia, 16 February 2016).

31 See n 29 above, IBAHRI, ‘Phase 2’ (unpublished, IBAHRI 2006).

Consequently, Bars should carefully consider whether the role of ED needs to be a qualified lawyer, someone who has considerable legal experience such as a paralegal, or someone with primarily management experience. From the Malawi experience, if a Bar is new in establishing its secretariat and in becoming more active, it may be more useful to recruit a lawyer, as they may have to fulfil the role of subcommittees that are not yet active. They may also have to take on responsibility for developing rule of law, access to justice and human rights projects, as well as liaise with other justice sector stakeholders. A lawyer would also be more familiar with how the profession works and may already have established relationships with its members. However, as a Bar becomes more experienced and dynamic through its subcommittees and general membership, it is arguably unnecessary for the ED to be a lawyer. Instead, someone with practical legal experience and/or managerial experience, along with office space, may be sufficient.

ADMINISTRATIVE SUPPORT

The work of an active Bar will generate a great deal of administration and the ED cannot be expected to undertake all administrative tasks arising at the secretariat. It is essential that support exists to undertake typing of correspondence, minutes and notes, as well as filing, organising and arranging meetings. Malawi is an example where the ED was struggling to fulfil his full potential due to a lack of adequate administrative support.³² Meanwhile, Zambia is an example of a secretariat that has been able to function efficiently due to the support of a legal secretary.³³

In some cases, at the outset, a secretary may be the bare minimum a Bar can afford but it can still make a significant difference to its work. Where resources are insufficient for the recruitment of an ED, it is important to consider recruitment of an administrative person who can perhaps run the office on a daily basis and perform basic administrative support functions.

Where possible, a research officer to serve the Bar secretariat and representative council could also be recruited to assist in undertaking

³² See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished).

³³ *Ibid.*, 'Appendix 3: Report on Trip to Zambia to Meet Law Association of Zambia'.

important research to support the executive and committee members in their work.

ACCOUNTANT

A small Bar becoming more active may struggle to recruit an accountant. But it will be essential to instruct at least one to produce an annual budget and annual accounts to present to its membership each year. For Bars that are growing and unable to recruit someone full-time, a part-time accountant may suffice. Where Bars are managing more funds due to a large membership and compensation, fidelity or charity funds, a full-time accountant may prove to be indispensable.

COMPLAINTS OFFICER

Where a Bar is small and has no separate body to deal with grievances against lawyers, the secretariat may have to process complaints. Even where there is a disciplinary committee, it will be necessary for someone to process the complaints – that is, responding to letters and forwarding complaints on to the relevant person or committee. Smaller Bars, which are in the early stages of establishing a secretariat, may rely on a secretary or the ED to deal with complaints from the public. However, this can slow down the ED in performing other functions considerably or simply lead to a backlog of complaints that are not being dealt with.³⁴ Where Bars receive a large number of complaints, they should plan for the funding of a complaints officer who can process them; a failure to efficiently deal with them will undermine public trust in the legal profession and lead to a perception that there is no real accountability. A complaints officer will also be able to filter out many complaints and relieve the burden for any disciplinary committee.

2.1.4. General assembly

The general membership needs recognition to ensure a sense of ownership. This may be achieved by organising a general assembly that meets regularly through general meetings, including an AGM, as well as special or extraordinary general meetings, which – pursuant to certain conditions – can be called by the membership when necessary.

³⁴ See n 29 above, IBAHRI 2006, 'Phase 2' (unpublished).

The latter two are essential to ensure that the membership can hold the executive body to account at reasonably short notice on important issues. Provision for such meetings, particularly the AGM, should be made in the governing legislation or rules to ensure the general membership is given the opportunity to participate, and the council or executive are accountable to them. Formalising a requirement for such meetings means they are more likely to take place.

The profession can thus be run democratically and in a way that is consistent with the principles of justice and fairness, which Bars must represent at all times. Internal elections further ensure accountability to members, promote participation and are an important component for the legal profession's ownership over its regulation and work. Internal accountability is an essential element of safeguarding professional interests of lawyers and strengthening the profession's independence.

As well as elections for selection of the executive body, they are also key in the passing of important resolutions relating to issues affecting members, such as subscription fees, the allocation of funds and the review and creation of legislation governing the profession.

It is important that internal elections be called by the council or executive, and not be subject to state interference. Nor should the eligibility of those who can vote be determined by forces outside the legal profession. Moreover, to ensure that elections are truly independent, members must be able to vote without any external influence or pressures. It is therefore necessary to ensure that voting is done through secret ballot. This should ideally be provided for in a Bar's governing legislation.

2.2. Strategic planning

2.2.1. Introduction

Strategic planning is essential to the success of any organisation. Put simply, it determines the direction in which an organisation is going over

a period of time, how it is going to get there, and how it will know if it has arrived. Different planning approaches can be adopted:³⁵

- A goal-based approach starts with focusing on the organisation's mission, vision and values, and involves identifying: (i) goals to work towards achieving that mission, vision and/or values; and (ii) strategies to achieve the goals and action planning (who does what by when).
- An issues-based approach often starts by examining issues facing the organisation, strategies to address those issues, and action plans.
- An organic approach might start by articulating the organisation's vision and values, and then developing action plans to achieve the vision while adhering to those values.

Whichever approach is adopted will depend on the nature of the organisation but in all cases, the planning process is a crucial component in achieving a successful strategic plan. In the case of bar associations, it is likely that a mixture of the listed approaches will be used as will be explored in this section.³⁶ The strategic plan should also be published and available to members for scrutiny to ensure accountability.

2.2.2. The importance of strategic planning

SETTING GOALS AND OBJECTIVES

By identifying its goals, objectives and time frames, an organisation is able to prioritise time, attention and resources. Bars have found that a strategic plan can assist in articulating a 'realistic vision' and providing 'a framework from which operational plans can be derived'.³⁷ It can further provide a 'framework' to 'position' an

35 Carter McNamara 'Basic Description of Strategic Planning (including key terms to know)', (adapted from the Field Guide to Non-profit Strategic Planning and Facilitation, Free Management Library, no date), available at <http://managementhelp.org/strategicplanning/basics.htm>.

36 Examples of strategic plans: Law Society of England and Wales – www.lawsociety.org.uk/about-us/our-strategy; Law Association of Zambia – www.laz.org.zm/wp-content/uploads/2014/07/LAZ-Strategic-Plan-2013-to-2018.pdf; American Bar Association – www.americanbar.org/groups/environment_energy_resources/about_us/mission_strategic_plan.html.

37 The Law Society of Lesotho, Strategic Plan 2006 to 2009.

organisation to address its terms of reference, and serves to ‘chart a clear direction’ for an organisation.³⁸

REVIEW

The process encourages a review of strengths and weaknesses, thereby allowing room for improvement.

BENCHMARKS

Strategic planning sets parameters against which the success may be measured: identifying clear goals and objectives (as well as strategies to achieve those goals and objectives); responsibilities and timelines (such as who needs to do what by when); and methods to monitor and evaluate. Without a strategic plan, it is difficult to measure how successful an organisation has been in achieving its aims.

PARTICIPATION AND ACCOUNTABILITY

Importantly, if the strategic planning process is open and participatory, it goes towards achieving greater accountability to stakeholders, and helps cultivate a sense of ownership over the organisation’s activities and achievements. It therefore engenders a common purpose among stakeholders.³⁹

FINANCIAL PLANNING

Strategic planning further encourages financial planning as organisations must consider how funds will be raised and allocated for planned activities.

A strategic plan is essential to achieving a focused, efficiently run, accountable organisation. This is particularly important in the case of Bars because their objectives usually include serving members and the public. The process can allow greater accountability to members, the public and other stakeholders. It ensures the focus is on specific goals and objectives, including how exactly these will be achieved, as well as the timeframe.

2.2.3. Who develops the strategic plan?

This often depends on the experience and resources available to a Bar. The following outlines several options (which may also be combined) for deciding who develops a strategic plan:

38 SADC Lawyers Association and Law Society of Swaziland, Past Strategic Plans.

39 The Law Society of Lesotho, Strategic Plan 2006 to 2009.

EXTERNAL CONSULTANT

External expertise can be particularly beneficial where there is no internal experience of strategic planning, and can add objectivity. Smaller Bars in particular may benefit from external assistance. For example, the Mozambican Bar and the Law Society of Lesotho have held strategic planning sessions with the aid of external consultants, made possible by IBAHRI capacity building projects.⁴⁰

SUBCOMMITTEE

Regardless of whether an external consultant is instructed, it is essential to have individuals internally to initiate and drive the process. The appointment of a subcommittee is a good way of doing this. In Malawi, Law Society members agreed at a general meeting to a proposal from the executive committee to develop a strategic plan. Members mandated the executive to appoint a subcommittee to coordinate and drive the process of developing the plan, which then became the subject of a workshop for members.⁴¹

PARTICIPATION AND CONSULTATION

Participation by and consultation with the appropriate people is an important part of the planning stage and a crucial component for success.⁴² Workshops are also often conducted as part of the strategic planning process. Participation of membership and staff is crucial to providing a sense of ownership and accountability. Consultation with relevant stakeholders is essential to ensuring a Bar is aware of the context within which it works: that is, for example, its role within society and its relationship with the state and other organisations, as well as its regional and international role. A good example for developing Bars, especially in Africa, is that of the Law Society of Kenya, which has taken a participatory input approach and had participation of the Law Society Council, staff and membership. The issues and objectives determined were a result of wide consultation with

40 IBAHRI, 'Capacity Building Program to Support the Law Society of Mozambique: Final Report' (unpublished, IBAHRI 2006), p 5; also The Law Society of Lesotho, Strategic Plan 2006 to 2009.

41 Malawi Law Society, Strategic Plan 2003 to 2007, presented at the 2003 AGM.

42 See n 35 above, McNamara (no date).

stakeholders in order to enhance stakeholders' sense of ownership and subsequent commitment to continuous performance assessment.⁴³

Questionnaires may be developed to obtain feedback from a range of actors, in addition to Bar members, such as: members of donor partners; the public; the judiciary; statutory bodies; civil society organisations; police; and members of parliament. Specifically, involvement at an early stage can lead to funding for particular activities that form part of the strategic plan.

An inclusive approach assists Bars in realising their role within society in relation to others, and determining how they can work together and coordinate to achieve their goals. Through such involvement, Bars will learn how others perceive them and it is a good method of evaluating and monitoring their work.

2.2.4. Developing a strategic plan

Participation and consultation is crucial but this has to be done through an organised approach to ensure effectiveness. Looking at the strategic plans of six different bar associations (including one regional association), some common approaches can be identified:⁴⁴

STRATEGIC ANALYSIS

This involves conducting a review of the Bar's environment and the driving forces within it, as well as an analysis of various strengths, weaknesses, opportunities and threats (a 'SWOT analysis'). The following are examples taken from regional and national Bars:

- The Southern African Development Community's (SADC) Lawyers' Association first conducted a situation analysis to determine the current situation and the demands facing them. It then carried out a SWOT analysis and considered legal, social and economic challenges facing the Association, both internally and externally.
- The Mozambican Bar held a preliminary meeting with 15 members to assess the capacity of the organisation and discuss weaknesses.

⁴³ Law Society of Kenya, Strategic Plan 2012 to 2016.

⁴⁴ Law Society of Kenya, Strategic Plan 2007 to 2012; Malawi Law Society, Strategic Plan 2003 to 2007, presented at the 2003 AGM; see n 40 above, IBAHRI 2006. See also Lawyers' Association of Swaziland Strategic Plan 2004 to 2005; and SADC Lawyers Association, Strategic Plan 2003 to 2008.

- In Malawi, the Strategic Development Subcommittee undertook a review, which documented the background to the Law Society and its budgeting, and conducted a survey on stakeholders' perceptions of it.
- An external consultant in Lesotho conducted a needs analysis at the outset through interviews and questionnaires with stakeholders, carried out a SWOT analysis and reviewed their governing legislation.
- In Kenya, the process began with an intensive organisation assessment to consider what had produced the current situation in the Law Society. This involved an evaluation of existing structures, an assessment of its continued relevance, and consideration of achievements realised thus far. There was also a diagnosis process, which helped identify areas that required strategic responses.
- In the US, the Connecticut Bar Association formed a Long Range Planning (LRP) Committee, which determined priorities and long-range objectives, prior to requesting the ED to guide the development of the strategic plan consistent with industry best practices. Essential to the development of the plan were: the ED's operational assessment of the association's staffing and projects; and the LRP Committee's input and observations regarding the SWOT.

SETTING STRATEGIC DIRECTION

Bars require goals and objectives to have a direction and focus. Formulating a strategic direction involves coming to conclusions about what the Bar must do as a result of the major issues and opportunities (identified through the strategic analysis) facing it. These conclusions include what overall accomplishments or strategic goals the organisation should achieve, as well as the strategies to achieve the accomplishments. It also involves identifying or updating a mission statement, vision or values statement.⁴⁵

45 See n 35 above, McNamara 'Basic Description of Strategic Planning'. McNamara also sets out that mission, vision and value statements can be defined as follows: 'A Mission Statement is a brief description of the purpose of the organisation'; 'A Vision Statement is usually a compelling description of how an organisation will or should operate at some point in the future and of how customers or clients are benefiting from the organisation's services and products'; and 'a Values Statement includes overall priorities in how the organisation will operate'.

ACTION PLANNING

It is important to set out how strategic goals will be accomplished. This often includes specifying objectives or milestones within each strategic goal. Each objective is associated with actions needed to achieve it; implementing a strategy is implementing a set of activities along the way. Action planning also includes specifying responsibilities and timelines with each objective (who needs to do what by when), as well as methods to monitor and evaluate the plan.

The Law Society of Malawi produced an agenda for action, which identified the output (action taken or result achieved), timeframe (within which to achieve the result), person responsible and verification (confirmation of achievement or evidence of attainment of the goal). In Kenya, the Law Society drew up an implementation plan (fulfilling the same purpose as an action plan), which provided for monitoring and evaluation of the strategy. Further, as access to information is an essential component of a successful strategy, the Law Society of Kenya's strategic plan involved annual reporting on the progress of output, outcomes and results, to members, partners and donors, to provide a clear status of projects, programmes and policies.

2.2.5. Determining priorities

Strategic planning is a way for Bars to focus on priority activities and essential work. By considering its aims and objectives, a Bar can identify its priority work. Primarily, all Bars should be working to promote the rule of law, human rights and access to justice, as these are fundamental functions of the legal profession. But the strategic process can also be used to establish subcommittees with specific objectives. The following should be considered priority and essential activities:

- **Upholding and promoting the rule of law, including the independence of the judiciary and human rights.** Activities include participating in, initiating or supporting legal reforms; undertaking advocacy in support for the rule of law; and formulating rule of law and human rights projects.
- **Promoting access to justice.** Bars must prioritise their important function of providing assistance to the public. This may be done

through pro bono legal work but can also be achieved through public interest cases, civic education projects and working with other organisations to provide access to justice to the public.

- **Regulating and disciplining lawyers, including ensuring compliance with professional ethical standards.** Regulation of the legal profession is essential to ensuring accountability. Bars should ensure that their strategic planning process prioritises putting in place and maintaining effective disciplinary mechanisms.
- **Providing CLE for lawyers.** Continuing education for lawyers is essential to ensuring that the high professional standards expected from them are met. It is also a fundamental part of creating a legal profession that has the knowledge and skills to fulfil its role within society.
- **Ensuring a fully functioning and effective bar association.** Bars cannot fulfil their aims and objectives if they lack capacity in terms of staff, resources, training and organisation. Developing Bars must, therefore, prioritise as a strategic objective the creation of a fully equipped and trained secretariat that can take responsibility for the day-to-day running of the Bar. In addition, they must ensure effective organisation, not only through an executive committee or council, but also through the use of subcommittees that can assist the Bar achieve its aims and objectives.

2.3. Committees

2.3.1. Establishing committees

Committees may be standing committees and provided for by statute or regulations, such as a Disciplinary or Ethics Committee. For example, Ireland's Solicitor's Acts of 1954 to 2008 require the Law Society to regulate solicitors, and the Charter of the Law Society gives the Council powers to make by-laws. By-laws were subsequently made by the Council providing for the passing of Council regulations, which delegate regulatory functions of the Society, including the consideration of complaints, to the Regulation of Practice Committee, and the Complaints and Client Relations Committee.

In Malawi, the Law Society's Disciplinary Committee is established by the Legal Education and Legal Practitioners Act 1965. Among the Japan Federation of Bar Association's statutory committees are: a qualifications screening board; a disciplinary actions committee; and a disciplinary enforcement committee.⁴⁶

However, Bars should also be able to set up other committees as and when necessary, and provision will need to be made for this in governing legislation or regulations. They should ideally be set up to deal with key areas in which Bars should be active and, therefore, be aimed at achieving its aims and objectives. The Japan Federation of Bar Associations has an extensive list of standing and specialist committees, which cover areas ranging from human rights to intellectual property.⁴⁷

Bars may need to address specific pressing issues. For example, the Afghanistan Independent Bar Association established a Corruption Committee, a Woman's and Children's Issues Committee and a Commercial Law Committee, reflecting the concerns in the country with respect to the first two matters, and the need for a third when there had been virtually no commercial practice for decades.

Meanwhile, the Law Society of Kenya has established committees on the following areas, tasked with fulfilling particular facets of its objective of fostering the administration of law and justice:

- Continuing Legal Education Committee;
- Discipline Committee;
- Ethics Committee;
- Constitutional Reform, Human Rights, Public Interest and Legal Aid Committee;
- Standing Committee on Legislation, Law Reform and Scholarly Interest;
- Law Reporting and Publications Committee;
- Editorial Committee of the Law Society of Kenya Journal;
- Environmental Committee;

⁴⁶ There are a total of seven statutory committees. See Japan Federation of Bar Association website at www.nichibenren.or.jp/en/about/us/organization/committee.html.

⁴⁷ *Ibid.*

- Gender Committee; and
- In-House Counsel Committee.⁴⁸

When establishing any committees, it may also be necessary to consider whether membership will include lay members. Some Bars, for example, have lay members included in committees who perform some regulatory function (such as an ethics or complaints committee) or deal with compensation. If lay representation is permitted, it is good practice to advertise these appointments or have some other transparent recruitment process. Indeed, recruitment for all committees should be pursuant to a transparent and democratic process.

2.3.2. The importance of subcommittees

The establishment of committees or subcommittees can be fundamental to ensuring an active Bar, as it is not possible for the council or the secretariat alone to deal with all the Bar's activities and functions. The use of committees also allows lawyers with experience and an interest in a particular area to focus on specific issues. Where lawyers have volunteered themselves to be on a particular committee, they are more likely to be active.

The importance of establishing subcommittees can be demonstrated by the situation of the Law Society of Malawi. The Law Society had very few subcommittees and those that did exist were inactive, which made it difficult for the Law Society to perform all its functions. For example, when it came to working on law reform issues, producing a newsletter or organising CLE, it was left to the newly appointed ED (who did not have the capacity), or to individual executive members willing to offer their time when available. However, shortly after new subcommittees were formed through the IBAHRI capacity-building work, the Law Reform Committee became active and meetings were held with the Publications Committee to work on the newsletter.⁴⁹

⁴⁸ See Law Society of Kenya website at www.lsk.or.ke/committees.php.

⁴⁹ See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished), p 9. During this phase of the project, the IBAHRI Legal Specialist worked with the Malawi Law Society to set up a number of subcommittees in the following areas: human rights and constitutional law; CLE; publications; legal aid; intellectual property; international law; international trade; environmental affairs; commercial and corporate affairs; gender, child and family affairs; and fidelity fund and professional indemnity. The committees were approved at a general meeting and emails were sent to the general membership to express an interest in joining these committees.

2.3.3. *Activating committees*

It can be a challenge to encourage members to be more active through committees. However, Bars can persuade them to participate more by demonstrating the potential benefits. Individual lawyers have much to gain from becoming more active through their Bar. For example, involvement in a committee can lead to exposure to national, regional and international organisations, and provides opportunities to attend meetings and network. To illustrate, two members from the Malawi Law Society's Human Rights Committee were selected to attend a training workshop in Zimbabwe on litigating before the African Commission.⁵⁰ Lawyers who work on a Bar's newsletter can also raise their profile if it is circulated to relevant organisations throughout the country and internationally. Bars can encourage committee members to link up with committees of other Bars to exchange experiences, and these networks may lead to opportunities for the individuals concerned, as well as for the Bar.

The Law Society of Botswana tried to activate its members by launching a project entitled 'Why Should I?'. This involved circulating questionnaires and consulting members on what they thought the Law Society should be doing.⁵¹ Bars can, therefore, take a more proactive approach to involving its members.

50 *Ibid.*

51 Telephone interview with Patricia Obakeng Makhoana, Executive Secretary of the Botswana Law Society (16 March 2007).

Chapter 3: Financial Responsibility

3.1. Budgeting

3.1.1. *The importance of a budget*

Without financial planning and accountability, a Bar will be unable to function effectively. Many smaller Bars struggle due to a lack of resources, which may often be a result of failure to undertake financial planning and to budget for important activities. It also assists Bars in planning for the year ahead. For instance, before the Malawi Law Society began producing a budget, it found that funds were being spent as and when required. This often left little for later in the year when perhaps important activities or opportunities arose, and which could have been taken advantage of, had funds not been used for a less important activity earlier in the year. Accordingly, the Malawi Law Society began producing budgets for presentation to the AGM together with details of the activities that were to be undertaken.⁵²

The production of a budget also assists Bars in identifying whether more funds need to be raised. For example, it can justify a review of subscription fees if existing income is not covering essential activities. Members will not want to pay more in the way of fees unless they can see how that money is to be used. This approach was taken by the Malawi Law Society, where subscription fees had not been reviewed for many years and were eventually increased after the executive presented a budget for projected expenditure.⁵³ Budgeting allows Bars to identify areas where other fundraising activities may be required or where donor funding could be obtained.

Perhaps most importantly, the creation of a budget for presentation to the membership is crucial for establishing an accountable and democratic Bar; it allows the general membership to have a say in how funds are to be allocated and, therefore, to contribute to determining the overall direction of the Bar.

⁵² See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished).

⁵³ *Ibid.*

3.1.2. Factors to consider

There are several factors to take into consideration in the production of a budget. The 2015 approved budget for the Law Society of Upper Canada provides some useful examples when planning a budget.⁵⁴ These include:

- setting budget goals to be met;
- determining financial outcomes, for example, projections for the Law Society's available funds;
- budget scenario sensitivities, which include a number of assumptions and variables that have the possibility of varying the projected outcome. The major sensitivities identified by the Law Society in its 2015 budget included: membership growth; salaries, benefit and other expenses; investment returns on funds (for example, the Law Society's operations are supported by the combined investment income of a General Fund and Compensation Fund); returns from continuing profession development activities; regulatory issues, such as instructing external counsel and expert witnesses in claims against the Law Society; and
- budgetary and fiscal risks such as inflation and compensation fund claims.

3.2. Annual accounts and auditing

Most Bars, through their governing laws (either set out in primary legislation or regulations) will be required to have their accounts audited by an independent accountant for presentation to the general membership along with a report on their expenditure.⁵⁵ Producing accounts is an essential part of ensuring transparency and accountability to members. Transparent accounting makes all sources of income known, thereby contributing to the Bar's independence, as well as enabling Bar

⁵⁴ Law Society of Upper Canada, '2015 Approved Budget Summary' (Law Society of Upper Canada 2015), available at www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Reports/2015-budget-summary.pdf.

⁵⁵ For example, s 38 of the Law Society of Kenya Act 2014 (s 38 (1): 'The Council shall cause proper books and records of accounts of all funds, property, assets and liabilities of the Society to be kept, and to be audited as of the 31st December of every year. (2) The Council shall present the audited accounts of the immediately preceding year at every ordinary general meeting.').

members to scrutinise the expenditure and act as a check on the executive body. It is also an important way of ensuring income is spent on activities for fulfilling the Bar's aims and objectives, as set out in its governing laws.

On a practical level, Bars must ensure they instruct an accountant to audit their accounts in a timely manner. Fundamental to the production of accounts is the need for efficient bookkeeping in respect of all income and expenditure. Accordingly, systems must be in place for maintaining a record of all money spent and received. There should also be procedures for authorisation of expenditure, to ensure accountability. In the case of smaller Bars, there may not be staff based at a secretariat, and it will be necessary for the treasurer and/or the executive body to approve all expenditure.

Where a Bar does not have a separate finance committee, it can consider specifying the amounts to be authorised by the ED, treasurer and executive body. Alternatively, or additionally, different committees may be allocated a separate budget for their work, and be made to account for its expenditure each year. Ideally, financial reports should be produced regularly throughout the year.

3.3. Managing subscriptions

Bars of course require resources to function and achieve their objectives. Subscription fees are often an essential way of ensuring that they have a regular income to provide a service to members and the public. Smaller Bars may be almost entirely reliant on subscription fees as their main source of income. Fees are also an important way of ensuring the Bar's independence as it helps to avoid a situation where they need to accept financial assistance from the state. Many Bars will not accept funding from the state in order to maintain their independence.⁵⁶

In some jurisdictions, subscription fees may only be used for certain purposes, in line with the principle of independence. For example, in the UK, the Law Society of England and Wales can only use practising certificate fees

56 In the past, the IBAHRI has expressed concern over the Angolan Bar receiving funds from the government. See n 23, IBAHRI 2006, p 26. The IBA has been similarly concerned with the Law Society of Swaziland's acceptance of High Court offices (funded by the government) as their premises due to their inability to pay for rent or purchase of office space themselves.

for certain purposes, namely: regulatory activities; non-regulatory activities provided by the Law Society, which are permitted under the Legal Services Act 2007 – such as law reform activities; and levies required to be paid under the 2007 Act, which include part of the costs of the Legal Services Board, the Legal Ombudsman and the full cost of the Solicitors Disciplinary Tribunal.

DETERMINING THE AMOUNT

Bars must determine, and regularly review, the level of subscription fees through: consultation with members; consideration of expenditure required to perform its functions; and by taking into account how much lawyers will be able to pay.

In the UK, the Law Society of England and Wales has a consultation process for the purposes of determining practising certificate fees and the budget. It produces a consultation paper setting out the period of consultation for members, which is made available on their website, and then produces a summary of the findings. The Law Society Council makes its decision based on these findings.

Bars may also want to consider introducing a graded scale for fees so that the amount paid depends on how long a lawyer has been admitted, and which will often reflect how much they are able to charge clients. This is the case in Kenya, where the fee scale is broken down for lawyers as follows: newly admitted; below five years of practice; five to 19 years of practice; over 20 years of practice; and advocates aged over 70 years.⁵⁷

Bars will struggle in their work if fees are not regularly reviewed, particularly in the case of smaller Bars that are growing and becoming more active. For example, the Malawi Law Society had, for many years, fixed annual subscription fees, which were not managing to fund all of the secretariat's work. Through the IBAHRI capacity-building project, it had obtained assistance with activities, such as: running of the secretariat; payment of employees' salaries; CLE events; and training for the ED. But to sustain these activities, it was clearly necessary to revisit their subscription fees. Consequently, the executive committee produced a budget for annual expenditure, which took into account essential work of the secretariat, such as administrative costs, payment of employees'

⁵⁷ www.lsk.or.ke/index.php/practising-certificates.

salaries and running of a CLE programme. Using this budget, it justified an increase in subscription fees to members and fees were raised. It should be noted that the Malawi Law Society did face considerable opposition from members, demonstrating the importance of being able to strongly justify an increase. This involves planning and budgeting for their work, and justifying this to the general membership.⁵⁸

ENSURING TIMELY PAYMENT

One of the challenges facing Bars that are in the process of building their capacity, is the failure of members to pay subscription fees on time, if at all.⁵⁹ For example, in Malawi, of the 350 registered lawyers, only 177 had paid their subscription fee and were practising legally. Consequently, in 2013, the Law Society issued a press statement announcing that it would publish the names of all licensed lawyers in the local newspapers to protect the public. Most lawyers pay their fees on time to make sure their names were included.⁶⁰

A further option can be to introduce a financial penalty and ensure its enforcement. For example, in Zambia, members who do not pay their fees are subject to a penalty equivalent to 30 per cent of the total amount due. This penalty system is regulated by the Legal Practice Committee, and provided for in the Practice Rules as opposed to primary legislation. The establishment of a penalty system may be an effective way of requiring members to pay on time, and can further serve as an additional income. It may be that this is best done through legislation, in which case it is fundamental that the Bar and lawyers put this into practice.

When introducing or improving a system for the payment of subscription fees, Bars may consider:

58 For example, n 29 above, IBAHRI, 'Phase 2' (unpublished, IBAHRI 2006).

59 Another example is the Law Society of Lesotho. Telephone interview with Lindiwe Siphomolo, former Secretary of the Law Society of Lesotho (28 November 2007), indicated that fees are not paid on time. Similarly, telephone interview with Cyril Mphanga, President of Law Society of Swaziland (29 November 2007), indicated difficulties with collecting fees on time.

60 *Nyasa Times*, 26 March 2013, and information provided by Godfrey Kangaude, Malawi Law Society ED (24 May 2016).

- linking fees to an annual budget;
- reminding members of governing legislation;
- prohibiting practice to override statutory obligations;
- taking stronger action through ensuring compliance with any existing primary and secondary legislation relating to fees; and
- exploring how further mechanisms for compliance can be introduced into existing legislation, such as financial penalties for non-payment.

3.4. Fundraising and accounting to donors

Bars must have a fundraising strategy to put ideas into practice. For example, through the IBAHRI's capacity-building work, it was found that smaller associations find lack of funds a major drawback in achieving all their aims and objectives.⁶¹ Bars should, therefore, consider how funds are to be raised for specific projects, such as: establishing a secretariat (which would include payment of office rent or purchase of land or building, and recruitment of staff); running of CLE events; and administering disciplinary procedures.

There are a number of ways that Bars can generate income but the challenge often faced by developing Bars is that the general membership does not realise the important functions that a Bar, as a professional body, is required to play in society. A failure to appreciate this often results in a view that it does not require much money to function.

In light of the challenges in obtaining sufficient financial support from the general membership, Bars must look to raise funds through other means, and this can require time and planning. Accordingly, a fundraising subcommittee can be instrumental to raising funds generally and/or for specific projects and activities. The following are some fundraising initiatives that can be considered:

61 For example: Lesotho (see n 59 above, interview with Lindiwe Siphomolo, 2007); Swaziland (see n 60, interview with Cyril Mphanga 2007); and Malawi (see n 29 above, IBAHRI, 'Phase 2' (unpublished IBAHRI 2006), and IBAHRI, 'Phase 3' (unpublished, IBAHRI 2007)).

- **Organising specific fundraising events.** These may be CLE seminars, workshops, or social fundraising events such as dinners. If events are well organised, members will be willing to pay.
- **Generating an income through, for example, journals, newsletters or other publications.** These, and advertising space therein, can be sold to the private sector. For example, the Law Association of Zambia has considered producing an Annual Report in book form with advertising space that can be sold to institutions who want to advertise to lawyers.⁶²
- **Writing to the private sector for sponsorship of an activity or event.** For example, large businesses may be willing to sponsor a conference or dinner that can then generate an income.
- **Obtaining funding from the donor community through writing proposals or working in conjunction with them in relation to specific activities.** Bars can utilise links with national, regional and international organisations to obtain funding for a range of activities, such as: holding CLE events; printing a Code of Ethics; and undertaking rule of law projects and human rights work. For example, the Malawi Law Society and the Times Group entered into a partnership to launch a project on human rights awareness and legal literacy, which is funded by the OSISA, and carried out by way of newspaper articles, radio programmes and mobile legal clinics.⁶³
- **Implement penalty fees** where, for example, members have not paid their subscription fees on time.
- **Selling the robes required to be worn for court appearances and copies of the Advocates Law and Professional Code of Conduct,** as done by the Afghanistan Independent Bar Association, which sold copies of the Advocates Law and Professional Code of Conduct, as well as robes.

Where donor money is received, accounting to the donor organisation is an important aspect of ensuring accountability of the Bar, and is usually

62 Law Association of Zambia, Strategic Plan 2013 to 2018, p 13, available at www.laz.org.zm/wp-content/uploads/2014/07/LAZ-Strategic-Plan-2013-to-2018.pdf.

63 <http://malawilawsociety.net/pages/projectsosisa.html>.

a requirement of the funding. Donor organisations will often have their own rules on accounting for funds. However, the following are some common points that Bars need to be aware of:

- Donors may require a separate bank account to ensure their funds are used specifically for the purpose for which they are intended, and to enable greater transparency.
- Bars will be required to maintain a record of all expenditure and proof of this, such as receipts and invoices.
- Donors may require the Bar to request authorisation for certain or all expenditure.
- Bars will often be required to establish a system whereby authorisation within the structure of the Bar is required before donor funds can be spent.

Where donor money is accepted, it is important that such acceptance does not, and is not seen to, impugn the Bar's independence.

3.5. Fidelity or compensation funds

Fidelity or compensation funds are instrumental to Bars fulfilling their objective of protecting and acting in the interests of the public. They serve to compensate a client who has suffered loss as result of a lawyer's dishonesty or criminal offence, and where it is not possible to obtain any compensation from the lawyer concerned. By establishing a compensation fund, Bars are intervening to ensure that the client is protected at all times, which is an essential part of accountability and maintaining public confidence in the legal profession.

The South African Attorney's Fidelity Fund (AFF) is an exemplary model. Established to protect the public against loss as a result of theft of trust funds by practitioners, it is based on income derived principally from interest earned on practitioners' trust accounts, which enables the AFF to offer valuable financial support to the legal profession. Money from the AFF is used to administer it but also funds professional indemnity insurance for all lawyers, which is quite rare as in most jurisdictions, lawyers or law firms are required to pay for professional indemnity themselves.

The AFF is also able to fund the activities of the South African law societies, who each take a share of the trust interest. It further covers disciplinary and regulatory costs, as well as legal education and development of the profession, grants for university, bursaries, and grants for the university law clinic. It is administered by its own management and has a Board of Control that formulates policy and decision-making with respect to the AFF's affairs.⁶⁴

Similarly, the Law Society of New South Wales in Australia has a Legal Practitioners' Fidelity Fund. This is administered by the Law Society and funded by annual contributions from solicitors as part of their Practising Certificate requirements. The money received is used to pay compensation to members of the public (whether they were a client or not) who successfully claim financial loss due to a solicitor or firm's dishonest failure to pay or deliver trust money or property.⁶⁵

These examples, however, are largely successful due to the number of lawyers who can contribute through their trust accounts or practising certificate fees. Smaller Bars may initially find it a challenge to start and sustain such a fund. For example, the Law Society of Swaziland faced challenges with regards to its fidelity fund due to the small number of practitioners and the lack of capacity to manage the fund. A former President of the Law Society reported that the fund was so small, one claim would wipe it out.⁶⁶ Similar problems were faced by the Law Society of Lesotho.⁶⁷

It takes a considerable amount of time for a Bar to establish and maintain an effective fidelity or compensation fund. But it is positive if Bars at least introduce such funds in their legislation and aim to sustain them. The first step is to introduce the concept within the Bar, plan how it will work (preferably through a subcommittee specifically set up for this purpose), and thereafter provide for it through legislation.⁶⁸ The examples of Lesotho and Swaziland demonstrate that Bars must also consider how

64 www.fidfund.co.za.

65 www.lawsociety.com.au/community/makingacomplaint/Legalpractitionersfidelityfund/index.htm.

66 See n 59 above, interview with Cyril Mphanga 2007.

67 See n 59 above, interview with Lindiwe Sephomolo 2007.

68 For example, the Malawi Law Society established a Fidelity Fund and Professional Indemnity Committee to consider how these would work.

the funds will be managed and sustained. Meanwhile, the Law Association of Zambia is an example of a Bar that has a fund that can grow and be managed, as it has a system in place that requires a portion of a member's subscription fees to automatically be diverted into the compensation fund, which is held as government bonds and reinvested every two months. As a result, the Association is in a position to consider other investment options as it has a gradually growing fund that is being managed.

Where such a fidelity fund exists, it should be separated from other funds of the Bar. This is not only essential to ensuring that the funds are not diminished, but also to comply with the standards and duties expected from the legal profession.

Bars can also consider establishing a reasonable or fair maximum payment to any one individual, so that the fund cannot be cleaned out by one large claim to leave nothing for other claimants. It is further advisable that Bars insure the fund for claims made over a certain amount, as well as take out insurance against theft by cyber criminals.

3.6. Charitable funds

Established Bars that are able to may also offer assistance to members or members' families through a dedicated fund. For example, the New York State Bar Association (NYSBA) has a Lawyer Assistance Program that helps lawyers and/or their families facing hardship.⁶⁹

Some Bars may set up a benevolent fund, such as the Law Society of Kenya's Advocates Benevolent Association (LSKABA). It collects contributions from its members for the purpose of supporting advocates' dependants in the event of their death. The LSKABA was formed by statute and is managed by a board, which makes all policy decisions on its behalf. It aims to help poor or distressed persons who are: firstly, members of the association and the widows, children and other dependents of the deceased advocates; and secondly, but only in special circumstances, advocates who are not members of the association, and others who, for any reason, have ceased to be advocates.⁷⁰ Every member of the Law Society of Kenya, who has paid subscription fees, is a member of the LSKABA.

⁶⁹ www.nysba.org/lap.

⁷⁰ Section 23 of the Advocates' Act Cap 16.

The Hong Kong Bar operates a similar benevolent fund offering financial assistance to needy and deserving members of the Hong Kong Bar who are, or have been, in practice in Hong Kong. Beneficiaries may be assisted by way of a loan, grant or other means. The fund has a Fund Committee, which manages the funds and an annual statement of accounts is required to be submitted to the Committee.⁷¹

In the UK, separate to the Law Society of England and Wales, lawyers have set up a Solicitors Benevolent Association (SBA), called ‘SBA – The Solicitor’s Charity’, which helps solicitors, past and present, and their families in times of financial need, as a result of illness, accident or redundancy. It relies on donations of solicitors, law firms and local societies.⁷² While smaller or developing Bars may not have a formal charity fund, they may nonetheless raise money for the family of a member who has passed away, as is done in Malawi. However, where this is the case, Bars should be encouraged instead to establish a designated fund.

Finally, Bars may also set up charity funds for specific purposes, such as the ABA Fund for Justice and Education, which supports public service and education programmes.⁷³

Charity funds can be an important way of Bars fulfilling the important objective of assisting its members.

3.7. Professional indemnity insurance

3.7.1. Introduction

Professional indemnity insurance covers civil liability claims arising from a lawyer’s work in private legal practice. These claims most commonly involve professional negligence. It ensures that the public does not suffer loss that might otherwise be uncompensated, which is essential to maintaining public confidence in the integrity and standing of the legal profession.⁷⁴

71 www.hkba.org/the-bar/funds/funds3.html.

72 www.sba.org.uk.

73 www.americanbar.org/groups/departments_offices/fund_justice_education.html.

74 For example, www.lawsociety.org.uk/support-services/advice/practice-notes/professional-indemnity-insurance.

Many jurisdictions with a well-established legal profession require professional indemnity insurance as a condition for renewal of a practising licence or certificate. For example, the ABA Model Court Rule on Insurance Disclosure requires lawyers actively engaged in the practice of law to disclose whether they maintain professional liability insurance on their annual registration statements. (Lawyers engaged in the practice of law as full-time government or organisational employees are exempt from this requirement.) The purpose of the rule is to provide potential clients with access to relevant information to make an informed decision when hiring a lawyer. To date, 17 US jurisdictions require disclosure on the annual registration statement, with seven additional jurisdictions requiring disclosure directly to the client.⁷⁵

Similarly, lawyers in England and Wales must demonstrate to the SRA that they have a policy of insurance in place as part of their practicing certificate renewal process.⁷⁶ Statutory requirements can detail the type of professional indemnity insurance required. For example, the Attorney-General in Australia, pursuant to statute, approves the type of professional indemnity insurance policies and the terms of the policies that can be offered, and a minimum amount of cover is specified each year.⁷⁷

Unusually, in South Africa, as already mentioned, money from the Fidelity Fund is used to pay professional indemnity insurance for all lawyers. This is in contrast to most jurisdictions where lawyers or law firms will be expected to bear this cost themselves.

3.7.2. Professional indemnity models

The following is a brief overview of the approaches available to give effect to a requirement for law firms to hold professional indemnity insurance as a condition of entitlement to practise.⁷⁸ This overview compares and contrasts single mandatory master policy schemes with a freedom-of-choice approach.

⁷⁵ Contribution from Art Garwin, Director, Centre for Professional Responsibility, ABA.

⁷⁶ www.sra.org.uk/solicitors/code-of-conduct/indemnity.page.

⁷⁷ Section 95 of the Legal Profession Uniform Law Application Act 2014. For example, for practising year 2016–2017, the minimum level of professional indemnity insurance that a New South Wales barrister must take out is US\$1.5m. See www.nswbar.asn.au/for-members/pii.

⁷⁸ Contribution on Models of Professional Indemnity provided by Norville Connolly, Officer of the IBA BIC, former President of the Law Society of Northern Ireland (LSNI) and LSNI's nominee to the IBA.

MASTER POLICY SCHEME

This is a collective arrangement under which all members (or all member firms) that are obliged to have professional indemnity insurance are insured under a single scheme. A master policy scheme can provide professional indemnity insurance to a profession in a variety of ways:

- **Commercial insurers' scheme.** This is where one or more approved commercial insurers act in conjunction. The professional indemnity insurance contracts are between individual practitioners and firms and the approved insurer.
- **Mutual fund scheme and statutory fund scheme.** Both mutual and statutory funds contemplate a single-purpose fund into which all premium revenue or member contributions are paid, and from which claims payments are made and administration expenses are met. The operator of the fund is contractually liable to indemnify insured practitioners and firms against claims arising from their practices. The operator of the fund enters into an individual professional indemnity contract in its own right. It meets claims from the fund and from the proceeds of any reinsurance it has arranged to protect the fund.
- **Hybrid scheme.** This is a combination of the two aforementioned models. Under a hybrid model, the contracts of insurance are composite, with claims to a nominated monetary level being met from the fund and claims above that level being met by the insurer. A variation on this model is for the profession's cumulative risk to be insured in 'layers', with a layer being insured by a captive insurer and the balance being insured by a commercial insurer.

Benefits

A master policy scheme can achieve adequate consumer and solicitor protection; the suitability of such a scheme has been proven in a number of Australian and Canadian jurisdictions, as well as Scotland, Northern Ireland, Hong Kong, Singapore, Malaysia and the Isle of Man. Benefits include:

- **Group purchasing power.** The market power is commensurate with the size of the profession. The ability of an insurer to assess risk and set a premium for the whole group increases the appetite of an insurer for that risk.

- **Reduced administration costs.** Using a common process and negotiating with selected insurers reduces the administration costs for the insurers and for the profession. Transaction costs such as insurance broker commission are reduced, resulting in a lower total cost of cover.
- **Relative pricing stability.** As insurance pricing is negotiated with a single panel of insurers and, based on the losses of the profession as a whole, there is less volatility in pricing and the profession is less exposed to general insurance market fluctuation. Conversely, however, a sustained increase in claims will drive up price more quickly for members than an open market arrangement.
- **Certainty and uniformity of cover.** All members are guaranteed cover, regardless of individual claims experience.
- **High quality cover.** Master policy schemes often develop very broad coverage as the profession or trade association seeks to ensure that as far as possible, the insurance responds to provide public protection, maintaining the reputation of the profession.
- **Cover for run-off liabilities.** Automatic run-off cover is provided for firms that cease to practise. This cover remains in place for as long as the master policy is in existence.
- **Increased data accessibility.** Loss data and key metrics can be recorded and maintained in an agreed format, ensuring meaningful and consistent reporting.
- **Expert claims handling.** This can provide invaluable support to the profession and result in improved claims outcomes, thereby reducing the total cost of claims.
- **Ability to target meaningful risk management.** There is a greater ability to effectively use data to inform the profession why losses occur, and to take corrective action through focused risk management.
- **Flexible premium allocation.** The master policy holder has the ability to allocate the premium/contributions differentially among its members if it chooses. Alternatively, this can be at the discretion of insurers. This allocation could be on the basis of the risk an individual lawyer or law firm poses, that is, claims risk and/or experience.

- **Greater alignment of interests.** There is focus on profession-wide, long-term risk management, driven by the economic incentive to minimise the types of conduct that cause members of the profession to have claims. Litigation with the potential to affect the whole profession can also be managed in a consistent manner with a view to achieving the best result for the profession.

Disadvantages

Disadvantages of a master policy scheme include:

- **No competition or choice at buyer level.**
- **Direct exposure to insurance market cycles.**
- **Exposure to possible insurer insolvency.**
- **Potential for insurance disputes**, which can arise where insurers' participation changes from year to year.
- **Cross-subsidisation**, as it may be perceived that a master policy can disproportionately benefit smaller and higher-risk firms.
- **The potential that a master policy might not renew on acceptable terms.** If this were to occur, an alternative would need to be hastily developed.
- **Termination of a scheme**, which would require arrangements to be made to fund claims against firms no longer in existence but previously covered under the scheme.

FREEDOM OF CHOICE

Under a freedom-of-choice model, members negotiate directly for professional indemnity insurance in an open insurance market with qualifying insurers. The qualifying criteria for participating insurers is usually agreed with the profession's representative or regulatory body, and insurers agree to provide cover at least equal to specified minimum terms and conditions.

The freedom of choice model is the current professional indemnity insurance system operating in England and Wales and in the Republic of Ireland.

Benefits

The ability of individual firms to purchase professional indemnity insurance in an open market environment has some advantages, which include:

- **All risk is transferred to insurers.**
- **A competitive insurance market is stimulated.** This approach will entice insurers into the market and their competition for market share will be reflected in premiums and terms of cover.
- **Premiums will reflect the risk presented by firms.** Premiums will be based on each firm's own risk profile, claims history, risk management practices, and chosen deductible, as opposed to them subsidising a profession-wide risk profile under which they are rated for claims they did not have, charged for risks they do not have, and not rewarded for resources they devote to maintaining good risk management and practice standards.
- **Firms can negotiate on price and cover.**
- **Reward for good risk management.** Insurers seek to identify and increase pricing for perceived poor risks and will aim to reward firms that invest in good risk management with lower premiums.
- **Reduction in cross-subsidisation.** Insurers will adjust their rating to reflect risk and this reduces the potential for subsidising poorly performing firms.

Disadvantages

There are a number of disadvantages in an open market arrangement, including:

- **Selective approach of insurers.** This may result in firms that are not perceived as good risks being declined insurance or being offered insurance at a cost that makes practising unviable.
- **Exposure to insurance cycles.** Terms available in the open market fluctuate according to factors that cause cycles in the insurance industry resulting in unpredictable sharp fluctuations or the unavailability of cover.
- **Increased administrative costs.** With the ability of firms to negotiate individually with insurers, the administrative cost for both parties is higher

than for a master policy. This increased cost is reflected in premium levels. In addition, each insurer will generally have different processes and information requirements, which increases complexity for firms.

- **Run-off cover.** The onus is on individual firms to ensure that run-off cover is in place when they cease to practise. Run-off cover is limited and can be costly. Ensuring firms maintain this cover after they cease to practise is challenging for regulators.
- **Absence of comprehensive information.** Lack of access to information on claims losses or trends and premium rates reduces transparency of pricing and the ability of firms (or their brokers) to negotiate.
- **Less incentive for insurers to invest in risk management.** This is because the investment made is short-term, whereas the benefits are reaped over a longer timescale and the insurer making the investment is not guaranteed to get this return in an open market model.
- **Barriers to free flow of information.** This may lead to less effective communication on important risk issues and claims trends.
- **Quality of claims' services may vary.** An insurer may outsource its claims' service or may not adequately resource this, especially if they elect to leave the professional indemnity insurance market.

Freedom of choice generally tends to suit larger law firms. Typically they have the necessary management infrastructure and the level of premium spend, which are factors in negotiating in favourable terms. Insurers can weed out unsatisfactorily performing firms as insurers can be very selective in the risks they choose to insure. A master policy scheme ensures universal cover. Moreover, scale is important to freedom of choice, where the amount of premium available to competing insurers must be sufficient to attract their participation and their investment of resources to compete for and handle the business. As a consequence, in smaller jurisdictions, insurers tend to favour master policy schemes where acquisition costs are lower, and underwriting results are a little more predictable over time. For most other professions, where some form of professional indemnity insurance is compulsory, freedom of choice, with varying degrees of regulation is the most commonly adopted methodology.

Chapter 4: Membership Services

4.1. Criteria for admission

4.1.1. Introduction

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

Moreover, one of the indicia of independence is that a Bar is able to set standards for professional practice, and controlling the standards of entry into, and exclusion from, the profession is a means to achieving this. While in some jurisdictions there may be input from the government in these decisions, the control over them must rest with the legal profession, and there should be transparent standards and procedures, as well as a proper system of appeals from decisions.

There are three main issues that need to be considered with regard to the criteria for admission to practise:

- educational and training requirements;
- admission or licensing; and
- membership of a bar association (or law society).

4.1.2. Educational and training requirements

Crucial to maintaining suitable standards of professional practice are: the level of training required to be a lawyer; how this training is to be undertaken; and who is to perform the task of training. In some jurisdictions, such as the US, the bar association sets the examinations that qualify a person for admission to practise as a lawyer. Bars do not usually, however, undertake the training: this is left to universities and other educational institutions. Bars can, nonetheless, have significant input into the curriculum for the training of lawyers.

Where Bars are only starting to establish themselves, and where the formal justice system is weak, there may be lawyers practising without any formal educational or training qualifications. For example, in Somaliland, many lawyers do not have a university education. Rather, they may have experience as traditional elders, or may be experienced in Sharia law. In a country such as Somaliland, it is therefore unrealistic to require that all current lawyers have a law degree. For these lawyers, experience in place of a degree could be accepted.

With regard to new graduates, however, it has been recommended that Somaliland's Lawyers Association require proof of graduation with an undergraduate law degree from a recognised Somaliland university.⁷⁹ For this, it is necessary to have a system in place for recognition of a university. Bars may thus be required to set certain minimum standards to be met by universities offering legal studies – for instance, a minimum of three to four years of full-time study; an adequate library for use by students; and a sufficient number of qualified faculty members.

Afghanistan faced a situation where, after decades of conflict, people returned claiming to have trained in law overseas, holding forged degrees, while there were others who had stayed and practised as lawyers, but had never trained. In response, the Bar introduced a mini Bar oral exam run by the Bar president, to gauge the person's legal abilities. They were then given a conditional admission by the Bar, on the understanding that they would do the 'Stage' course in legal training at the National Legal Training Centre.⁸⁰

⁷⁹ Horizon Institute's Somaliland Justice Sector Project, 2014 to 2016. For further information see www.thehorizoninstitute.org.

⁸⁰ Information provided by IBAHRI.

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

In the UK, there is agreement between the Solicitors Regulation Authority (SRA – the regulatory body for solicitors), and the Bar Standards Board (BSB – the regulatory body for barristers), which dictates the mandatory content of the qualifying law degree. Seven foundations of legal knowledge have been identified as compulsory subjects for the qualifying law degree for the purposes of equipping law graduates to proceed to qualification as a solicitor or barrister. These currently include:

- criminal law;
- equity and trusts;
- law of the EU;
- obligations 1 (Contract);
- obligations 2 (Tort);
- property/land law; and
- public law (constitutional law, administrative law and human rights law).

To proceed to the vocational stage of the training, certification of completion of the academic stage must be obtained from the SRA or the BSB. The SRA also provides a list of universities that offer the qualifying law degree.

In the US, it is the ABA that approves institutions as qualified to confer a first degree in law. It has set standards and rules of procedure for the approval of law schools.⁸¹

In New Zealand, the Council of Legal Education (NZCLE) approves the Bachelor of Law degree, which must be completed to enter the profession, as well as the Professional Legal Studies' Course. A certificate of completion must be obtained from the NZCLE, as well as a certificate of character from the Law Society, before a lawyer can be admitted.

In many jurisdictions, the relevant government ministry may have a role to play in training and qualifications for legal practice. For example,

81 ABA, '2015-2016 Standards and Rules of Procedure for Approval of Law Schools' (ABA website, no date) www.americanbar.org/groups/legal_education/resources/standards.html.

in Singapore, it is the Ministry of Law that determines the qualifications to be admitted to the Bar, while importantly, it is the Law Society that assesses suitability for admission. The Ministry has the responsibility of setting admission requirements and determining ‘approved universities’.⁸²

Several countries also require an additional professional course and/or examination after graduating with a law degree. Requirements may include a post-graduate bar course as well as a period of internship or training with a qualified lawyer, followed by a bar examination. For example, in the UK and Canada, it is a requirement that a period of traineeship (‘articling’ for solicitors or ‘pupillage’ for barristers) take place. It is usually the law society or bar association that has a role in approving the lawyer that is authorised to provide the necessary training.

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

In Tajikistan, the IBAHRI recommended that a Qualification Commission be established by a new draft law on advocacy and the Bar because, if established by the law as originally drafted, the Commission’s composition and placement under the authority of the Ministry of Justice could lead to potential interference from the Tajik executive. While it is not uncommon for representatives of the Ministry of Justice to sit on a body, such as the Qualification Commission, the IBAHRI was concerned that the balance of power might be weighted in the Ministry of Justice’s favour, as the Deputy Minister of Justice was to chair the Commission. Attempting to direct who should be permitted to practise law, and similarly to expel controversial elements of the profession, could be an abuse of the powers of the ministry or the executive, thereby breaching UN Basic Principle 16.⁸³

82 Ministry of Law Singapore, ‘Admission Requirements’ (Ministry of Law Singapore no date) www.mlaw.gov.sg/content/minlaw/en/practising-as-a-lawyer/AdmissionRequirements.html.

83 IBAHRI, Expert Opinion Regarding the New Draft Law on the Republic of Tajikistan on Advocacy and the Bar (IBAHRI 2013), available at www.ibanet.org/Article/Detail.aspx?ArticleUid=d6d63f56-3ab5-4810-80aa-b6ce8f54d09d.

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

4.1.3. Admission, licensing and membership

Admission to practise and licensing (or the issuing of a practising certificate) are two different, but interdependent, requirements for lawyers. Usually, a lawyer cannot obtain the right to practise until admitted, but admission alone does not entitle a lawyer to practise. Commonly, an annual practising licence or certificate will be required. Licensing is usually prescribed by legislation but in some jurisdictions the licence is issued by the judiciary (such as a supreme court), and in others, by the Bar. In most jurisdictions, the latter has a significant input into the decision of whether a person is qualified to practise law. The matter is how the balance between the competences of the relevant institutions to make this decision is to be decided.

Membership of the Bar is often tied to licensing or issuing of the practising certificate, as these responsibilities commonly fall within the remit of the Bar. For example, in New Zealand, it is necessary to be admitted to the roll of barristers or solicitors of the High Court of New Zealand and hold a current practising certificate issued by the Law Society. Although an individual may be admitted without a valid practising certificate, they cannot describe themselves as a lawyer.⁸⁴ Similarly, in Singapore, admission of advocates and solicitors, governed by the Legal Profession Act, is confined to ‘qualified persons’. The Law Society then assesses fitness and suitability of the applicant for admission as an advocate and solicitor of the Supreme Court of Singapore, after the application for admission has been filed in the Supreme Court.⁸⁵

84 New Zealand Law Society, ‘Admission’ (New Zealand Law Society website, no date) www.lawsociety.org.nz/for-lawyers/joining-the-legal-profession/admission.

85 The Law Society of Singapore, ‘Admission and Training Contracts’ (Law Society of Singapore website, no date) www.lawsociety.org.sg/forMembers/AdmissionsandTrainingContracts.aspx.

In federal systems, practising licences will usually be issued locally. For example, in India, it is the state bar councils that admit lawyers, and in Nigeria, it is the local branches of the Bar that issue practising certificates.⁸⁶ Meanwhile, in the US, admission falls to the judicial arm of government of each state. To illustrate, in New York, the Appellate Division of the Supreme Court is responsible for evaluating the character and fitness of persons seeking admission to the Bar. This duty is discharged by the Court's Committee on Character and Fitness, which is comprised of practising attorneys appointed by the Court. After passing the Bar examination, applicants submit a written application, which forms the basis for a personal interview conducted by the Committee. Successful applicants are then sworn in before the Court. Each attorney admitted by the Court must take the oath of office in person and sign the roll of attorneys.⁸⁷

Some jurisdictions may require further examination before a licence is issued, such as in Ontario where, after ten months of 'articling' with an approved articling principal, students prepare for the Licensing Examination for Solicitors or Barristers. Once this is completed, applicants provide proof of good character to the bar association and, upon satisfaction of the good character requirement, the applicant is called to the Bar.⁸⁸

Caution should be exercised where, as in some countries, the government has a role to play in admission through a relevant ministry, with the potential for political interference, as seen from the Tajik example at Chapter 4.1.2.⁸⁹

86 Bar Council of India, 'Enrolment of Advocates' (Bar Council of India website, no date) www.barcouncilofindia.org/about/enrolment-of-advocates; Nigerian Bar Association website www.nigerianbar.org.ng.

87 New York State Unified Court System, 'Committee on Character and Fitness' (New York State Unified Court System, no date) www.nycourts.gov/courts/ad1/Committees&Programs/CFC/index.shtml.

88 The Law Society of Upper Canada, 'Guide to the Barrister and Solicitor Licensing Examinations' (The Law Society of Upper Canada website, no date) www.lsuc.on.ca/LawyerExaminationGuide.

89 See n 83 above, IBAHRI 2013.

4.2. Continuing legal education

4.2.1. Introduction

The obligation of governments, professional associations of lawyers and educational institutions to ensure that lawyers have appropriate education and training (UN Basic Principle 9) extends to CLE, also referred to as CPD. UN Basic Principle 24 further provides that ‘continuing education and training’ is one of the purposes of forming and joining bar associations, with a view to protecting professional integrity.

In most jurisdictions with an established Bar, CLE will be mandatory and a requirement for the renewal of a practising certificate or licence. Indeed, CLE ensures that lawyers are able to fulfil their ethical duty to work in a competent and timely manner.⁹⁰ Moreover, in some cases, CLE is used by Bars as a means of certifying a lawyer’s speciality, so that they may publicise their expertise as, for example, an employment lawyer, or aircraft leasing lawyer, or a particular area of banking, finance or tax. Indeed, there is an increasing trend that bar associations will not permit practice in certain areas – for example, matters relating to children – unless these certifications are obtained. Caution should, however, be exercised in introducing more and more certifications to avoid the initial qualification of ‘lawyer’ to be diluted.

As outlined in this section, the body entrusted with regulating and providing CLE may vary between jurisdictions, but it is important to note that a range of activities, from structured courses to writing articles, may be used for the purposes of contributing to and developing lawyers’ skills.

4.2.2. Importance of CLE

‘Continuing education or professional development has assumed an urgent priority in developed and developing economies and is now a primary professional concern. It is a lifelong learning process that is indispensable to professional growth and individual competence. With the dynamic social, political and economic changes taking

90 IBA International Principles on Conduct for the Legal Profession, Principle 9.1.

place in society, there is increased demand for legal services that are responsive, innovative and effective.⁹¹

This statement is even more relevant in developing societies where changes are occurring fast. Particularly in respect of the legal profession, *continuing* education is a vital component of *legal education*. The latter does not end once a lawyer has qualified and been admitted to practice. As noted in the 1971 Ormrod Report produced in England, there are three stages of legal education:⁹²

- an academic stage;
- a professional stage, comprising institutional training and in-house training; and
- a CLE stage.

Likewise, the Commonwealth Legal Education Association has noted that CLE for legal practitioners forms a fundamental part of the range of programmes that compose legal education and practice in the Commonwealth.⁹³ Thus, CLE is, or ought to be, ingrained in a legal practitioner's life and serves to bridge the gap between legal education and the level of a lawyer's competence after they are admitted to practice.

CLE is also fundamental to independence. A legal profession that is competent is less likely to be subject to influences and will be able to act independently and with integrity. Moreover, professional development demonstrates to the public that lawyers value standards and, as a profession, are prepared to undertake CLE to maintain and enhance those standards. CLE is therefore closely linked to the duty to uphold the 'honour and dignity' of the profession and protection of 'professional integrity'.⁹⁴

As such, CLE may substantiate the legal profession's claim to self-regulation. It has been suggested, for instance, that the public willingness to allow the profession to continue to be self-regulating is based in

91 Elizabeth Muli and Venkant Iyer, 'Continuing Legal Professional Education Policy' (draft prepared under Component B of the World Bank IDF Grant No TF054290 on 'Capacity Building of the Continuing Legal Education of the Law Society of Kenya', 2007).

92 Mr Justice Ormrod, 'Report of the Committee on Legal Education' (presented to Parliament by the Lord Chancellor, HMSO 1971) (Cmnd 4595).

93 www.clea-web.com.

94 UN Basic Principles, Preamble (final paragraph), 12 and 24.

part on its specialist training, knowledge and skills, which differentiate it from other professionals and from the general public.⁹⁵ If lawyers do not maintain this specialist training and knowledge, their status as professionals will be undermined.

Lawyers are also given a special status in society as ‘agents of the administration of justice’. It follows that the highest standards are expected of them. Indeed, the lawyer’s duty to maintain standards is also linked to the issue of ethics.⁹⁶

4.2.3. What qualifies as CLE?

CLE may include a range of activities. For example, in the UK, the SRA’s Training Regulations 2011 provide that CPD can include:

- structured training, coaching or mentoring sessions;
- live or recorded webinars;
- writing on law or practice – for example, authoring law books, journals, publications for clients, clients’ own publications, newspapers and magazines, online or in print;
- structured work shadowing schemes with clear aims and objectives and requiring feedback or reflection on the activity;
- research that relates to legal topics or has relevance to the practice/organisation that results in some form of written document, precedent, memorandum, questionnaire or survey;
- study for or production of a dissertation counting towards a qualification recognised by the Law Society;
- watching DVDs, webcasts, television broadcasts or videotapes and/or listening to audio podcasts, radio broadcasts or audio tapes produced by learning and development providers;
- work towards the Qualification Credit Framework awards relating to assessment, verification and/or quality assurance

95 Law Society of New South Wales, ‘MCLE Task Force: Final Report and Recommendations’ (Law Society of New South Wales 2000).

96 UN Basic Principle 12.

of competence-based assessment models (such as, for example, National Vocational Qualifications);

- participating in the development of specialist areas of law and practice by attending meetings of specialist committees and/or working parties of relevant professional or other competent bodies charged with such work;
- work towards the achievement of a National Vocational Qualifications in any business-related area and at any level; and
- study towards professional qualifications.

These activities can be completed face-to-face, or by distance learning where appropriate, but must contribute to general professional skill and knowledge. Preparing and delivering these activities can also count where appropriate. The responsibility for meeting the CPD requirements rests with the individual lawyer and not their employer.⁹⁷

Whatever form CLE takes it should aim to:

- promote legal competence;
- maintain quality and ethical legal service that is both accessible and affordable; and
- attain sustainable human development by upgrading highly qualitative professional services that will be globally competitive and ultimately more responsive to society's need for justice, equity and order.⁹⁸

Bars can set certain requirements for CLE. For example, in the Philippines, all CLE activities must meet the following standards:

- significant current intellectual or practical content;
- organised programme of learning including cross-profession activities;
- the group or individual conducting the CLE must be qualified by practical or academic experience;

⁹⁷ SRA Training Regulations 2011 – Part 3, CPD Regulations 8.1 and 8.2, and Guidance Note to 8.1. See www.sra.org.uk/solicitors/handbook/cpd/part5/content.page.

⁹⁸ American Law Institute-American Bar Association Committee on Continuing Professional Education, 'A Model Peer Review', in Myrna S Feliciano 'Continuing Legal Education Towards Sustainable Development' (paper presented to the United Nations Development Programme, 1980).

- substantive written materials must be distributed when the CLE activity is more than one hour in length; and
- the venue of CLE activities must be free from unnecessary interruptions.

4.2.4. *Who provides CLE?*

UN Basic Principle 9 refers to '[g]overnments, professional associations of lawyers and educational institutions' as those responsible for providing CLE. Indeed, with the increasing body of law and the fast rate at which changes in the profession are occurring, lawyers cannot realistically be expected to cope through self-study alone. Monitoring such changes in the law is a specialised function that does not consist merely in noting what is new in the law. It also demands the ability to compare and harmonise such developments. Therefore, the ideal mode of keeping abreast of these developments is to delegate the function of surveying current trends in the law to a specialised group or body.

In most jurisdictions, CLE falls under the control of either a national council of legal education or within the remit of the local law society or Bar.⁹⁹ For example, in Kenya, although the Council of Legal Education has responsibility for education for the legal profession under the Legal Education Act 2012, it is the Law Society that has taken over responsibility for this. It has a CPD Programme mandated with the responsibility of ensuring continuous professional learning for all advocates in Kenya after they are admitted to the Bar. It has been in operation for years, and the programme is self-financed by registration fees, charged on participation in CPD sessions.¹⁰⁰

Sometimes, a Bar may not have the resources and capacity to run a CLE programme. In these cases, partnering with a Council of Legal Education that receives state funding can be useful. In Zambia, for example, the Institute for Advanced Legal Education is a statutory body that falls within the remit of the Ministry of Justice. Consequently, it receives funding

99 For example, the Council of the Zambia Institute of Advanced Legal Education. See The Zambia Institute of Advanced Legal Education Act, Chapter 49 of the Laws of Zambia. See also Kenya, Malawi, England and Wales.

100 The Law Society of Kenya, 'CPD Calendar of Events' (Law Society of Kenya website, no date) www.lsk.or.ke/index.php/cpd-events-a-training.

from the state, as well as course fee revenue. In addition to providing undergraduate and postgraduate law courses, it works with the Law Association of Zambia to hold CLE events, and has been planning to run CLE and organise a series of courses for lawyers in advance.¹⁰¹

In some instances, other external organisations can provide CLE courses. However, in order to regulate this and ensure they meet the standards required for CPD of the profession, the Bar can be involved with accrediting the courses, as do the Law Society for England and Wales and the Law Society of Kenya.¹⁰² Regarding the latter, the Law Society Committee on CPD is empowered to accredit any programme conducted by a sponsoring agency, that is, any institution, body or other organisation empowered to conduct CLE. An institution seeking accreditation must make an application to the CPD Committee. The Committee provides policy direction to the programme and meets monthly to discuss any issues pertinent to the CPD programme. It is mandated to work with the Law Society Secretariat in the implementation of the CPD calendar of events, as well as development of the curriculum and content of the programme. The Committee has two subcommittees: the Education Committee, which deals with accreditation matters of advocates; and the Finance Committee, which deals with the budgetary issues of the CLE programme.

4.2.5. Developing a CLE programme

In most jurisdictions, a CLE scheme exists in one form or another. A formalised programme of CLE can promote a greater degree of professionalism as well as providing an institutional framework. It also allows professional development to be spread to a wider range of legal personnel and creates room for evaluation. For lawyers who may be practising in remote areas where references and resources may be difficult to access and expensive for individuals to acquire, a CLE programme provides a centralised source of information that can reduce or eliminate such costs.

101 See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished), 'Appendix 3: Report on Trip to Zambia to Meet Law Association of Zambia'.

102 See n 100 above, and the Solicitors Regulation Authority website, www.sra.org.uk/about.page.

One successful example is that of the Law Society of Kenya. In 2001, the Law Society took a major step towards establishing a formal CLE programme in Kenya when, in collaboration with the IBA and with funding from Ford Foundation, it commissioned a consultant to review the need and mechanisms for implementing a programme of compulsory CLE. The review recommended that responsibility for CLE be formally shifted from the Council of Legal Education to the Law Society, which then in 2003 launched a non-compulsory pilot programme.

Most importantly, the Advocates Act was amended to give the Law Society Council power to make rules with regard to CLE for all advocates practising in Kenya. The Council formulated regulations, and the Advocate (Continuing Legal Education) Regulations 2004 came into force in January 2005. The Law Society of Kenya is now responsible for administering the CLE programme through a dedicated committee made up of nine lawyers responsible for advising the Law Society Council on the courses, speakers, accreditation, rules and regulations of CLE. Each year, the Law Society of Kenya issues a calendar of events to be held at different parts of the country, from which advocates can choose to attend.

Smaller Bars, such as Lesotho, Malawi and Swaziland, have been in the process of developing CLE programmes. Through the IBAHRI capacity-building project in Malawi, the Law Society developed a timetable of CLE events after requesting feedback from its members. During 2006 and 2007, it was able to hold a number of events through the capacity building work and using links established with other organisations. These events included:

- a workshop on a draft Money Laundering, Proceeds of Serious Crimes and Terrorist Financing Bill and a draft Legal Profession Act;
- a seminar on ‘Access to Justice and the Role of Lawyers: A focus on Juvenile Justice’,¹⁰³
- a seminar on the Law of Evidence;
- a seminar on ethics;

¹⁰³ The Malawi Law Society used links established with United Nations Children’s Emergency Fund (UNICEF) and lawyers from UNICEF agreed to conduct the seminar.

- training on costs;¹⁰⁴
- advocacy training in conjunction with United States Agency for International Development (USAID); and
- a workshop on refugee law in conjunction with the UN High Commissioner for Refugees (UNHCR) in Malawi.

The Malawian example illustrates how Bars who are building their capacity can at least start holding regular events and develop a programme by identifying priority areas, which can eventually be formalised.

In devising a formal CLE programme or plan, Bars need to determine which topics to include. In the case of developing Bars, many newly qualified lawyers often lack practical skills because their law degree is largely theory-based with no practical course or structured training to follow. Where this is the case, it is useful to include practical skills in a CLE programme. CLE can also be used to highlight the important role of lawyers in promoting the rule of law, ensuring human rights and facilitating access to justice.

The ideal minimum of topics to be included in a CLE plan to be conducted over a one-year period is as follows:¹⁰⁵

- **Ethics.** One reason why lawyers often fall foul of ethical standards is due to a lack of knowledge and understanding of ethics. Therefore it is essential that ethics be part of a regular CLE programme to ensure an awareness amongst lawyers, particularly junior lawyers, of their duties and responsibilities.
- **Practice management.** Management skills are crucial to the work of a lawyer, particularly where they have their own legal practice. It might be common for lawyers in some jurisdictions to have their own practice despite having very little post-qualification experience.
- **Costs.** Bars often receive a large number of complaints from members of the public regarding costs – that is, a client complaining of a lawyer charging too much, holding back money received from the other party

104 The Malawi Law Society used links established with Advocates for International Development who facilitated a costs expert travelling to Malawi to conduct a training session.

105 This is based on holding at least nine CLE events over a period of 12 months.

in a case or refusing to do further work before more fees are paid. In some cases, the lawyer will be at fault, perhaps not realising that they are in breach of costs rules and, consequently, also professional conduct rules. Many lawyers do not fully understand rules relating to *inter partes* costs.

- **Law of evidence.** Although the subject of evidence will usually be included as part of a law degree, a practical insight is crucial to fully understand how to apply rules of evidence, which can sometimes be complicated and may not be sufficiently covered as part of an academic law degree. As part of a regular CLE plan, practical exercises on the law of evidence can be included.
- **Advocacy.** Similarly, advocacy often requires specialist training, for example, in relation to the examination of witnesses. Often, a law degree will be insufficient and, where there is no practical course or structured training to follow graduation, advocacy training should form an essential component of a regular CLE plan. For example, junior lawyers can particularly benefit from regular practical training in advocacy through participating in mock trials.
- **Information technology (IT).** Many lawyers do not realise the potential of IT skills. Not only do such skills make a lawyer's life more efficient and easier, but there is also a wealth of online legal resources that lawyers can use. This is particularly important for Bars in developing countries because of the lack of legal materials available. Regular IT training should, therefore, form part of a CLE plan, and not only on using computers and relevant programmes such as Microsoft Word and Excel, but also on how to conduct online legal research and accessing legal resources online.
- **Important legal developments.** A useful topic for a CLE plan is an analysis and discussion of recent legal developments to ensure that lawyers are kept updated.
- **Using domestic regional and international human rights provisions, before domestic courts.** If lawyers are to lead the way in transforming society by upholding the rule of law and promoting human rights, they

must know how to use human rights law before their own courts. Often, where there is a weak or developing justice system, domestic provisions – such as constitutional or statutory provisions that may reflect international human rights standards – are not tested before national courts of a lack of human rights awareness among the legal profession.

Similarly, lawyers may not be aware of how to use regional and international human rights standards.¹⁰⁶ Where states have incorporated human rights treaties through domestic legislation, lawyers may need to be educated on these standards and how to use them. Where they have not been incorporated, lawyers can, nonetheless, be educated on how they can use them – either through assistance with interpretation of domestic provisions or through advocating for ratification or incorporation. For example, Somaliland has several fundamental rights enshrined in its Constitution but these have yet to be applied by the courts and, in particular, by the country's supreme court.¹⁰⁷

- **Using regional and international legal mechanisms.** This is another essential topic as many lawyers at the national level, particularly in developing countries, have very little awareness of regional and international bodies, courts and tribunals that can be used to promote the rule of law and human rights within their jurisdictions. (This is considered further in Chapter 7.)

This list is by no means exhaustive and Bars should aim to include other topics. This can be done through consultation with general membership, perhaps through feedback questionnaires where members are asked to specify subjects they would find useful.¹⁰⁸

106 Considered in more detail in Chapter 6.

107 The Constitution of the Republic of Somaliland, (English translation by Ibrahim Hashi Jama, Somaliland Law website 2005), available at www.somalilandlaw.com/Somaliland_Constitution/body_somaliland_constitution.htm.

108 This was the approach taken in Malawi, where, for example, in addition to some of the mentioned topics, a number of lawyers specified an interest in international trade law. See n 29 above, IBAHRI 2006, 'Phase 2' (unpublished).

4.2.6. Should CLE be mandatory?

Whether a CLE programme should be mandatory depends on the experiences of Bars from one jurisdiction to another. As a debate that has confronted CLE programmes already being implemented in foreign jurisdictions, the question becomes more relevant only after a programme has been put in place because, of course, only after implementing CLE, can there be an empirical basis to evaluate whether it is more likely to attain its objectives if made mandatory.

It is, however, worth noting that often lawyers may not undertake CLE if it is not compulsory. This has been a problem particularly in relation to developing Bars who are still in the process of building their capacity generally. The advantage of mandatory CLE is that it ensures lawyers are continuing with their professional development and, therefore, serves to guarantee public confidence in the profession.

If CLE is to be made mandatory, a Bar must consider who and/or which organisations can provide it, and whether there are sufficient CLE providers and events for lawyers to be able to fulfil requirements.

Where CLE is not mandatory, Bars must play a role in encouraging lawyers to take advantage of legal education and training that is available. For example, lawyers may be more interested in attending if external facilitators are involved, or where their own profile can be raised, for example, through writing articles for publications or delivering training themselves. Often, junior lawyers may be more likely to attend if they are encouraged by their seniors and/or where the CLE is conducted by a senior practitioner. Bars could, therefore, liaise with law firms and senior lawyers to encourage junior members of the profession to attend CLE events, as well as inviting senior members to conduct a seminar or workshop.

While smaller Bars may struggle to implement a CLE programme and make it compulsory for all members, the following are examples of jurisdictions where mandatory CLE has successfully been implemented.

Case study: Kenya

Previously voluntary for lawyers, with practitioners attending only those events that were of direct interest to them, CLE is now mandatory. Each event attracts a certain number of points and an advocate must earn five units in one calendar year to comply with CLE regulations. Every application for an annual practising certificate must be accompanied by proof that the applicant has secured five units of CLE during each practising year.¹⁰⁹

The Continuous Professional Development Programme has an annual calendar of events that covers different law topics in the format of seminars and lectures. The sessions are carried out in various towns in the country and advocates, as well as non-advocate experts in various professional fields, volunteer to present at the sessions. The calendar has over 60 sessions in 15 towns in Kenya. The programme also rolls out supplementary free programmes throughout the year, many of which are organised with development partners.

Case study: Malaysia

CLE is mandatory in Malaysia and the CPD cycle runs for 24 months. Members of the Bar must accumulate 16 CPD points and Bar pupils, eight CPD points. Notably, the Malaysia Bar has an attendance policy mandating that CPD points assigned to an activity will not be awarded if individuals: arrive more than 15 minutes late; are not present throughout the CPD activity; or leave before its scheduled end.¹¹⁰

109 Regulation 11 of the Advocates Act (Continuous Professional Development) Regulation, 2004.

110 The Malaysian Bar, 'CPD Guide' (The Malaysian Bar website, no date), available at www.malaysianbar.org.my/cpd/?page_id=2049.

Case study: Nigeria

The Nigerian Bar Association requires all practitioners to complete CLE. It will publish, on its website and in book form, the Annual Practising List of legal practitioners who have complied with the requirements of the Continuing Professional Development Programme, and who have paid their practising fees and are, therefore, entitled to practise as legal practitioners.¹¹¹

Case study: US

The majority of US states (44 of 50) have mandatory CLE. Among the common characteristics of mandatory CLE are: a credit system based on actual in-class attendance (some states allow credit to be gained through self-study); similar number of hours allowed per year; self-reporting by attorneys through the use of personal affidavits; system of spot-checks to ensure that lawyers are not listing courses that they did not attend; full range of disciplinary sanctions, up to and including disbarment for failure to comply; minimum of exempt classes of lawyers; requirements that courses be presented in a formal education setting and that high-quality written materials be provided; and there are greater restrictions on private or in-house presentations than on courses open to all interested lawyers.¹¹²

111 Nigerian Bar Association, 'Notice to All Legal Practitioners' (Nigerian Bar Association 2015), www.nigeriabar.com/2015/07/nigerian-bar-association-notice-to-all-legal-practitioners#.VzQJV3T6hjo.

112 ABA, 'Mandatory CLE' (ABA website, no date) www.americanbar.org/cle/mandatory_cle.html.

4.2.7. *Monitoring and reviewing*

Finally, there must be a monitoring and evaluation system for a CLE programme in order to promote sustainability, improvement and relevance. For example, feedback forms can be distributed to all participants, and a record maintained of how many attended and which lawyers attended.

The evaluation of CLE activities should not be restricted to outputs but should provide an assessment of changes within society – social, economic, political or cultural – and how these changes can be dealt with through CLE, or whether a CLE policy is making a difference to these areas. For example, a CLE event on sensitising laws to the issue of HIV/AIDs is responding to changes within society, as well as having the potential to make a difference to policies and practise in this area. Another example is that of a CLE event on using human rights mechanisms, which may be a response to a human rights situation in a particular country, and can also serve to assist victims of human rights abuses.¹¹³

There should, therefore, be regular reviews of CLE, in light of changes in society, as well as legal and technological developments, and consultation with members and other stakeholders. When Bars are reviewing their CLE programme, they should also keep in mind the Bar’s long-term objectives and principles as CLE also has a role to play in achieving these.

4.3. Practice advice

Most established bar associations offer some form of practice advice service. For example, in the UK, the Law Society of England and Wales has a Practice Advice Service that offers free and confidential support and guidance on legal practice and procedure. The service is staffed by experienced solicitors who take queries via telephone. Similarly, the NYSBA has a practice management section on its website, offering

¹¹³ For example, Zimbabwe Lawyers for Human Rights, SADC Lawyers Association and OSISA organised regional training in 2007 on litigation at the African Commission on Human and People’s Rights. A workshop was held for 18 young lawyers from the SADC region on how to litigate before the African Commission. In Malawi, the Law Society organised a seminar in conjunction with UNICEF on access to justice and the role of lawyers, particularly with regard to juvenile justice, as a response to the large prison population and people being held in inhumane conditions, often for years without trial, including many children.

advice on matters such as: starting a practice; managing a practice; marketing; and protecting a practice. It also has an ‘Ethics Opinion’ page, which features opinions issued by the NYSBA Committee on Professional Ethics to lawyers concerning their own proposed conduct – essentially clarifying what attorneys can or cannot do on all practice matters. The opinions appear on the NYSBA website to provide a resource for all.

Some Bars may produce materials offering practice advice. For example, the Law Society of South Africa has a practice management toolkit consisting of a compendium of practice management articles written by experts to support members in their practice.¹¹⁴

4.4. Individual support and assistance

An important function of bar associations is that they must protect and defend the rights, interests, prerogatives and immunities of individual members, particularly in situations where they may not be able to adequately defend themselves. Bars have a responsibility to ensure that a lawyer is not targeted for taking on an unpopular case, or unduly harassed, persecuted or intimidated in situations where they speak out in support of the rule of law. Interference can also take the form of negative media campaigns or, even more subtle, through the withdrawal of business, as discussed in Chapter 1. It is vital that bar associations are able to speak out against such abuses of power.

Bars should include in their aims and objectives protection of their members and their practice. For example, the Uganda Law Society’s mandate includes the protection of its members and their practice, and defending its rights. Where member lawyers are targeted, they should be able to count on their Bar for support and assistance. For instance, some Bars may issue a press release to raise awareness of lawyers being targeted or to apply pressure on the authorities. The Malaysian Bar President, for example, spoke out in support of members who were being targeted under the Sedition Act 1948, a repressive

¹¹⁴ Law Society of South Africa, ‘Practice management toolkit’ (Law Society of South Africa, no date) www.lssa.org.za/legal-practitioners/resources-for-attorneys/misc/practice-management-toolkit.

and archaic piece of legislation often used in Malaysia to stifle human rights defenders.¹¹⁵

Where law associations fail to protect their members' rights, this is because they lack independence. For example, the All China's Lawyers' Association is designated the sole national Bar and operates under the direct supervision of the Ministry of Justice. It has, to date, failed to defend the rights of lawyers working on politically sensitive issues. A crackdown on lawyers in 2015 resulting in arrests and the disappearance of lawyers drew no support or comments from the Lawyers' Association. This failure clearly undermines the association as an independent representative body able to uphold the rule of law.¹¹⁶

4.5. Representation and regional support

4.5.1. *The importance of representation and support*

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

It is common for a national Bar to act collaboratively with regional Bars to provide adequate representation for its members. On a regional level, bar associations are able to preserve a sense of local identity and to respond to

115 Malaysian Bar, 'PDRM Must Respect the Statutory Duties of the Bar Council and the Statutory Rights of Members of the Malaysian Bar' (Press Release, Malaysian Bar 29 March 2016) www.malaysianbar.org.my/press_statements/press_release_%7C_pdrm_must_respect_the_statutory_duties_of_the_bar_council_and_the_statutory_rights_of_members_of_the_malaysian_bar.html.

116 See Chapter 1, 1.1.

localised issues.¹¹⁷ At a federal level, Bars are crucial to the representation of the legal profession on a national scale. National coordination facilitates the relationship between Bars and the state, which, in turn, supports adherence to obligations owed by the state to lawyers. These obligations include ensuring that a lawyer is able to perform their professional functions without harassment, and is able to travel and consult with clients freely, both within the country and abroad. The state is also responsible for preventing the prosecution, or administrative or economic sanction, of any lawyer for actions taken in accordance with recognised professional duties, standards or ethics.¹¹⁸ Each bar association's role as a representative body is important to this model of representation for both the lawyer and the legal profession.¹¹⁹

4.5.2. Representation models

AUSTRALIA

In Australia, each state and territory maintains its own independent bar association and law society. This is necessary for local representation, and reflects a historical difference in the administration of the profession. In early years, New South Wales, Queensland and Victoria were the only states of Australia that had enough practitioners to support an independent Bar, while the other states, and subsequently the Northern Territory and Australian Capital Territory, supported a fused profession. The separation of the role of barrister and solicitor still applies in New South Wales and Queensland.

Despite these independent law societies and bar associations, it became apparent as early as 1911 that there was a real need for a federal body in Australia. The Law Council of Australia was established in 1933 to represent the national interests of the Australian legal profession of both barristers and solicitors. Since 2007, the Law Council of Australia has also represented the large law firms of Australia through its

117 Stan Ross, 'Prospects for Structural and Economic Integration of the Australian Legal Profession' (1997) 4(3) *International Journal of the Legal Profession*, 267, 278, cited in the contribution from Margery Nicholl, Deputy Secretary-General Law Council of Australia and IBA BIC Chair, and Catherine Brims, Administrative Assistant, International Division and International Law Section, Law Council of Australia.

118 UN Basic Principle 16.

119 See n 117, Nicholl and Brims.

constituent body, the Law Firms Australia. The work of the Law Council includes coordinating Australia-wide submissions and negotiations with government departments on matters of federal law.

The Australian Bar Association was formed in 1962 to represent the interests of members of the independent Bars. The Association now comprises the heads of each of the state and territory Bars. This model ensures adequate representation across the legal profession at both local and federal levels.¹²⁰

CANADA

In Canada, the legal profession is organised in a way that the regulatory and representative functions are separate. The Federation of Law Societies of Canada (FLSC) is the national coordinating body of Canada's 14 provisional and territorial law societies, which regulate more than 100,000 lawyers and 4,000 Quebec notaries. Therefore, provincial and territorial law societies are members of the FLSC, while the national representative body for lawyers is the CBA, which has branches in each province. Membership of the national CBA is not mandatory as lawyers are required to join their provincial law society or bar association. However, there are benefits of joining the national Bar, including receiving nationwide access to professional development, advocacy, publications and activities.¹²¹

ENGLAND AND WALES

Although not a federal system as such, the Law Society of England and Wales nonetheless includes regional representation. It has a regional structure with managers in the nine English regions, and Wales. The network maintains relationships with members across England and Wales to better represent regional views, promotes national Law Society initiatives, increases members' awareness of Law Society services and activities, and forges partnerships and strategic alliances with key external stakeholders in order to add value to members' businesses.¹²²

120 *Ibid.*

121 Federation of Law Societies Canada – <http://flsc.ca>; Canadian Bar Association – www.cba.org/Home.

122 The Law Society of England and Wales, 'Regional Support' (The Law Society website, no date) www.lawsociety.org.uk/support-services/regional-support.

GERMANY

As a self-regulatory body, the German Federal Bar (BRAK) represents the professional and political interests of the legal profession at the national level. It is the umbrella organisation of the 28 regional Bars. Thus, all lawyers in Germany are represented by it through their respective membership of the regional Bars. BRAK, which was founded in 1959, represents the interests of lawyers vis-à-vis parliament, the government, the courts and the public. For instance, it provides position papers on draft legislation, prepares expert opinions for the courts and promotes continuing training for lawyers.

Moreover, the continually increasing importance of European legislation also requires practical and effective representation for German lawyers at European institutions. In 1991, BRAK established an office in Brussels, which, as well as monitoring the EU institutions' activities and projects, also establishes and maintains links with members of the European Parliament, Commission officials and Council representatives. BRAK provides information on the interests and concerns of the German legal profession in meetings with EU officials, by submitting position papers and participating in hearings. The Brussels office further ensures up-to-date information and gives individual lawyers access to European documents.¹²³

US

The US is another example of regional support and representation. More than 2,000 bar associations serve the needs of lawyers and communities throughout the US. This includes: 37 unified state and territory Bars to which lawyers must belong in order to practise; 22 voluntary state Bars; more than 500 voluntary local (metropolitan and county) Bars; and approximately 45 mandatory judicial district Bars to which lawyers must belong in order to practise (in North Carolina only).¹²⁴

¹²³ Contribution from Axel C Filges, IBA Access to Justice and Legal Aid Committee Co-Chair and member of German Federal Bar, and Veronika Horrer, German Federal Bar.

¹²⁴ Contribution from Art Garwin, Director, Centre for Professional Responsibility, ABA.

4.6. Networking

Bar Associations provide an excellent opportunity to network with other lawyers. Networking provides various benefits, such as opportunities to: share information and learn from experiences; discuss particular practice issues or issues of law; learn about job openings; receive career advice; write articles for journals, newsletters or a Bar website; CLE opportunities; and access to advice or assistance with specific projects, such as pro bono work. Bars may publicise networking events on their websites, which is often the case with larger and more established associations.

A Bar cannot effectively serve its members and the public without developing information-sharing activities with its members and the wider community. Developing such activities significantly assists in the daily work of a Bar. For example, through communicating with members; notifying members of legal developments; regularly liaising with those working in the area of justice; and networking and maintaining contact with organisations in other countries.¹²⁵ Information-sharing can also raise the profile of the Bar regionally, nationally and internationally, and lead to increased support for their work.

4.7. Legal resources

Legal resources, including online resources, are essential to the legal profession. They provide opportunities to remain abreast of legal developments and exchange information, as well as a forum for discussing the law. Without legal resources, lawyers will lack the ability to use law reports, legislation and academic legal materials, which will undermine their research and analytical skills, and the ability to think creatively as well as challenge findings – all of which are essential skills for a lawyer. These resources, such as libraries, newsletters and websites, all contribute towards ensuring a lawyer can competently fulfil their duties.

¹²⁵ For example, as well as Bars in other countries, regional and international bar associations such as SADC Lawyers Association – <http://sadclawyers.com>; East African Law Society – www.ealawsociety.org; Commonwealth Lawyer’s Association – www.commonwealthlawyers.com; and the IBA.

Larger Bars and law societies, such as those in Canada, the UK and the US, will have large law libraries with legal materials also available online.¹²⁶ Bars with more limited funding may struggle to maintain a large law library, but can nevertheless have a resource centre or library with some basic legal materials. Moreover, some jurisdictions with developing legal systems may not have a practise of law reporting. Where this is the case, the Bar can include this as one of its roles and apply for funding for a law reporting and library project. The Uganda Law Society is an example of a Bar that has taken on that responsibility, and produces annual law reports and online lists of books and other legal materials available at its legal resource centre.¹²⁷

Where funds to establish a library are lacking, a website can be an indispensable resource. The development and maintenance of a website is not necessarily a costly activity for a Bar to undertake. It can be a one-off expenditure with minimal maintenance costs and may have a hugely positive impact for Bars – not only in raising their profile and providing information for lawyers and the public, but also in providing access to legal resources. In particular, it can:

- share important legal developments, as well as articles, cases, news and notices regarding the law;
- include links to other online legal resources that lawyers may not be aware of;¹²⁸
- raise the profile of a Bar, both nationally and internationally;
- include details of CLE events and training materials; and
- provide information for the public about the justice system, finding a lawyer, duties of lawyers and any complaints procedures.

Websites are also a useful tool for educating the public, and further provide important information to other organisations and Bars across the world, as well as the donor community, which can lead to increased assistance and support.

126 For example, The Law Society of England and Wales Library Service – www.lawsociety.org.uk/support-services/library-services.

127 Uganda Law Society, 'Library Services' (Uganda Law Society website, no date) www.uls.or.ug/library-services.

128 See section on Useful Online Resources, at p198.

Bars may, however, initially face challenges with maintenance of a new website. They should budget carefully for maintenance costs and give thought to how the website will be financially sustained. For example, the Malawi Law Society considered obtaining sponsorship and selling advertisement space. Where a shortfall in resources remains and funds cannot be raised for the maintenance of the website, Bars should consider alternatives, such as obtaining the assistance of volunteers or establishing a subcommittee of lawyers that can take on this responsibility. Despite the challenges, Bars should not underestimate the importance of websites and the huge benefits that can result.

From considering websites that are utilised to their full extent, the following are the sort of things that can be included by Bars:¹²⁹

- information about the Bar, for example, the executive/council members and their roles, as well as details of other standing or subcommittees;
- legal developments, such as: new bills and legislation; recent judgments from national, regional or international courts, tribunals or bodies;
- articles and links to journals, as well as an electronic newsletter;
- information on admissions and the renewal of practising certificates;
- laws, rules and regulations governing the Bar;
- notices of meetings, CLE and other events;
- press statements and details about projects run by the Bar;
- the complaints procedure for the public;
- links to other relevant national, regional and international organisations; and
- details of how to find a lawyer.

Similarly, newsletters are also a useful information-sharing tool. Like websites, they serve to forge links with other organisations and Bars, which is particularly relevant for developing bar associations. Newsletters

¹²⁹ For example, The Law Society for England and Wales – www.lawsociety.org.uk; Malaysian Bar – www.malaysianbar.org.my; Law Society of Kenya – www.lsk.or.ke/lsk.php; Law Society of South Africa – www.lssa.org.za.

can be distributed to donor organisations, international and regional organisations, other bar associations, civil society and to public information points such as courts, colleges and libraries.

Newsletters may also feature articles on important current legal issues, and notices about meetings and events, to encourage participation and attendance. Members may be motivated to become more active and write articles for newsletters when they are aware it will reach not only the membership, but also a wider community of national and international organisations.

The newsletter, therefore, has the potential to raise the profile of the Bar and its members. It is of course necessary for Bars to raise funds for regular publication, but the newsletter itself can generate income through advertising space and/or selling it for a small fee.

Consideration should also be given to the format a newsletter or news bulletin might take. The Afghanistan Independent Bar Association has run a bi-weekly radio programme for both lawyers and civil society, explaining the functions of a new Bar, the role of lawyers and people's rights generally.¹³⁰ Radio is the best means of communication in a country where internet coverage is poor, and where television and newspapers do not reach the provinces. The Malawi Law Society has also acknowledged this through a project it is undertaking to raise human rights awareness and legal literacy through, among other things, radio programmes.¹³¹

¹³⁰ Information provided by IBAHRI in relation to its capacity-building work in Afghanistan.

¹³¹ This is discussed later in Chapter 6. See also www.malawilawsociety.net/pages/projects.html.

Chapter 5: Regulation

5.1. The Bar as a regulatory body

5.1.1. Introduction

Professional associations of lawyers have a vital role to play in upholding professional standards and ethics.¹³² Indeed, the legal profession's right to self-govern, as stipulated in UN Basic Principle 24, goes hand in hand with the obligation to also self-regulate effectively. This requirement pertains to conditions for entering into the profession, rules of conduct and CLE while a member of the profession, and rules regarding disbarment. Often, such regulation is based on rules and requirements set out by bar associations themselves in order to ensure independence. While some jurisdictions may allow for certain regulatory functions to be assigned to the judiciary or executive, these should be limited in order to avoid unnecessary interference in the legal profession. In each instance, however, the balance between independence, integrity, confidentiality and the public interest has to be struck.

Once a lawyer is qualified and licensed to practise, they must adhere to certain professional ethics, as addressed in the following sections. The Bar must carefully consider its role as the author, provider and/or upholder of these ethical requirements through informing and educating members and the public about rules of ethics, and enforcing them through disciplinary proceedings.¹³³

¹³² UN Basic Principles, Preamble; UN Declaration on the Rights and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, GA Res. 53/144, Annex, Art 11: 'Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.'

Available at www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx.

¹³³ Søren Jenstrup, IBA BIC Policy Committee member, and partner at LETT Law Firm, Denmark.

5.1.2. Regulatory models

It is useful to consider different models that currently exist and which ones to a large extent, depend on the representational model of the Bars. Looking at a range of models, these can be categorised as follows:

- a federal system, with the local state judiciary or provincial law societies regulating the legal profession;
- a unitary or centralised system of regulation, overseen by an independent body; and
- a system that bestows regulatory functions on a unified, national Bar.

It is worth noting that changes globally, as a result of high-profile cases of corporate malpractice, have led to recent legislative changes such as the UK Legal Services Act 2007, and the Australian Legal Profession Amendment (Incorporated Legal Practices) Act 2000. These are paving the way for wide-ranging and unprecedented regulatory change at a global level, leading to separation of ownership from control within the profession.

GERMANY

Self-regulation has long been identified as a core characteristic of professionalism. In Germany, every lawyer must be a member of a self-regulating regional Bar (28 Bars are now active nationwide). Based on a 1987 decision of the Federal Constitutional Court, the legislature gave the legal profession power to decide upon, and issue, professional practice regulations. This led to the establishment of the Statutory Assembly, whose members are elected directly by all the lawyers from among members of the profession for a four-year term. The Statutory Assembly is an independent decision-making body, which is attached to BRAK. It decides on amendments and additions to the professional practice rules for lawyers and the rules pertaining to specialist lawyers. Meanwhile, the executive is formed of regional Bars and has responsibility for admission and disciplinary control.¹³⁴

¹³⁴ See n 123, Filges and Horrer.

US AND CANADA

Both the US and Canada have federal systems with local bar associations taking the lead in regulating. In the US, state-based regulation is generally handled by the judicial branch of government, rather than by the executive or legislative branch. In most, but not all US states, the state supreme courts admit and license lawyers, adopt lawyer codes of conduct and discipline lawyers. Some US states have what is known as an ‘integrated’ Bar to which all lawyers licensed in that state must belong. These integrated Bars exercise both regulatory and representational functions.¹³⁵ If a state does not have an integrated Bar, it will have a voluntary bar association whose primary purpose is representational, although this Bar may advise the state supreme court and others with respect to regulatory issues.¹³⁶

Although the ABA is a voluntary organisation, it has been very influential in the area of lawyer admissions, conduct rules and discipline rules and has issued model rules that it recommends the state supreme courts adopt.¹³⁷ Through its Center for Professional Responsibility, it has long had, and continues to retain, the premier role in developing and shaping professional regulatory policies and procedures in the US. The Center has been very successful in achieving state implementation of the ABA’s regulatory policies.¹³⁸

135 See, eg, State Bar of California, ‘The State Bar of California Overview’ (State Bar of California, no date) www.calbar.ca.gov/AboutUs/StateBarOverview.aspx.

136 See, eg, The Pennsylvania Bar Association, ‘About the Committee on Legal Ethics and Professional Responsibility’ (The Pennsylvania Bar Association, no date) www.pabar.org/public/committees/lglethic/about/mission.asp. The Pennsylvania Bar Association is not an integrated bar association, but its legal ethics committee makes recommendations to the Pennsylvania Supreme Court regarding proposed rule changes.

137 Information provided by the ABA Center of Professional Responsibility. See also, eg, ABA Center for Professional Responsibility, ‘About the Model Rules’ (ABA website, no date) www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html; The Pennsylvania Bar Association, ‘Disciplinary Board of the Supreme Court of Pennsylvania: Pennsylvania Rules of Disciplinary Enforcement (as at 14 July 2011, The Pennsylvania Bar Association website), available at www.padisiplinaryboard.org/documents/PARDE-current.pdf; ABA Center of Professional Responsibility, ‘Standing Committee on Professional Discipline’ (ABA website, no date) www.americanbar.org/groups/professional_responsibility/committees_commissions/disciplinecommittee.html.

138 Available at www.americanbar.org/groups/professional_responsibility.html.

Similarly, Canadian lawyers are primarily regulated on a provincial rather than a national basis with the Federation of Law Societies of Canada being the association that coordinates the provincial and territorial societies, while the CBA is the national representative body, of which membership is voluntary.

ENGLAND AND WALES

The UK legal profession is regulated by the Legal Services Board (LSB), which is responsible for overseeing the regulation of all lawyers in England and Wales. It is a creature of statute, established by the Legal Services Act 2007, and represents a further shift away from self-regulation. The LSB oversees the ‘approved regulators’ of the legal profession – in the case of solicitors, the SRA and, for barristers, the BSB.¹³⁹ The purpose of the LSB was to have a single oversight body to sit at the head of a regulatory framework and ensure that the approved regulators carry out their regulatory functions to the required standards. The LSB’s duties, functions and powers include:

- making statutory decisions including approving practising certificate fees, approving changes to regulatory arrangements, and recommending designation of new approved regulators and licensing authorities;
- providing guidance for the purpose of meeting the regulatory objectives or about any matter relating to its functions;
- assisting in the maintenance and setting of standards of regulation, education and training; and
- a general power, so that it may do anything it judges necessary to facilitate the carrying out of its functions.

The oversight function, and the powers that stem from it, are far-reaching. For example, in an extreme case, the LSB can recommend to the Lord Chancellor that the regulatory body be stripped of its authority to regulate legal activities. In fact, the LSB’s decisions are not limited to considering whether a decision of an approved regulator was reasonable, but extends to imposing a solution where it finds that a regulator’s decision is harmful when considered in the broader context

¹³⁹ See www.sra.org.uk and www.barstandardsboard.org.uk.

of its oversight of the entire sector, or that a more proportionate, effective means of implementation is possible.¹⁴⁰

NEW ZEALAND

Being a federal system, New Zealand lawyers were originally regulated on a district-wide basis, but this changed with the adoption of the national Lawyers and Conveyancers Act 2006, under which the New Zealand Law Society now has both regulatory and representative functions and powers.¹⁴¹

5.2. Importance of professional ethics

5.2.1. Access to justice and the rule of law

‘Lawyers as guardians of the law, play a vital role in the preservation of society. The fulfilment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.’¹⁴²

Professional standards and ethics for the legal profession are key to promoting the rule of law and access to justice in society, as lawyers are integral to the working out of the law and the rule of law is itself founded on principles of justice, fairness and equity. If lawyers do not adhere to and promote these ethical principles, the law itself is brought into disrepute and trust in the law will be undermined. Lawyers, therefore, have a ‘special responsibility for the quality of justice’.¹⁴³

5.2.2. Maintaining the profession’s reputation

‘Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.’¹⁴⁴

It has been said that a profession’s most valuable asset is its collective reputation and the confidence it inspires. This conveys the notion that

140 www.legalservicesboard.org.uk.

141 www.lawsociety.org.nz.

142 Preamble to the New York Code of Professional Responsibility.

143 Preamble to the ABA Model Rules of Professional Conduct.

144 UN Basic Principle 12.

issues of ethical responsibility and duty are an inherent part of the legal profession, which must have the confidence of the community.¹⁴⁵ Codes of conduct or ethics will often set out the high standards required by the profession. They are intended, in part, to help reassure the public that a high standard of professional services is being given not only by properly qualified persons, but also by persons whose professional standards merit a high degree of public trustworthiness typically required of professionals. Specifically, in relation to the legal profession, lawyers have a special status as agents of the administration of justice, as provided for by UN Basic Principle 12. Codes of ethics, therefore, often refer to the reputation of the profession by reference to its dignity and honour.¹⁴⁶

5.2.3. Accountability

If ethical standards exist and clearly define the duties a lawyer owes their client, the public can bring to account those that fall short of these standards. Ethical standards and codes of professional conduct for lawyers are, in this way, essential to achieving accountability and empowering the public to ensure lawyers maintain the high degree of professionalism expected. This was recognised by the IBA in publishing its International Principles on Conduct for the Legal Profession in May 2011.

The legal profession in many jurisdictions – particularly those with developing Bars and weak formal justice systems – is viewed in a negative light by the public. This perception unfortunately stems from cases where lawyers may have abused their position, as well as clients being unaware of their rights and the duties owed to them. It is also the result of an absence of effective accountability mechanisms. For example, a combination of all these factors is a problem in Somaliland, where a weak formal justice system and no organised Bar means that lawyers are left to practise without any effective regulation.¹⁴⁷

145 Peter MacFarlane, 'The Importance of Ethics and the Application of Ethical Principles to the Legal Profession' [2002] 6 J South Pac Law.

146 Malawi Law Society Code of Ethics states that it 'intends to strengthen the dignity and integrity of the legal profession'.

147 Horizon Institute's Somaliland Justice Sector Project 2014 to 2016. For more information, see www.thehorizoninstitute.org.

Malawi is also an example where lawyers are often perceived badly. The Malawi Law Society received a number of complaints regarding lawyers overcharging clients and retaining more than their entitlement out of damages recovered. This may not have been entirely due to a lawyer's dishonesty but, on many occasions, due to a lack of understanding on the part of the client. There have also been reports of lawyers taking advance payment and then not doing any further work on a case.¹⁴⁸

5.3. Developing ethical standards

5.3.1. *Who should develop a code of ethics?*

UN Basic Principle 26 provides:

'Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognised international standards and norms.'

As part of the fundamental principle of independence, Bars should themselves take responsibility for developing their code of ethics in most jurisdictions, this is normally the case. A useful example can be drawn from the ABA, which has a number of standing committees pertaining to ethics and conduct, including:

- a Standing Committee on Ethics and Professional Responsibility, which develops – and revises as necessary – model ethics standards for lawyers and judges and publishes formal ethics opinions interpreting those standards;
- a Standing Committee on Professional Discipline, which develops, updates, promotes and implements national model regulatory enforcement procedures; and

¹⁴⁸ During the IBAHRI capacity-building project in Malawi, the IBAHRI Legal Specialist reviewed the complaints files at the Law Society office. Many of the complaints involved lawyers not paying all monies, representing damages awarded, to the client. The Legal Specialist also spoke to prisoners and found that some prisoners had paid a lawyer who had promised to represent them and then never saw them again.

- a Standing Committee on Client Protection, which develops, promotes and implements a comprehensive series of policies and programmes related to client trust accounts, fee arbitration and the mediation of non-fee related disputes, insurance payee notification and malpractice insurance disclosure.

The ABA, though not the regulatory body for lawyers in the US, has formulated a number of policy documents on ethics and professional regulations through its Center for Professional Responsibility.¹⁴⁹

5.3.2. Reflecting international and regional standards

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

- lawyers shall at all times maintain the honour and dignity of the profession as essential agents of the administration of justice (UN Basic Principle 12);
- duties of lawyers towards their clients shall include: (i) advising clients as to their legal rights and obligations and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (ii) assisting clients in every appropriate way, and taking legal action to protect their interests; (iii) assisting clients before courts, tribunals or administrative authorities, where appropriate (UN Basic Principle 13);
- lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognised by national and international law and shall at all times act freely and diligently in accordance with the law and

¹⁴⁹ ABA Model Rules of Professional Conduct; ABA Model Code of Judicial Conduct; ABA Model Rules for Lawyer Disciplinary Enforcement; ABA Model Rules for Judicial Disciplinary Enforcement; ABA, 'Report of the Commission on Evaluation of Disciplinary Enforcement' ('McKay Report', ABA 1992); and ABA Standards for Imposing Lawyer Sanctions.

recognised standards and ethics of the legal profession (UN Basic Principle 14); and

- interests of the client should always be respected (UN Basic Principle 15).

Relevant human rights instruments to be considered when developing a code of ethics include, but are not limited to:

- International Covenant on Civil and Political Rights (ICCPR);¹⁵⁰
- European Convention on Human Rights (ECHR);¹⁵¹
- American Convention on Human Rights (AmCHR);¹⁵²
- African Charter on Human and People's Rights (ACHPR);¹⁵³
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988);¹⁵⁴
- The UN Standard Minimum Rules for the Treatment of Prisoners;¹⁵⁵ and
- The ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.¹⁵⁶

Specific standards that can be taken from these instruments include:

150 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), available at www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

151 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), available at www.echr.coe.int/Documents/Convention_ENG.pdf.

152 American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992), available at www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf.

153 African Charter on Human and People's Rights (entered into force 25 January 2005) (ACHPR), available at www.achpr.org/instruments/achpr.

154 Adopted by General Assembly resolution 43/173 of 9 December 1988. Available at www.unhchr.ch/html/menu3/b/h_comp36.html.

155 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, available at www.unhchr.ch/html/menu3/b/h_comp34.htm.

156 Available at www.achpr.org/english/declarations/Guidelines_Trial_en.html.

- the right to be tried without undue delay or within a reasonable time, which is relevant to the lawyer's duty to act diligently;¹⁵⁷
- the right to a defence including the right to be defended by counsel of one's own choice, and to receive legal assistance without payment when an individual has insufficient means to pay for it.¹⁵⁸ The right to a defence is relevant to a lawyer's duty to put the client's interests and the exigencies of the administration of justice before payment for services, which is also reinforced in Principle 5.1 of the IBA's International Principles on the Conduct of the Legal Profession. This principle requires that lawyers treat clients' interests as paramount. It should be noted that the right to defend oneself in person or through a lawyer of one's own choosing can be violated where there are any indications to show that the lawyer 'was not using his best judgment in the interests of his client'.¹⁵⁹
- The right to privileged communication with one's lawyer, which is the right to communicate confidentially. This is an important component of the right to legal assistance.¹⁶⁰ Codes of ethics will usually cover issues of confidentiality and legal professional privilege, which are key to lawyers facilitating the right to legal assistance.

The protection and promotion of human rights is a necessary part, and a logical consequence, of meeting professional ethical standards. Lawyers have a duty to uphold human rights and fundamental freedoms and thus codes of ethics should be informed by the standards found in human rights instruments.

157 Art 14 (3) (c) ICCPR, Principle A 2(i) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Art 7 (1) (d) ACHPR; Art 6 (1) ECHR; Art 8 (1) AmCHR.

158 Art 14 (3) (d) ICCPR; Art 7 (1) (b) ACHPR; Art 6 (3) (c) ECHR; Art 8 (2) (d) AmCHR; Principles G and H of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

159 *N Lewis v Jamaica*, Communication No 708/1996, (views adopted on 17 July 1997) in UN Doc GAOR, A/52/40 (Vol II), para 8.4.

160 160 Art 14 (3) ICCPR; Art 7 (1) (c) ACHPR; Art 6 (3) (c) ECHR; Art 8 (2) (d) AmCHR; Rule 93 of the Standard Minimum Rules on the Treatment of Prisoners and Principle 18 (3) of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. Principle A 2 (f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

5.3.3. *Guidance from other Bars*

A further source of guidance is the standards created by international and regional organisations such as the IBA. The IBA International Principles on Conduct for the Legal Profession include principles relating to:¹⁶¹

- independence;
- honour, integrity and fairness;
- conflict of interest;
- confidentiality and professional secrecy;
- clients' interests;
- clients' freedom;
- competence;
- fees; and
- advertising and soliciting business.

The development of these international principles on professional conduct responds to the need for common ethical standards, a necessity born out of the increasing global market for legal services. The principles can be applied in both common law and civil law jurisdictions, facilitating the recognition and acceptance of key ethical concepts for lawyers.

Regional organisations, such as the European Bars Federation, the East African Law Society (EALS) and the SADC Lawyer's Association, can provide professional conduct standards that can be incorporated and followed by Bars developing rules of ethics. Smaller Bars can find further guidance in the codes of larger national Bars and, where there is not yet sufficient capacity to develop a separate code of ethics, may adopt existing international and/or regional codes. For example, before the Law Society of Lesotho was able to formulate its own ethical code, it adopted the IBA's Code of Conduct.¹⁶²

¹⁶¹ Available at <http://tinyurl.com/IBA-Principles-on-Conduct-2011>.

¹⁶² See The Law Society of Lesotho, Strategic Plan 2006 to 2009. The Law Society of Lesotho now has a code of ethics. See Legal Notice No 50 of 2012, Law Society Rules 2012, Part III Professional Code of Ethics of Members.

Zimbabwe is an example of where assistance from experts outside the Bar can help build capacity to develop a code of ethics. The project in Zimbabwe involved an IBAHRI legal specialist working with the Law Society to develop a code for lawyers. The IBAHRI also arranged meetings with experts at the IBA, UK Bar Council and the Law Society of England and Wales in relation to ethics and discipline.¹⁶³ Similarly, as part of their capacity-building work with the IBAHRI, the Law Society of Swaziland included the production of a code of ethics in their strategic plan, and subsequently produced one.¹⁶⁴

5.4. Raising awareness

A code of ethics will fail to serve its purpose if lawyers are not educated on ethical standards, and if members of the public have no knowledge of duties owed to them or complaint procedures. UN Basic Principle 9 states:

‘Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognised by national and international law.’

Accordingly, Bars have an obligation to raise awareness of the ethical duties binding a lawyer as recognised by national and international law, and to ensure that lawyers receive education and training on ethics, as well as sufficient education and training to ensure they meet professional ethical standards. The publication and dissemination of ethical standards is therefore fundamental to Bars fulfilling their role in ensuring the legal profession is regulated and able to serve the public.

It is essential that rules on ethics be circulated to all lawyers and that they receive appropriate training. Bars that do not have sufficient funds for the finalisation, publication or dissemination of a code must focus on fundraising initiatives as there are often willing sponsors and donors to assist (this is another example of the importance of networking). In Malawi, for instance, copies of the Law Society’s Code of Ethics were printed with funding from

163 IBA long-term assistance programme to the Law Society of Zimbabwe, Project Report and Appendices, October 2003.

164 Swaziland Law Society Strategic Plan, 2004 to 2005; see n 59, interview with Cyril Mphanga 2007.

the EU and distributed to all lawyers, as well as government departments such as Legal Aid and the Office of the Director of Public Prosecutions. A workshop was also held to promote an understanding of the Code of Ethics among lawyers. This was facilitated by a very experienced senior counsel who assisted in drafting the Code and involved a consideration and discussion of case studies that raised professional conduct issues.¹⁶⁵

Where a Bar has not yet established itself, and the legal profession has no rules on ethics, until such rules are finalised, lawyers can still be made aware of important ethical standards. For example, in Somaliland, the legal profession is not yet sufficiently organised or resourced, and no rules or code of conduct for lawyers exists. Nevertheless, a booklet on ethics was compiled to raise awareness among lawyers about the importance of ethics and the main principles by which all lawyers must always be guided. The booklet further included case studies relevant to the context of Somaliland to foster a practical understanding of the importance, and implementation, of ethics.¹⁶⁶

However, it is important for Bars to make sure regular training on ethics continues and is not done on an ad hoc basis.¹⁶⁷ In most jurisdictions, ethics will form part of a law student's studies, either at undergraduate level or through a postgraduate course. In Malawi, ethics is taught at undergraduate level as part of the law degree. However, this has proved to be insufficient for the purposes of practice and the Law Society had indicated that further training is necessary, perhaps through a postgraduate course that includes ethics.¹⁶⁸ For example, in the UK, both the Legal Practice and Professional Skills courses, which are the compulsory postgraduate courses to be completed before an individual can start their legal training as a solicitor, include professional conduct. Similarly, the Zambian Institute of Advanced Legal Studies includes

165 See n 29 above, IBAHRI 2006, 'Phase 2' (unpublished) and IBAHRI 2007, 'Phase 3' (unpublished).

166 Horizon Institute's Somaliland Justice Sector Project 2014 to 2016. See www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf.

167 For example, in Zimbabwe, although a code of ethics had been developed, there had been no consistent programme on ethics and sessions had been on an ad hoc basis (telephone interview with Sternford Moyo, former President of the Zimbabwe Law Society, and former IBAHRI Co-Chair (30 November 2008)). This is the case with many developing Bars.

168 See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished).

professional conduct and ethics as part of the postgraduate Bar Qualifying Course, a prerequisite for anyone intending to practise law in Zambia.

Where such institutes exist, they can work with the local Bar to develop a regular programme on ethics for lawyers. This is often part of the regulatory framework that is imposed on a lawyer. Completion of a course in ethics on a periodic basis, often annually, is a registration requirement for lawyers. Larger Bars have well-developed programmes and require certain units of study to be completed each year. For example, in Australia, Canada and England, the compulsory requirement to complete an ethics education programme has been implemented to satisfy registration requirements. Each lawyer must demonstrate the completion of an annual programme on professional ethics, to be issued with a practising certificate.

Lawyers are essentially providers of access to justice to the public. And so it is equally important that the public is aware of the duties and responsibilities lawyers owe their clients. For example, in Malawi, the Code of Ethics was made available at public information points such as libraries, colleges, courts and banks. Similarly, in Swaziland, the Law Society produced a pamphlet on complaints against lawyers. Many Bars that have websites also now include information there for the public on how to make a complaint. Bars can also use links with other organisations that undertake rights-based civic education work to help raise awareness of professional conduct rules. Generally, it is recommended that, where a code of ethics has been formulated, Bars ensure public access and undertake to awareness-raising activities as part of their obligation to uphold the standards of the profession.

5.5. Complaints and disciplinary procedures

5.5.1. Standards for disciplinary procedures

The UN Basic Principles provide the following important guidance on disciplinary proceedings against lawyers:

- Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures.

Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice (UN Basic Principle 27).

- Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority or before a court, and shall be subject to independent judicial review (UN Basic Principle 28).
- All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognised standards and ethics of the legal profession and in the light of these principles (UN Basic Principle 29).

It follows that any disciplinary procedures must be expeditious, fair, independent and must guarantee due process in the course of proceedings. In relation to independence, it should be noted that, where the executive has a role to play in disciplining lawyers, the independence of the legal profession can be undermined. For example, the African Commission on Human and People's Rights has in the past considered whether Nigeria's Legal Practitioners (Amendment) Decree 1993 was inconsistent with the terms of the African Charter. The Decree established a new governing body of the Nigerian Bar Association. Of the total 128 members of the Body of Benchers – which had 'wide discretionary powers, among them the disciplining of lawyers' – only 31 were nominees of the bar association, while the other members were nominated by the government. The Commission found that the Body of Benchers was 'dominated by representatives of the Government' and, as 'an association of lawyers legally independent of the Government, the Nigerian Bar Association should be able to choose its own governing body'.¹⁶⁹

It is most important to ensure the appropriate balance between the rights of the clients and the right of the lawyer to a fair hearing, and so the disciplinary system will usually include an important role for the Bar. As provided in the UN Basic Principles, the system for dealing with complaints must be independent of the state and transparent. As well

169 *Civil Liberties Organisation v Nigeria*, Communication No 101/93, (in respect of the Nigerian Bar Association) ACHPR, decision adopted during the 17th Ordinary Session, March 1995, para 1.

as securing its fairness, impartiality and independence, the Bar also must weigh up aspects such as trustworthiness, image and respect, and consider what reasonable expectations those outside the profession could (and should) have.

There should also be a right to independent judicial review. For example, the Special Rapporteur on the Independence of Judges and Lawyers found that in Cuba, it appeared that the government, through the Ministry of Justice, had some control over disciplinary sanctions.¹⁷⁰ The Criminal Procedure Law in Cuba contained certain provisions with regard to the functions of lawyers. The law included a provision that: disciplinary measures against members of the organisation may be appealed to the highest levels; and that disciplinary sanctions may be appealed by the courts against legal professionals for misconduct in the performance of their functions. However, the fact that appeal was to the Ministry of Justice indicated there may not be provision in the legislation for an independent judicial review as required by UN Basic Principle 28.

Lastly, publication of the outcome of disciplinary proceedings should also be considered, in order to protect the public. While some jurisdictions do not publish minor disciplinary findings, other jurisdictions will do so. In the case of more serious findings, publication can be in wider journals or newspapers, not just law journals that the public would not normally read. Consideration should also be given to sharing disciplinary information on serious cases with regulators in other jurisdictions where an offending lawyer is known to practise. This is currently being considered by the IBA's Bar Issues Commission for draft guidelines on the sharing of disciplinary information.

5.5.2. Disciplinary models

There are a range of models that are available for disciplinary proceedings. They could involve the judiciary taking the lead role, or an ombudsman or other body independent from the Bar. Alternatively, discipline can fall within the remit of the Bar itself, and indeed this is often the case. Though smaller, developing Bars may not have a sophisticated regulatory

¹⁷⁰ ECOSOC, Fifty-Fourth Session 12 February 1998 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (12 February 1998) UN Doc E/CN.4/1998/39, para 64.

structure in place, they may, nonetheless, have complaints and disciplinary mechanisms within their structure, such as a complaints or disciplinary committee recognised in their governing statute or regulations.¹⁷¹ The following are examples from different jurisdictions:

UNITED STATES

The responsibility of regulating the legal profession in the US belongs primarily to the judicial branch of government of each state, and ABA policy has long supported state-based judicial regulation.¹⁷² In each state, and the District of Columbia, the highest appellate court has the inherent and/or constitutional authority to regulate the practise of law. This includes the adoption of rules of professional conduct, and rules and procedures for disciplinary enforcement, to fulfil the primary purpose of professional regulation, which is protection of the public.

While a state legislature may, under its police power, act to protect the interests of the public, with respect to the practise of law, it does so in aid of the courts; its actions do not supersede or detract from the courts' powers to regulate the Bar. In the few states where the legislature has some involvement in the regulation of lawyers, the courts retain their authority. The regulation of the legal profession by the judicial branch of government is consistent with the doctrine of separation of powers and maintains the necessary balance between the three branches of government.

Due to the positive reaction by state supreme courts to ABA regulatory policies, lawyer disciplinary enforcement in the US is an effective, complex, professionally staffed enterprise. Professional staff responsible for the operation of a given disciplinary agency include, but are not limited to:

171 For example, in Tanzania, the Advocates (Disciplinary) Rules 1955 (Laws of Tanzania) establish a disciplinary committee that considers applications to remove the name of an advocate from the roll or to require an advocate to answer allegations. In Uganda, the Advocates (Disciplinary Committee) (Procedure) Regulations of 1974 made pursuant to s 18(4) of the Advocates Act 1970, confer powers on a disciplinary committee that has a mandate to consider a complaint made against an advocate, by any person, the law council or the law society. The disciplinary committee decides whether a prima facie case is established and can request further information from the complainant or the advocate. Where a prima facie case is established, the committee fixes a date for a hearing.

172 The contribution on US disciplinary procedures was provided by Art Garwin, Director of the ABA's Centre for Professional Responsibility.

- a chief disciplinary counsel and assistant disciplinary counsel, whose job it is to investigate and prosecute allegations of misconduct;
- investigators;
- paralegals;
- secretaries and other administrative staff;
- auditors; and
- probation monitors.

The size of the staff varies depending on the size of the jurisdiction.

The entity responsible for investigating, prosecuting and adjudicating violations of the rules of professional conduct at the behest of the court varies in each state. In some jurisdictions, the court has delegated that job to the state Bar. In others, it has created a separate agency. ABA policy prefers an agency independent of the bar association, as this enhances the public's perception of the system as fair, accessible and free from appearance that the internal politics of Bars may somehow influence disciplinary proceedings.

Each state's disciplinary system operates under a sophisticated set of substantive and procedural rules adopted by the court. Disciplinary sanctions include:

- admonition;
- reprimand;
- censure;
- suspension;
- disbarment;
- probation; and
- restitution.

The court may also order a disciplined lawyer to comply with specific conditions, such as submission to drug and alcohol testing, or monitoring of client trust accounts. It may further require a disciplined lawyer to reimburse the disciplinary agency for the costs of the investigation and prosecution.

A large, transparent body of regulatory case law in each jurisdiction exists. In many states, information about disciplined lawyers is available online.

Filing complaints can be done by anyone. A disciplinary agency may also initiate investigations on its own when appropriate. Once filed, a complaint against a lawyer is first analysed to determine if the agency has jurisdiction or, if the facts as alleged, would constitute a violation of the applicable rules of professional conduct. If not, the complainant will be notified and, where appropriate, referred to another agency for assistance.

If the disciplinary agency has jurisdiction, the complaint will be investigated. At this stage in the process, except in a very few states, matters are kept confidential. If the agency determines that there is probable cause that the lawyer committed misconduct, formal charges will be filed. In most states, consistent with ABA policy, upon the filing and service of those formal charges, the matters become public. Members of the public can view the formal pleadings filed in the case and can attend the disciplinary trial.

Consistent with ABA policy that the public be involved in the disciplinary process, disciplinary trials are typically heard by a hearing panel consisting of two lawyers and a non-lawyer. Certain due process protections apply. For example, lawyers charged with misconduct are entitled to:

- notice of the charges against them;
- the right to confront witnesses against them and present evidence;
- the right to counsel; and
- the right to assert their Fifth Amendment protections against self-incrimination.

In most states the rules of evidence apply, and the state's rules of civil procedure govern pre-trial practice.

Post-trial, the hearing panel issues a report and recommendation as to whether the lawyer has committed the charged misconduct. The disciplinary agency bears the burden of proving the allegations of the formal charges by the designated standard of proof, which in most jurisdictions is clear and convincing evidence. In addition, the hearing panel report contains a recommended disciplinary sanction consistent with existing precedent. In some states, there is an intermediate appeal available to the lawyer and to

the disciplinary agency. Ultimately, the state supreme court will decide the matter and impose the appropriate discipline.

GERMANY

Germany has an ombudsman that serves as a mediator and advisor in civil disputes between a lawyer and client. The ombudsman will conciliate on disputes ranging from disagreements over professional fees to client liability claims. Agreements can be reached on claims worth up to €15,000 without recourse to the courts, thereby avoiding a further burden on the court system. The ombudsman, therefore, provides the public with a less expensive method to resolve disputes with lawyers, and complements the conciliation and mediation services that regional Bars provide. Indeed, the mediation route can be a useful model for smaller Bars to use where sophisticated regulatory structures are not yet in place.¹⁷³

ZAMBIA

The Law Association of Zambia (LAZ) has a Legal Practitioners' Committee (LPC), which handles the welfare of advocates, maintains a directory and considers complaints of professional misconduct. The LPC sits once in each region every month and hears over 100 complaints a year. It attempts to resolve issues before there is a ruling. Where the LPC considers there is a good case against a lawyer, it prosecutes before the Disciplinary Committee (DC), which consists of the Attorney General (Chair), Solicitor General (Vice Chair) and nominees of the LAZ Council. The DC also hears appeals from the LPC.

Any complaints to the DC are made in affidavit form. Parties usually comply with a decision and an Unless Order is made to follow the ruling. Members of the public can also apply directly to the High Court but it is likely to refer the matter back to the DC.

If the respondent is found guilty of grave misconduct, they may face a reprimand, suspension or seizure. Once a lawyer is suspended, the LPC produces an affidavit for the DC and the parties are called again. The LPC becomes the complainant and the complainant becomes a witness.

¹⁷³ See n 123 above, Filges and Horrer.

If found guilty by the DC, an application is made to the Chief Justice for the respondent to be struck off. A member can only be disbarred by the DC. When the LPC prosecutes before the DC, it appoints an advocate of good standing to prosecute who acts on a pro bono basis.¹⁷⁴

5.5.3. Overcoming challenges faced by smaller Bars

In Lesotho, the responsibility for disciplining lawyers falls with the DC, which is made up of practising legal practitioners. However, as they undertake this responsibility on a voluntary basis, they can only meet when the work from their respective offices permits it. Although the committee, nonetheless, managed to meet regularly, it had found that its members complained of not receiving any payment or reimbursement for their time and expenses.¹⁷⁵ This is an issue that Bars should try to address for the sake of maintaining the will among members to partake in such disciplinary committees. This may be dealt with through at least payment of expenses, as done by the LAZ's LPC.

Where smaller Bars are struggling with disciplinary proceedings and processing complaints, interim measures can be taken to nevertheless achieve some form of accountability. For example, the Malawi Law Society has in the past dealt with complaints against lawyers through mediation without resorting to the DC, where the latter was failing to deal with complaints. Meanwhile, in Swaziland, a conciliation procedure was introduced to settle less serious cases.¹⁷⁶ Bars could also look to the model of the regional Bars in Germany providing conciliation and mediation services.

In Afghanistan, the Bar's DC – the 'Monitoring Board' – is elected at the biennial General Meeting. While this promotes democratic processes in selection of the members, the outcome can be less than advantageous when many of the elected members live too far away from the Bar to be able to attend meetings regularly. This issue should be drawn to the

¹⁷⁴ See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished), 'Appendix 3: Report of Trip to Zambia'; and interview with complaints handler at Law Association of Zambia Secretariat during a visit as part of the IBAHRI capacity-building project (Malawi February 2006).

¹⁷⁵ See n 59 above, interview with Lindiwe Siphomolo 2007.

¹⁷⁶ IBAHRI, 'Capacity Building to Support the Law Society of Swaziland: Final Report' (IBAHRI 2005), p 7.

attention of the members prior to the voting. Committee members should nevertheless be provided with a designated room in which to hear complaints and hold discussions, and have a lockable cabinet in which to store papers.

Complaints procedures can also benefit from having staff dedicated to processing complaints. For example, LAZ has a full-time employee to refer complaints to the LPC.¹⁷⁷ Many complaints may be due to a simple misunderstanding and can be resolved simply through correspondence. However, where members of the public do not receive a response, or there are major delays, it gives the perception that their complaint is not being taken seriously and can undermine trust in the legal profession. Where Bars are concerned that complaints may be vexatious, it may assist to introduce a fee for lodging a complaint, as done in Zambia.¹⁷⁸ This goes towards ensuring that most complaints have some merit.

5.6. Risk and compliance

5.6.1. Importance of regulating risk and promoting compliance

An integral part of promoting a competent and ethical legal profession is to take steps to minimise the risks of non-compliance with, or breach of, professional standards and the damage that can result from such non-compliance or breach. Bars have a role in gathering information and reflecting on general risks and dangers inherent in the provision of legal services, such as liability for malpractice and damage or loss caused to the public. Indeed, in the global market of legal services, with large international law firms, the financial damage caused by non-compliance with legislation or professional standards can potentially be huge.

The ABA Business Law Section Co-Chair sums up how a culture of compliance should be promoted in order to minimise risks in any institution and encourage ethical conduct and compliance, that is, by making compliance risk management everyone's responsibility within an institution.

¹⁷⁷ www.laz.org.zm/secretariat-staff; see n 29 above, IBAHRI 2007, 'Phase 3' (unpublished), 'Appendix 3: Report of Trip to Zambia'.

¹⁷⁸ LAZ has a fee of ZMK 100,000 (approximately US\$9 at the time of writing). However, where a complainant cannot pay but the complaint has merit, the fee is waived.

Furthermore, the institution's senior management has responsibility for setting the tone and reinforcing the culture of compliance established by the leadership, and implementing the measures to promote the culture. It is also important to ensure the views about the importance of compliance are understood and communicated by senior management across, and at all levels of, the organisation through ongoing training and other means.¹⁷⁹

5.6.2. Model of risk and compliance approach

ENGLAND AND WALES

In England and Wales, the SRA, the primary regulator of solicitors (overseen by the Legal Services Board), has as one of its main functions, regulating risk and promoting compliance in the practice of law.¹⁸⁰ It takes an 'outcomes-focused' and 'risk-based' approach to regulation, through identification of risks to the regulatory objectives set out in the Legal Services Act 2007. It allocates its own resources proportionately, in line with identified risks to the regulatory objectives, and requires that law firms ensure that they do the same. Risks are assessed in terms of their probability and the impact of any harm they cause to desired outcomes, before action is taken, ensuring that regulatory activities and resources are prioritised and applied proportionately.

The ultimate goal of the SRA's regulatory activity is to work compatibly with the following regulatory objectives set out in the Legal Services Act 2007:¹⁸¹

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law;
- improving access to justice;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of services;

¹⁷⁹ ABA, 'Corporate Compliance' (Newsletter, ABA 2011) <http://apps.americanbar.org/buslaw/committees/CL925000pub/newsletter/201107>.

¹⁸⁰ Model taken from the SRA's webpage on risk and compliance at www.sra.org.uk/risk/risk.page.

¹⁸¹ SRA's Regulatory Framework available at www.sra.org.uk/risk/risk-framework.page.

- encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of the citizen's legal rights and duties; and
- promoting and maintaining adherence to the professional principles.

The SRA specifies that the regulatory outcomes are to be as follows:

- The public interest is protected by ensuring that legal services are delivered ethically and the public have confidence in the legal system.
- The market for legal services is competitive and diverse, and operates in the interests of consumers.
- Consumers can access the services they need, receive a proper service and are treated fairly.
- Regulation is effective, efficient and meets the principles of better regulation.

The SRA's risk-based approach to regulation focuses attention on 'issues, firms and potential risks that pose the greatest threat' to the regulatory outcomes. In order to achieve this, it needs to:

- have a clear view on what the risks are to the regulatory outcomes and how exposed they are to them;
- to demonstrate where the most significant risks lie, what regulatory controls are being applied to address them, and that these controls are both proportionate and effective; and
- have clear governance arrangements in place to ensure that risks are escalated as appropriate and that there is accountability for the effective management of risk.

These requirements shape the SRA's approach to every area of regulatory activity, for example authorising individuals joining the profession, supervising firms, enforcement activities, and the setting of policies and standards. The tools that the SRA has to hand to try to ensure compliance with the regulatory framework include:

- controls on how a firm or individual practises;
- issuing a warning about future conduct;

- closing a firm with immediate effect or imposing a disciplinary sanction, such as a fine;
- informing the market about undesirable trends and risks;
- adapting regulatory policy to minimise recurrence of an issue; and
- setting qualification standards and ongoing competency requirements.

The SRA specifies that it makes a distinction between operational and regulatory risk:

‘Operational risks generated by the SRA’s activities, including our activities to control regulatory risks, are identified and assessed separately to the regulatory risks. This framework describes our approach to the latter, although the risk management approach and behaviours can also be applied to these operational risks.’

Accordingly, it is important to note that the approach should apply to Bar Associations, as well as to the legal practices they regulate.

Bars who take such a risk-based approach to regulation can be proactive, and identify and tackle risks before they occur, rather than acting retrospectively once damage or loss has resulted.

Chapter 6: Rule of Law and Access to Justice

6.1. Introduction

The legal profession in any society has a crucial role to play in upholding the rule of law and ensuring that access to justice is not merely illusory but a reality for all. As provided by the UN Basic Principles, the

‘[A]dequate protection of the rights and fundamental freedoms to which all persons are entitled [...] requires that all persons have effective access to legal services provided by an independent legal profession.’

Bars, therefore, are integral to ensuring that human rights are respected and protected. Indeed, they have an obligation to promote and provide ‘effective access to legal services’ to all persons, and ‘cooperat[e] with governmental and other institutions in furthering the ends of justice and public interest’.¹⁸²

Human rights, such as the right to: equality before the courts and to a fair hearing without undue delay; adequate time and facilities to prepare a defence; defend oneself through legal assistance and to have legal assistance assigned where an individual has insufficient means to pay, cannot be realised unless there is an independent legal profession willing and able to uphold and promote access to justice.

This section looks at the important role of Bars in protecting and promoting the rule of law, human rights, and access to justice.

6.2. Rule of law and human rights

6.2.1. Introduction

‘It is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.’¹⁸³

¹⁸² UN Basic Principles, Preamble.

¹⁸³ Universal Declaration of Human Rights, Preamble.

For individuals to fully realise their rights, they must be protected by national legal systems.¹⁸⁴ Indeed, human rights, the rule of law and democracy are interlinked and mutually reinforcing.¹⁸⁵

In response to the increasing erosion of the rule of law around the world, the IBA adopted a Resolution in September 2005, setting out some fundamental rule of law principles:

‘An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process; are all unacceptable.

The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect. The IBA calls upon all countries to respect these fundamental principles. It also calls upon its members to speak out in support of the Rule of Law within their respective communities.’¹⁸⁶

184 See also the definition of the ‘rule of law’ provided by former UN Secretary-General, Kofi Annan: ‘...a concept that refers to a principle of government in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’ See UNSC Report of the UN Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (23 August 2004) S/2004/616, para 6, available at www.undp.org/cpr/documents/jssr/ssr/rule%20of%20law%20and%20transitional%20justice.pdf.

185 UNGA, Sixty-Seventh Session 30 November 2012, ‘Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels’ (30 November 2012) Resolution adopted by the General Assembly on 24 September 2012, A/RES/67/1, paras 5–6.

186 IBA Rule of Law Resolution adopted in September 2005 available at www.ibanet.org/PPID/Constituent/Rule_of_Law_Forum/Default.aspx.

The rule of law and human rights are two interdependent and intertwined concepts. Without the former, the latter cannot be realised, and a society without human rights is evidence that the rule of law has been undermined or is non-existent.

6.2.2. The role of Bars

An independent legal profession, and in particular Bars, are fundamental to the maintenance of the rule of law and the protection of rights and freedoms. Bars have an obligation to ensure such protection, which includes:

- adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession (UN Basic Principles, Preamble);
- professional associations of lawyers have a vital role to play in cooperating with governmental and other institutions in furthering the ends of justice and public interest (UN Basic Principles, Preamble);
- governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms (UN Basic Principle 4);
- lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognised by national and international law (UN Basic Principle 14); and
- professional associations of lawyers shall cooperate with governments to ensure that everyone has effective and equal access to legal services (UN Basic Principle 25).¹⁸⁷

¹⁸⁷ See also IBA, 'A Commentary on the IBA Council's Resolution' (IBA 2005), available at www.ibanet.org/PPID/Constituent/Rule_of_Law_Forum/Default.aspx.

A number of international human rights treaties, principles and guidelines further specify the indispensable role of lawyers in the promotion and protection of the rule of law and human rights.¹⁸⁸

Their role is particularly fundamental in countries with weak or developing legal systems, where rule of law principles are possibly not being respected by state institutions. In such circumstances, a Bar can play an essential role in transforming society. More specifically, it can develop strategies that give due attention to promoting:

- legislation that is in conformity with international human rights law, and that responds to the country's current needs and realities;
- a strong and independent judiciary and legal profession, which is at the institutional core of systems based on the rule of law;
- lawful police services, humane prison services, fair prosecutions and capable associations of criminal defence lawyers;
- effective legal mechanisms for redressing civil claims and disputes;
- juvenile justice systems that ensure that children in conflict with the law are treated appropriately in line with recognised international standards for juvenile justice; and
- gender sensitivity.¹⁸⁹

To do so, Bars may undertake a number of initiatives, explored in the following section.

188 For example, Art 14 ICCPR; Principles 74 and 99 (e) and (f) Draft Universal Declaration on the Independence of Justice (the 'Singhvi Declaration'); Art 37 (d) Convention on the Rights of the Child; Art 9 (2) Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (GA Res 53/144, adopted 8 March 1999); I (a) and (i) Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Article 7 African Charter on Human and People's Rights; Rule 93 Standard Minimum Rules for the Treatment of Prisoners; Principles 11, 12, 15, 17, 18, 23, 25, 32 and 33 Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment; Latimer House Guidelines VIII (3) ('An independent, effective and competent legal profession is an essential component in the protection of the rule of law.').

189 UNSC Report of the UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) S/2004/616, para 35.

6.2.3. Advocacy

STATEMENTS AND PROTESTS

Bars must be able to speak out freely against abuses of power. UN Basic Principle 23 provides:

‘Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights...’

Bars must ensure that lawyers are not unnecessarily limited in speaking out publicly. In August 2003, the UN Special Rapporteur on the Independence of Judges and Lawyers sent an urgent appeal against the Law Council of Uganda’s public announcement that it would enforce Regulation 22 of the Advocate’s (Professional Conduct) Regulations 1977, which stipulated that all lawyers were to refrain from participating in radio talk shows, making public comments, writing articles or issuing press statements on legal or constitutional matters. Reportedly the only way to be granted exemption from this regulation was to obtain express authority from the council body, which was under the authority of the Minister of Justice. The Special Rapporteur expressed concern that lawyers may be restricted from exercising their right to freedom of expression in their professional capacity.¹⁹⁰ Arguably, the legal profession not only has a right to speak out publicly on the promotion and protection of human rights, but has an obligation to do so, as a result of the special status accorded to lawyers as professionals.

Advocacy may take the form of public or press statements that may be oral or written. It may also be as written representations to the government, other state institutions or even non-governmental organisations, and may further include legal challenges or *amicus curiae* briefs in litigation before national or regional courts or tribunals.

In some cases, advocacy can have a real impact on the state. For example, the Law Society of Kenya played an important role in opposing the one-party state in the 1980s. In Malawi, the Law Society has spoken out

¹⁹⁰ ECOSOC, ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’ (4 March 2004) E/CN.4/2004/60/Add 1, para 99.

against debts owed to statutory corporations and public utility companies by the government, emphasising that the government should not be above the law.¹⁹¹ It has further advocated in support of the independence of the judiciary when parliament faced a deadlock over the issue of an increase in judges' salaries, as well as against the government's failure to implement salary increases for judges, despite such increases having been approved by parliament.¹⁹²

In Zimbabwe, despite facing persecution, harassment and intimidation, the legal profession has continued to speak out against human rights violations and abuses of power by the government. The Law Society of Zimbabwe has consistently defended human rights and worked to highlight the severe decline in the rule of law in order to draw regional and international attention and support. There have been direct attacks on members of the legal profession representing opposition party members, and lawyers have been unable to gain access to their clients.¹⁹³ But despite such targeting, in May 2007, lawyers gathered for a peaceful protest outside the High Court of Zimbabwe to present a petition to the Minister of Justice, the Attorney General and the Commissioner of Police, urging protection of lawyers in the execution of their professional duties, as stipulated in the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.¹⁹⁴

In Japan, the Federation of Bar Associations has an active human rights committee. It has issued statements or opinion papers on several human rights issues, such as: protesting execution of the death penalty and requesting suspension of executions and the launch of a nationwide debate on the abolition of the death penalty; calling for better working conditions for women; calling for relief for those affected by the Fukushima nuclear power plant disaster; and demanding respect for freedom of the press.¹⁹⁵

191 See n 29 above, IBAHRI 2006, 'Phase 2' (unpublished), p 44.

192 See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished), pp 30–31.

193 Arnold Tsunga and Otto Saki, 'Zimbabwe Human Rights in Crisis: A Shadow Report to the African Commission for Human and People's Rights' (Law Society of Zimbabwe 2007a), and Arnold Tsunga and Otto Saki, 'Self-Regulation at a Crossroads: Attacks on Lawyers and the Independence of the Legal Profession in Zimbabwe' (Law Society of Zimbabwe 2007b).

194 Principle I (b).

195 www.nichibenren.or.jp/en.

Case study: England and Wales

The Law Society of England and Wales provides consultation responses on draft bills, and has often highlighted areas where there is a potential for human rights being undermined. For example, in its response to the Regulation of Investigatory Powers Act equipment interference and interception codes of practice (March 2015), it stressed the importance of the individual's right to communicate with their lawyer without fear of their computer being bugged or messages being intercepted by the security and intelligence services, as a basic for the functioning of the justice system and the rule of law. The Law Society argued that there is a need for a review and reform of the legislative framework for surveillance in the UK, and called for statutory guarantees recognising the importance of client-lawyer confidentiality – fundamental to the right to a fair trial.¹⁹⁶

Case study: Australia

In Australia, the legal profession has been highly active in its defence of the rule of law and fundamental legal privileges. For example, in September 2015, the Crimes Legislation Amendment (Foreign Fighters) Bill 2014 was introduced into the Australian Parliament. The Bill was intended to protect Australians from the threats of overseas travellers returning to conduct terrorist attacks at home. While a worthy objective, achieving this under the Bill would have come at

¹⁹⁶ The Law Society of England and Wales, 'Law Society response to RIPA consultation: equipment interference and interception of communications codes of practice' (The Law Society of England and Wales 2015), <http://communities.lawsociety.org.uk/human-rights/news-and-events/law-society-response-to-ripa-consultation-equipment-interference-and-interception-of-communications-codes-of-practice/5047946.article>.

the cost of impinging on several human rights, such as the freedom of speech and the freedom of movement. The Law Council of Australia was successful in ensuring the addition of provisions, which guaranteed that information obtained through torture or duress overseas was not admissible in Australian courts, and in securing the introduction of safeguards relating to the expanded detention powers.¹⁹⁷

Moreover, working closely with its constituent bodies, the Law Council developed a policy in support of a federal Human Rights Act. The policy is aimed at ensuring that decision-makers take human rights into account when making and administering the law. This policy formed the basis of the Law Council's contribution to the National Human Rights Consultation, run by an independent Committee, which took place in 2009. The National Consultation Committee's report recommended the enactment of a Human Rights Act. In response to the National Consultation Committee's report, the Attorney-General released Australia's Human Rights Framework. One positive inclusion in the Framework was the establishment of the Parliamentary Joint Committee on Human Rights in January 2012.¹⁹⁸

LAW REFORM

Bars can advocate for law reform to promote human rights and the rule of law. This can also include participation in constitutional review or constitution making. Through law reform activities, Bars can further advocate for laws giving effect to international human rights standards.

In some jurisdictions, Bars have been instrumental in the process of constitution-making and constitutional reform. For example, in Southern Africa – particularly over the past 20 years or so – all countries in the

¹⁹⁷ See n 117, Nicholl and Brims.

¹⁹⁸ Law Council of Australia, 'Protecting and Promoting Human Rights in Australia' (Law Council of Australia website, no date) www.lawcouncil.asn.au/lawcouncil/index.php/protecting-and-promoting-human-rights-in-australia.

region have experienced some form of constitution-making, review or reform, in which lawyers have played a key role.¹⁹⁹ For example, the Law Society of Kenya was involved in the constitutional review process in 2006, and played an important part in the production of a draft constitution. It formed an ad hoc committee of constitutional law experts to review the constitutional review process, and came up with recommendations on the way forward. In Swaziland, the role played by the Law Society during the constitutional crisis eventually led to plans for a National Convention and a Constitutional Assembly to debate the constitution.²⁰⁰ Meanwhile, the Malawi Law Society held its own constitutional review conference in 2006 intended to inform the National Constitutional Review Process.²⁰¹

PUBLIC INTEREST LITIGATION

Advocacy can also take the form of public interest litigation or interventions in cases (or *amicus* briefs). The former may include class or group actions, and test cases aimed at influencing policy, practice or procedure that has an impact on a group of people. Such litigation is a vehicle through which laws can be used to transform society, empower the vulnerable, and act as a check on the state and its institutions. It can be an important political tool affording marginalised groups and interests an entry point into contested issues. Public interest litigation has played an important role in fighting discrimination, for example, in India, South Africa and the US, and has even been used to promote social and economic rights.

Bars should aspire to take a lead in public interest litigation as they possess a wealth of legal experience and knowledge in comparison to the rest of society. As well as working to change laws that are inconsistent with human rights and the rule of law, Bars may also consider whether current practices or policies are inconsistent with domestic legislation. In many jurisdictions, although constitutions and domestic laws may in theory reflect international human rights standards, they have not been

199 Louise Olivier, 'Constitutional Review and Reform and the Adherence to Democratic Principles in Constitutions in Southern African Countries' (Open Society Initiative for Southern Africa 2007), p 5.

200 See n 117, IBAHRI 2005 (unpublished).

201 The Malawi Law Society held workshops with the assistance of the IBAHRI capacity building project to make submissions at the National Constitutional Review Conference during 2006 (see n 29 above, IBAHRI 2006 (unpublished), pp 25–26).

enforced or tested before domestic courts. For example, in Somaliland, the constitution contains several fundamental rights that have yet to be tested in national courts, particularly by the Supreme Court.²⁰²

Case study: test case litigation challenging the death penalty

An example of the development of public interest litigation from developing jurisdictions is the challenge to the death penalty in Africa. In 2003, lawyers in Uganda represented 417 prisoners on death row and filed a petition in the Constitutional Court. The case challenged the legality and constitutionality of the mandatory nature of the death penalty on the basis that the court was unable to take into account any individual circumstances that might render the death penalty a severe punishment.²⁰³ In 2009, although the Supreme Court upheld the death penalty, it ruled that it was unconstitutional to keep convicts on death row for more than three years, and directed that sentences for such prisoners be reduced to life imprisonment.

In Malawi, lawyers teamed up with UK barristers to bring a challenge to the mandatory death penalty under the Constitution.²⁰⁴ The High Court of Malawi ruled that its mandatory nature in murder cases violated the right to life and prohibition of torture, or cruel, inhuman and degrading punishment, as it did not provide the individuals concerned with an opportunity to mitigate their death sentences.²⁰⁵

Such cases are also an example of Bars working to promote international human rights norms through domestic courts.

202 See n 107 above, Constitution of the Republic of Somaliland (Part III) available at www.somalilandlaw.com/Somaliland_Constitution/body_somaliland_constitution.htm.

203 *Kigula and Others v Attorney General*, Constitutional Court of Uganda, Constitutional Petition No 6 [2003] (13 June 2005).

204 *Kafantayeni v Attorney General*, Constitutional Case No 12 of 2005 [2007] MWHC 1 (27 April 2007).

205 Section 16 of the Republican Constitution protects the right to life and s 19 (3) prohibits torture, or cruel, inhuman and degrading treatment.

HUMAN RIGHTS COMMITTEE

Several Bars, particularly those that are more established, will have a human rights committee. Such a committee can undertake much of the human rights and rule of law work mentioned in this Chapter. One excellent example is that of the Japan Federation of Bar Associations' Human Rights Protection Committee (HRPC).

In Japan, Article 1 of the Bar's Attorney Act provides: 'an attorney is entrusted with a mission to protect fundamental human rights and to realise social justice'. Protection of fundamental human rights is one of the most important missions of both the Bar and individual attorneys. The Japan Federation of Bar Associations has established a number of committees – including the HRPC – on various aspects of human rights, which work in collaboration with local Bars.

The HRPC categorises human rights issues into seven areas and conducts research in each. It also provides specific individual relief services when requests are received from the general public. Victims and relevant parties file requests with the HRPC for human rights relief when human rights have been infringed, or where there is the threat of infringement. Upon receiving the complaint, the HRPC establishes a case committee to investigate the facts of the case as necessary, and to determine whether there is a human rights violation. If this committee determines that an infringement of human rights has taken place, it refers the matter to the board for decision, and the Bar issues a warning, recommendation or request to the infringing institution or organisation.

Importantly, these warnings may be issued to not just government institutions but also private institutions and organisations, including investigative agencies such as the police and public prosecutors, prisons or detention centres, as well as psychiatric hospitals and other facilities. Although these warnings or recommendations are not legally binding, they are influential because they are the result of strict and fair procedures conducted by a legal professional organisation that, over many years and cases, has established its trustworthiness with the general public. They are thus seen as an effective means of addressing human rights violations.

The HRPC also seeks relief in cases of miscarriages of justice. The Retrial Committee, working under the HRPC, seeks relief in these cases and has proven innocence in more than a dozen retrials.

The Japan Federation of Bar Associations undertakes activities through various other committees working on specific issues, including: children's rights; gender equality; rights of the elderly and disabled; rights of victims of crime; the environment; consumer protection; labour rights; and poverty issues.

6.2.4. Monitoring

National Bars can undertake a range of monitoring work that aims to protect human rights and the rule of law. This may include monitoring and reporting on elections, prison conditions, trials, and the treatment of human rights defenders and lawyers. With regards to elections, Bars can legitimately involve themselves with the rule of law aspects of elections (as opposed to party politics to ensure their independence). For example, the Law Society of Kenya was given observer status by the Electoral Commission of Kenya for elections to ensure that the rule of law is upheld during election times.²⁰⁶ The Law Association of Zambia has also been active in this area, initiating proceedings against the Attorney General regarding the Zambian Electoral Commission and the independence of the electoral process. It has also monitored elections and produced reports of its findings.²⁰⁷

Other monitoring work may include visiting prisons to report on prison conditions. For example, the Malawi Law Society carried out a survey of seven prisons and produced a standard questionnaire for prisoners, the results of which were used in a proposal for a pilot legal aid scheme.²⁰⁸ The Law Association of Zambia has also reported on prison visits, and the Mozambican Bar has monitored prisons and police stations, publishing

206 Statement by Okong'o Omogeni in 'The Role of the Law Society of Kenya' (*The Advocate: The Magazine of the Law Society of Kenya* 2007).

207 See, for example, the joint press statement of the ICJ and the Law Association of Zambia of 2011 available at www.icj.org/joint-press-statement-of-the-africa-programme-of-the-icj-and-the-law-association-of-zambia-on-the-zambian-2011-tripartite-elections.

208 See n 29 above, IBAHRI 2006a, 'Phase 2' (unpublished), Appendix 13.

findings in an assessment report.²⁰⁹ The latter received funding from the EU for its Human Rights Committee to monitor, promote and defend human rights.²¹⁰

As well as advocacy and law reform, Bars may undertake monitoring activities to ensure independence of the judiciary. This might include trial observations or alerting international or regional organisations to the need for independent trial observers. Projects can also be developed to actively promote the independence of the judiciary. This is particularly important in jurisdictions where the government, or those associated with it, are or appear to be interfering in the administration of justice. Even the perception of a partial judiciary can undermine public trust in the rule of law.

For instance, according to Transparency International's Global Corruption Barometer, most Africans perceived the judiciary as corrupt. Through a survey of eight countries, one out of five individuals had paid a bribe to judges, with Niger, Nigeria, Zambia and Zimbabwe being the most affected. In Zimbabwe, the government had allocated farms expropriated under land reform programmes to judges at all levels to ensure court decisions favoured political interests.²¹¹

In Brazil, a poll commissioned by the bar association in 2003 found that the judiciary was the second least-trusted state institution in Brazil. A further poll commissioned six years later found that 69 per cent believed that judges lacked impartiality.²¹² By highlighting such issues, Bars can potentially gain external support to conduct further monitoring work or undertake capacity building.

6.2.5. *Civic education*

Civic education is essential for empowering and enabling the public to assert their rights. As provided in UN Basic Principle 4, Bars have an

209 See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished), Appendix 3.

210 IBAHRI, 'Capacity Building of Mozambican Bar Association, Report on the Implementation of Part II of the Project, 24 June to 24 December 2005' (IBAHRI 2006b).

211 Transparency International, *Global Corruption Report 2007*, available at https://issuu.com/transparencyinternational/docs/global_corruption_report_2007_english?backgroundColor=.

212 IBAHRI, 'One in Five: the crisis in Brazil's criminal justice and penal systems' (IBAHRI 2010), p 41–43.

obligation to promote programmes that inform the public about their rights. Their expertise, and the ability to acquire resources to undertake civic education projects, means that they are well placed to raise awareness of the law, the justice system and rights.

For example, the Malawi Law Society has in the past obtained funding to produce leaflets on five different areas of the law, provide an advice and information service from the Secretariat and conduct radio shows on the law.²¹³ More recently, it has entered into a partnership with the Times Group to launch a project on human rights awareness and legal literacy. The project aims to promote understanding of laws that impact on social justice issues – particularly those that affect vulnerable groups such as children, women and people with disabilities. The project will be carried out by way of newspaper articles, radio programmes and mobile legal clinics.²¹⁴

The Mozambican Bar has also undertaken civic education work, publishing a booklet on basic rights and the administration of justice, duties of lawyers towards their client, and disciplinary mechanisms. The publication has been distributed widely throughout the country in official and community-based courts.²¹⁵

6.2.6. Human rights events

Organising and hosting workshops, conferences and awareness-raising events, is another way that Bars can help promote the rule of law and protection of human rights: these information-sharing activities can be educational and informative for lawyers who can learn from the experiences of other individuals or organisations. They can also provide forums for developing recommendations, which may then be used for the purposes of law reform, for instance, or to exert pressure on governments. Publicity of such events can further raise awareness and lead to support from other organisations.

The Law Society of Swaziland, for example, held a conference at which former government leaders joined human rights lawyers in criticising officials

213 See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished), p 26.

214 The project is funded by the Open Society Initiative for Southern Africa. See www.malawilawsociety.net/pages/projects.html.

215 See n 210, IBAHRI 2006b, p 11.

perpetuating Swaziland's rule of law crisis in 2004. The crisis had begun two years earlier when the royal government refused to obey High Court rulings limiting the King's power to rule by decree. At the conclusion of the conference, a statement by participants was released and widely reported.²¹⁶

Annual lectures, awards ceremonies and social events can be held to highlight particular human rights issues. The Law Society of Lesotho holds an annual lecture with contributions from eminent jurists on the topic of access to justice and the rule of law, which is publicised among colleagues and the donor community, and develops recommendations.²¹⁷ The ABA has an International Human Rights Lobby Day encouraging the lobbying of representatives or senators on human rights issues, and has produced a digital and social media lobbying toolkit.²¹⁸ There are a variety of events and activities that can be undertaken to promote human rights and the rule of law.

6.3. Access to justice and legal aid

6.3.1. Introduction

Access to justice is a basic principle of the rule of law. In its absence, people are without a voice, and cannot exercise their rights, challenge discrimination or hold decision-makers accountable.

Access to justice does not only mean access to formal justice mechanisms; in many jurisdictions, where traditional legal systems operate, justice may be achieved through customary courts or other means, but it is essential that these mechanisms or outcomes do not violate fundamental rights.²¹⁹ Moreover, providing access to justice can extend beyond merely legal advice, assistance and representation.

It also requires that justice mechanisms be made accessible without discrimination and regardless of where individuals are living. In

216 IRIN, 'Civil society decries lack of action on rule-of-law crisis' (IRIN News website 27 August 2004) <http://www.irinnews.org/news/2004/08/27/civil-society-decries-lack-action-rule-law-crisis>.

217 See n 59 above, interview with Lindiwe Sephomolo 2007.

218 http://www.slideshare.net/ABA_IHRC/aba-intl-human-rights-lobby-day-social-media-toolkit.

219 UNGA, 'Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (24 September 2012) A/RES/67/1.

particular, some communities may be geographically alienated from any formal courts and legal services. Bringing justice to such communities and raising awareness among them is therefore an essential part of ensuring access to justice, and can be an important function of Bars – through pro bono activities or through working with state institutions and civil society organisations.

Essential to ensuring access to justice, is the provision of legal aid, which has been described as one of the ‘hallmarks of a civilised society’.²²⁰ Legal aid and pro bono work are two fundamental ways of indigent and vulnerable members of society accessing justice.

The rights to access to justice and legal aid are provided for in several international and regional human rights instruments, some of which clearly set out the obligation and role of Bars in helping the public to realise these rights. This section outlines these obligations and considers how bar associations around the world have played an invaluable role in promoting access to justice.

6.3.2. Principles and standards on access to justice

There are several international and regional human rights instruments that set out the right to, and the importance of, access to justice and legal aid, as well as the role of the legal profession in realising this. The following are some of the principles and standards that Bars and governments must be mindful of, but the list is by no means exhaustive:

- Equal access to justice and in criminal cases, the right to a lawyer of one’s own choosing, without pay where he or she has insufficient means to pay (ICCPR, Article 14 (1) and (3) (b) and (d); ECHR, Article 6 (1), (3) (c); ACHPR Article 3 (Equality before the law and equal protection), Article 7 (1) (c); and ACHR, Article 8 (1), (2) (d) (e)).
- All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings (UN Basic Principle 1).

²²⁰ Lord Justice Longmore in *R (on the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice*, Court of Appeal Judgment of 18 February 2016 [2016] EWCA Civ 91, para 1.

- Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status (UN Basic Principle 2).
- Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organisation and provision of services, facilities and other resources (UN Basic Principle 3).
- Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights, and where necessary, call upon the assistance of lawyers (UN Basic Principle 4).
- States should guarantee the right to legal aid (UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (UN Legal Aid Guidelines), Principles 1 to 11).
- States should recognise and encourage the contribution of lawyers' associations, universities, civil society and other groups and institutions in providing legal aid and public-private partnerships should be established to extend the reach of legal aid (UN Legal Aid Guidelines, Principle 14).
- The right to be informed of legal aid (UN Legal Aid Guidelines, Guideline 2).
- Bar and legal associations should be encouraged to draw up rosters of lawyers and paralegals where appropriate to visit prisons to provide legal advice and assistance at no cost to prisoners (UN Legal Aid Guidelines, Guideline 6 (47) (b)).

- Mechanisms and procedures should be established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals such as health, social and child welfare providers, to obtain a comprehensive understanding of the victim (UN Legal Aid Guidelines, Guideline 7 (48)(g)).
- Equal access to justice for all, including members of vulnerable groups; Member States must take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all (UN Declaration of the High-level Meeting on the Rule of Law).²²¹

From these standards and principles, it is possible to extract specific obligations that attach to Bars. These include:

- working to ensure that all persons have the assistance of a lawyer, regardless of whether they have the means to pay;
- cooperating with the government, as well as a range of non-state organisations, on the coordination and provision of legal services and facilities; and
- promoting programmes for the public to inform them of their rights and assisting the poor and vulnerable.

Most Bars will have these among their objectives, as specified in governing legislation (see section 1.4 above) and there are several means by which Bars can achieve these objectives.

6.3.3. Promoting access to justice and legal aid

Many larger and more established Bars have spoken out in support of access to justice and legal aid. The Law Society of England and Wales, for example, has a very active Access to Justice Campaign and has consistently opposed the legal aid cuts that have been implemented in the UK by recent governments. It has issued press statements, written to ministers and newspapers, supported test case litigation and provided evidence at parliamentary select committees on the issue of legal aid.

²²¹ UNGA, 'Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (24 September 2010) A/RES/67/1.

In 2014, the Law Society gave evidence to the Justice Select Committee inquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, expressing that legal aid cuts have had negative consequences for access to justice, with the greatest impact affecting the poorest and most vulnerable sectors of society.²²² It has also supported a legal challenge brought by the Public Law Project on behalf of the domestic violence charity Rights of Women, as legal aid enabling access to expert legal advice is essential for victims of abuse. The challenge resulted in the court recognising the importance of removing the strict evidence requirements for legal aid that cut women off from family law remedies which could keep them and their children safe.²²³

Moreover, in April 2016, following a report by national justice charity Transform Justice, the President of the Law Society expressed alarm at the number of unrepresented defendants in criminal cases, creating issues for access to justice, slowing down the justice process and creating greater cost to the public. He also recommended that the income limit for legal aid be increased, as the existing threshold was too low and left thousands ineligible for legal aid yet unable to afford legal advice.²²⁴

The ABA has a Standing Committee on Legal Aid and Indigent Defendants, which has undertaken several initiatives to promote access to justice and legal aid. It works on matters relating to legal aid and defender services, focusing on: the administration of justice as it affects low-income populations; remedial measures intended to help protect the legal rights of low-income populations; the establishment and efficient

²²² The Law Society of England and Wales, 'Justice Select Committee inquiry into LASPO civil legal aid changes – Law Society evidence' (Press Release, The Law Society 30 April 2014) www.lawsociety.org.uk/policy-campaigns/consultation-responses/justice-select-committee-inquiry-into-laspo-civil-legal-aid-changes.

²²³ See n 220, *R (on the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91. See also The Law Society of England and Wales, 'Law Society response to the ministerial statement on civil legal aid' (Press Release, The Law Society 22 April 2016) <http://lawsociety.org.uk/news/press-releases/law-society-press-release-in-response-to-the-ministerial-statement-on-civil-legal-aid>.

²²⁴ The Law Society of England and Wales, 'Law Society responds to report highlighting surge in unrepresented defendants in the criminal courts' (News Release, The Law Society 28 April 2016) www.lawsociety.org.uk/news/stories/law-society-responds-to-report-highlighting-surge-in-unrepresented-defendants-in-the-criminal-courts.

maintenance of legal aid and defender organisations; and cooperation with other interested agencies, whether public or private.

The ABA Standing Committee has provided expert support and technical assistance to individuals and organisations seeking to improve indigent defence and legal aid in states throughout the US. It convenes chief defenders, state supreme court justices, state legislators, Bar and other leaders to engage in regional and national dialogue concerning improvements in indigent defence delivery and access to civil justice.

As part of this work, the ABA has also established the Resource Center for Access to Justice (ATJ). Initiatives of the ATJ focus on supporting the growth and development of state-based Access to Justice Commissions, and collecting and analysing data on the various sources of funding for civil legal aid.²²⁵

The Law Council of Australia has spoken out strongly in support of legal aid. It has been leading the campaign ‘Legal Aid Matters’, which calls for the Australian government to end the crisis in, and properly fund, legal aid, described by the President of the Law Council as the ‘backbone of a modern, functioning justice system’. The campaign has a website that is separate to that of the Law Council and sets out: how the public can lobby members of parliament; provides fact sheets for the public on legal aid; steps that the government needs to take to end the legal aid crisis; and real stories of individuals who have suffered without legal aid.²²⁶

As well as the campaign, the Law Council has issued statements on the legal aid crisis, recently highlighting that at least 45,000 Australians have been forced to represent themselves in court, often up against powerful and well-funded legal teams.²²⁷

225 ABA, ‘Standing Committee on Legal Aid and Indigent Defendants: Publications’ (ABA website, no date) www.americanbar.org/groups/legal_aid_indigent_defendants/publications.html.

226 <http://legalaidmatters.org.au>.

227 Law Council of Australia, ‘Legal Aid Matters: 45,000 faced courts alone due to legal aid crisis’ (News Release, Legal Aid Matters/Law Council of Australia 16 May 2016) www.lawcouncil.asn.au/lawcouncil/images/1629_-_45000_people_faced_courts_alone_due_to_legal_aid_crisis.pdf.

6.3.4. *Barriers to accessing justice*

In societies with developing or weakened formal justice systems, people may be unable to access justice because of physical and geographical barriers. For example, as of May 2003, it was reported that in Mozambique, over 90 per cent of all advocates were based in Maputo City and five provinces did not have a single advocate.²²⁸ Similarly, the majority of lawyers in Malawi are based in the two main towns – Blantyre and Lilongwe. The main town in the northern region has only a handful of lawyers and the remaining areas (many of which are difficult to reach) have no resident lawyers at all, meaning some people have to walk up to eight hours to access a court.²²⁹ Furthermore, in Malawi, English is the official court language but only a small percentage of the population is sufficiently fluent.²³⁰ As a result, the majority of Malawians have no access to legal assistance.

Somaliland is another example where the centralised formal justice system makes it extremely difficult for many in the country to access courts and lawyers. More than 65 per cent of Somaliland's population live in rural areas where formal legal structures have no presence. Centralisation of the formal justice system in Hargeisa, and a select few significant urban centres, means that legal aid is inaccessible to large parts of the country. Of the estimated 100 practising lawyers, there are thought to be 65 to 70 based in the capital, Hargeisa. Not only do lawyers, judges, prosecutors and courts not have any presence in rural communities of the country, but other key components of the criminal justice system, such as the police and prisons, are equally absent in most non-urban centres. Accordingly, despite an existing legal framework to protect rights of detained and accused persons, if members of rural communities are charged, arrested and held in district police stations, in practice they have no way to access legal assistance. Marginal and pastoral communities, as well as vulnerable groups such as women and children, are particularly affected.²³¹

228 Open Society Initiative for South Africa, 'Mozambique: Justice Sector and the Rule of Law' (Discussion Paper, OSISA 2006), p 100, available at http://democraciaejustica.org/cienciapolitica3/sites/default/files/moz_discussion_paper_english.pdf.

229 See n 17 above, Kanyongolo 2006.

230 *Ibid.*

231 Horizon Institute's Somaliland Justice Sector Project 2014 to 2016. See www.thehorizoninstitute.org.

In promoting access to justice and legal aid Bars can, for example, cooperate and coordinate with local community initiatives that are undertaking work in rural areas. In Somaliland, there are community-based initiatives such as village committees, child protection committees and community-based paralegals.²³² Where such local initiatives exist, Bars can link up with them to raise awareness about legal aid and the justice system, as well as build their capacity.

6.4. Pro bono work

6.4.1. Introduction

The provision of pro bono legal services is one crucial way of ensuring access to justice – particularly in jurisdictions where legal aid systems are overburdened and under resourced. Derived from the Latin ‘*pro bono publico*’, pro bono refers to the work or actions carried out ‘*for the public good*’. As seen from the standards and principles set out in section 6.3.2., Bars clearly have an obligation to assist the public. Pro bono work in many societies can be critical to ensuring that people can access the justice system and realise their rights.

The IBA’s Pro Bono Declaration of 2008 describes pro bono legal services as work that is carried out by a lawyer of a quality equal to that afforded to paying clients, without remuneration or the expectation of remuneration, and principally to benefit poor, underprivileged or marginalised persons or communities or the organisations that assist them. Pro bono legal services may extend to:

- advice to or representation of persons, communities or organisations who otherwise could not exercise or assert their rights or obtain access to justice;
- activities supporting the administration of justice, institution-building or strengthening; assisting Bars and civic, cultural, educational and other non-governmental institutions serving the public interest that otherwise cannot obtain effective advice or representation;

²³² *Ibid.*

- assisting with the drafting of legislation or participating in trial observations, election monitoring, and similar processes where public confidence in legislative, judicial and electoral systems may be at risk; and
- providing legal training and support through mentoring, project management and exchanging information resources.²³³

6.4.2. The role of Bars in pro bono legal services

In jurisdictions with strong rule of law and larger, well-established legal professions, Bars may not struggle to get lawyers to participate in pro bono legal services. For example, in Australia, the Law Council determined that the amount of pro bono work undertaken by lawyers in Australia was equivalent to roughly one week unpaid work each year for every lawyer in the country.²³⁴ Meanwhile, in Germany, lawyers have provided pro bono services to address pressing human rights problems: in response to the thousands of refugees entering the country in 2015 and 2016, the Berlin Bar called on its members to take over the legal guardianship of unaccompanied refugee children and more than 750 Berlin lawyers volunteered to do so.²³⁵

Where there is a lack of resources and lawyers, or a weak formal justice system, pro bono legal services become even more essential to providing some relief to overburdened state legal aid lawyers. For example, in Malawi in 2013, there were only 18 legal aid lawyers and 16 paralegals. The number of legal aid attorneys rapidly dropped in 2014 to only 11, to serve the entire country's population of 16.7 million.²³⁶

233 IBA Pro Bono Declaration (16 October 2008) para 1.

234 Law Council of Australia, 'National Pro Bono Day: Government must fund legal aid to back lawyers who back Australians in need' (Media Release, Law Council of Australia website 17 May 2016), www.lawcouncil.asn.au/lawcouncil/images/1630_-_National_Pro_Bono_Day_-_Government_must_fund_legal_aid_to_back_lawyers_who_back_Australians_in_need.pdf.

235 See n 123 above, Filges and Horrer.

236 The Advocates for Human Rights/World Coalition against the Death Penalty, Malawi: Written Statement submitted September 2014 to the 22nd Session of the Working Group on the Universal Periodic Review United Nations Human Rights Council (April 2015 – May 2015). Population figure from World Bank Country Data.

While many Bars in Africa have struggled to promote pro bono work among its members, there are examples of increased participation in some sort of legal aid or pro bono scheme to assist the underprivileged. Those with more experience of such work include the Law Societies of Kenya and South Africa, of which the latter requires all lawyers to complete 24 hours of pro bono work per practicing year.²³⁷ The Uganda Law Society had also, for many years, been running a legal aid project to provide legal assistance to indigent and vulnerable people in Uganda, and in 2008, a pro bono scheme was launched with over 350 advocates having since enrolled.²³⁸

In Latin America, the Pro Bono Declaration for the Americas was launched in January 2008 by a committee of leading practitioners in Latin America and the US. The Congress was attended by representatives from prestigious law firms, law schools, Bars and non-governmental organisations (NGOs) from Argentina, Brazil, Chile, Colombia, Mexico, and Peru. Signatories endorsing the declaration acknowledged that it is the duty of the legal profession to promote a fair and equitable legal system and respect for human rights. The Declaration calls for each signatory to encourage its attorneys to perform, on average, no less than 20 hours of pro bono work per year.²³⁹ Some jurisdictions have seen more success in this regard than others. For example, the Buenos Aires Bar in Argentina has been able to provide pro bono services through the Pro Bono and Public Interest Commission, which convenes a group of lawyers engaged in providing pro bono services in public interest cases. It is organised as a pro bono network of law firms and provides

237 Law Society of South Africa, 'Pro bono' (Law Society of South Africa website, no date), www.lssa.org.za/public/getting-legal-assistance/pro-bono.

238 Established in 1992, the Uganda Legal Aid Project (run by the Law Society) deals with a huge backlog of cases and the fact that there is no statutory free legal aid provision despite the fact that a large part of the population lives below the poverty line. The project offers legal information and advice; mediation, negotiation and alternative dispute resolution; court representation; training of paralegals in areas where there is a limited supply of advocates; legal and human rights awareness programmes; lobbying and advocacy for pro-poor laws; research and dissemination of documents; and the publication of legal and human rights materials. For the pro bono scheme, see www.uls.or.ug/projects/pro-bono-project/pro-bono-project.

239 Latham & Watkins, 'Survey of Pro Bono Practices and Opportunities in 71 Jurisdictions' (prepared for the Pro Bono Institute, Latham & Watkins August 2012).

free legal services to public interest cases, and also links up with other Bars in the region.²⁴⁰

The Mexican Bar has also taken on responsibility for pro bono services and administers the Asociación de Servicios Legales (ASL), which enlists the support of lawyers and acts as a clearing house for pro bono cases. Assistance through the ASL is only available to individuals and groups who lack equal access to justice. Those receiving assistance typically fall within one of the following categories: (i) people facing extreme poverty or illiteracy; (ii) people afflicted with a physical or mental disability; or (iii) minorities or victims of discrimination. The type of cases referred to the ASL members tend to include: family law cases, especially violence against women; issues involving minors; employment actions; mental and physical discrimination claims; and wills for indigent people.²⁴¹

Brazil, however, is an example of how regulatory rules can limit lawyers' ability to undertake pro bono work. Despite being the region's largest economy, and having the largest Bar in the region, Brazil suffers from major inequality. Unfortunately, there are regulatory restrictions on lawyers providing services for free and the federal Bar has traditionally banned pro bono work, reasoning that it adversely affects the ability of other attorneys to earn a livelihood – arguably not a sound reason for prohibiting pro bono work, especially given the dire need for such services in Brazil.

Nevertheless, lawyers in São Paulo created the Instituto Pro Bono, which worked to overturn the São Paulo Bar Association's prohibition on performing pro bono services. In 2002, the Bar passed a resolution permitting lawyers to provide free assistance to non-profit organisations, though not to individuals. This was an important step to expanding pro bono services to other areas in the country. In 2008, the Bar Association of Alagoas issued a similar resolution to allow pro bono work also for non-profit organisations. These encouraging steps demonstrate how reform within Bars can be essential to fulfilling important objectives.

Lastly, Bars should be mindful of the different types of activities that can constitute pro bono work. Those discussed in section 6.2, such as

240 *Ibid.*

241 *Ibid.*

advocacy, law reform, human rights monitoring, and civic education, are often carried out by lawyers and Bars on a pro bono basis.

6.4.3. Mandatory or non-mandatory pro bono work

One issue for Bars to consider with regard to pro bono work is whether it should be mandatory for members. As already seen, larger and more established Bars often do not face the challenge of encouraging members to undertake pro bono work. However, where there is a dire need for legal assistance for indigent and vulnerable members of the public, a weak or non-existent legal aid system, and a lack of lawyers willing to provide services, mandatory pro bono work may be a solution.

For example, a meeting with a member of the Tanganyika Law Society revealed that there are an insufficient number of lawyers to take cases as part of their Legal Assistance Committee. The Tanganyika Law Society countered this by making pro bono work mandatory for members – that is, they cannot refuse to take a pro bono case without good cause. If they do, they may not be recommended by the Law Society for renewal of their practising licence.²⁴²

Similarly, the new Afghanistan Independent Bar Association is one of the few in the world with compulsory pro bono requirements in criminal cases, requiring members to conduct three cases on a pro bono basis each year as a condition for registration.²⁴³ The Malawi Law Society also hopes to introduce mandatory pro bono work through the draft Legal Education and Legal Practitioners Bill (yet to become law at the time of writing) – the number of hours to be determined at intervals by the Law Society.²⁴⁴

However, where pro bono work is to be mandatory, Bars must consider how to enforce this duty. The Mozambican Bar Association's statutes provide that its members must accept instructions where they are nominated to represent individuals who cannot afford a lawyer in

242 Interview with former President of the Arusha Chapter of the Tanganyika Law Society and Deputy Chair of the EALS (9 September 2007).

243 www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Afghanistan.aspx.

244 Information provided by Godfrey Kangaude, Executive Director of the Malawi Law Society (24 May 2016).

criminal cases.²⁴⁵ But members of the Bar persistently fail to fulfil this duty despite a requirement that no member should refuse such cases without good reason.²⁴⁶ If a judge finds the reasons given are unacceptable, they are entitled to inform the Mozambican Bar Association for disciplinary purposes. However, the Bar has been reluctant to take disciplinary proceedings against members.²⁴⁷ Where Bars are to make such work mandatory, they will need to consider whether it will really make a difference if they are unable or unwilling to enforce the requirement.

It is also important to ensure that structures are in place for pro bono work. For example, in Mozambique, despite legislation providing that expenses incurred by lawyers will be regulated by further legislation, this has not been forthcoming.²⁴⁸ There is, therefore, no real system in place to reimburse lawyers for their expenses, and many claim it is economically unfeasible for them to undertake such defence work. Hence, if pro bono legal services are to be mandatory, a system of reimbursement for expenses may also need to be formulated.

In Zambia, while pro bono work is not mandatory, the Law Association has a Legal Aid Committee where lawyers volunteer to provide support to the Government Legal Aid department, and receive a nominal payment to cover their expenses.²⁴⁹

Where pro bono work is not mandatory, there are ways that Bars can, nonetheless, encourage members to get involved, such as:

- allowing certain pro bono work to be included as CLE so that it goes towards fulfilling CLE requirements;
- recognising lawyers who have provided pro bono legal services through annual awards ceremonies, such as Human Rights Lawyer of the Year or Pro Bono Lawyer of the Year, as done by the Law Societies of England and Wales, and Kenya;

245 Law No 7/1994, arts 50, 58 and 61.

246 Law No 7/1994, Art 58. See also 'Annual address of the Prosecutor-General to Parliament 2003', Infor/429/24.02.2003 and n 228 above, OSISA 2006.

247 *Ibid*, OSISA 2006.

248 Law No 7/1994 Art 61 [1].

249 The Law Association of Zambia Legal Aid Committee had completed a total of 1,000 cases over a period of three years. See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished), 'Appendix 3: Report on Trip to Zambia to Meet Law Association of Zambia'.

- holding pro bono events, such as a National Pro Bono Day, as done by the Law Council of Australia, or a National Pro Bono Week, as run by the Law Society of England and Wales;
- creating a pro bono committee to develop pro bono programmes, and raise funds for such activities, such as the ABA's Standing Committee on Pro Bono and Public Service;
- providing useful materials to facilitate and encourage lawyers to undertake pro bono work, as done by the Law Society of England and Wales with its Pro Bono Toolkit;²⁵⁰ and
- creating international pro bono opportunities, which can also lead to other opportunities for lawyers.

Ultimately, the success of pro bono work will depend not on whether it is compulsory, but on: (i) whether it is properly administered; and (ii) the steps taken by Bars to emphasise to its members the invaluable work that can be achieved through providing pro bono legal services.

6.5. Working with the government and the state

6.5.1. Introduction

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

- that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons, without discrimination (UN Basic Principle 2);
- the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons (UN Basic Principle 3);

²⁵⁰ www.lawsociety.org.uk/Support-services/Practice-management/Pro-bono/pro-bono-toolkit.

- that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention, or when charged with a criminal offence (UN Basic Principle 5).

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

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

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

This section considers the different ways that Bars and governments and state institutions can collaborate to better promote human rights and

access to justice. In some cases, such cooperation can be critical to state-run legal aid schemes.

6.5.2. Forming successful partnerships

To determine engagement strategies, it is important to identify the role of Bars in relation to the state. Bars can do this as part of their strategic plan and draw from the objectives in their governing legislation. However, strategies may also be determined at council or general meetings. In the past, for example, the Malawi Law Society identified in its strategic plan that, in relation to the state, it should be:

- a watchdog to the government and state institutions and ensure constitutional supremacy;
- an impartial adviser to the government and state institutions where necessary, while ensuring it is apolitical at all times; and
- partners with the state in promoting the rule of law.²⁵¹

As well as acting as a check on state power, Bars can work with the state to ensure the rule of law and human rights are respected at all times. For example, former President of the Zimbabwe Law Society and former Co-Chair of the IBAHRI Sternford Moyo has stressed the importance of dialogue, perhaps through regular liaison meetings between the Bar's leadership and the government.²⁵² In some instances, however, meetings may not be effective for exerting pressure on the state, and it can help to cooperate with other Bars and build support networks, often through regional umbrella associations and international organisations that are able to support a national Bar in standing up against the government. This latter approach has greatly assisted lawyers in Zimbabwe.²⁵³

Where possible, a designated office or committee can be an effective way of working with the government.

²⁵¹ See n 29 above, IBAHRI 2007, 'Phase 3' (unpublished).

²⁵² Sternford Moyo, 'Dealing with Governments – what bar leaders should expect and do' (IBA 2006), available at www.ibanet.org/Document/Default.aspx?DocumentUid=0b902575-a7c1-4375-9cee-c47324dd8706.

²⁵³ Telephone interview with Sternford Moyo (29 November 2007).

Case study: US

The ABA has a Government Affairs Office, which conveys the views of the Bar on a broad range of issues each year to numerous governmental entities. The Government Affairs Office legislative staff arranges for ABA witnesses to testify before congressional committees and other governmental bodies; it submits numerous written statements, position papers and letters advocating ABA policy on issues of interest to Congress; and meets regularly with Members of Congress and their staff to convey the Bar's concerns and views on matters of importance to the legal profession. The Office also maintains an active grassroots lobbying effort and distributes periodic alerts to entities, as well as state and local bar groups, advising them of legislative developments that call for concerted action.²⁵⁴

Another important initiative of the ABA, is the Access to Justice Commissions. These are collaborative entities that bring together courts, the Bar, civil legal aid providers and other stakeholders in an effort to remove barriers to civil justice for low-income and disadvantaged people. Beginning with the first Access to Justice Commission in 1994, these entities have been developing all over the country, engaging in a full range of activities and strategies to accomplish their objectives. A major strength of the Commission model is its ability to address the state's often-fragmented system for providing access to civil justice as a whole.²⁵⁵

The provision of legal aid services is an important area where Bars and the state can cooperate to promote access to justice and human rights. As mentioned, in some jurisdictions, a legal aid scheme will exist but be understaffed and underfunded. This has been a significant problem in several developing countries. However, Bars can work with the government

²⁵⁴ www.americanbar.org/advocacy.html.

²⁵⁵ ABA, 'Standing Committee on Legal Aid and Indigent Defendants' (ABA website, no date), www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions.html.

to improve legal aid schemes. For example, the Law Society of Kenya was partnering with the Ministry of Justice and Constitutional Affairs in the conceptualisation and implementation of a National Legal Aid Scheme to be run under the auspices of the Ministry, and implemented through its partners and various stakeholders. The Law Society has also partnered in the past with the Ministry in a workshop held for the sensitisation of members and creation of a work plan for implementation of the Scheme.²⁵⁶

In some countries, Bars have entered, or plan to enter, into agreements with the government so that legal aid services can be contracted out in cases where state legal aid is overburdened or all but non-existent. For instance, in Somaliland, a new Legal Aid Bill establishes an independent Public Defenders Council, with responsibility for managing a Public Defenders scheme. It will have authority to contract for services with a range of suppliers under ‘cooperation agreements’, including with the Somaliland Lawyers Association.²⁵⁷

Accordingly, cooperation with the state can improve coordination and provide a more comprehensive service to the indigent and vulnerable groups.

6.6. Working with civil society and NGOs

It is important for Bars to coordinate and work with civil society and NGOs who may already be carrying out invaluable work to promote human rights and access to justice. Bars can, for example, partner with NGOs who are providing legal assistance to the indigent and vulnerable groups by, for instance, taking on cases referred to them. They can also support campaigns through public statements or pro bono legal assistance.

In fact, lawyers are often already working through other organisations or associations to provide free legal assistance, and Bars can establish formal links with such actors to strategically advance the rule of law, human rights and access to justice. For example, in Malawi, organisations such as the Women Lawyers Association, the Civil Liberties Committee,

²⁵⁶ Workshop held in June 2006, Law Society of Kenya Strategic Plan 2007–2012.

²⁵⁷ Legal Aid Bill, arts 21(4), 23(3) 25(1)(m).

and the Centre for Human Rights, Education, Equality and Advice, have a roster of lawyers who volunteer their time.²⁵⁸

In some cases, lawyers themselves may set up legal resources centres, such as those in South Africa and Zambia. In South Africa, lawyers established the Legal Resources Centre in the 1970s with the objective of providing pro bono services to indigent people. The Legal Resources Centre now has 65 in-house attorneys, who are all members of the Cape Law Society, and operates in five centres. Formal links or coordination between such centres and Bars can lead to strategic litigation to promote human rights and access to justice. As seen in section 6.3.3, Bars can also support human rights organisations in litigation – for example, the Law Society of England and Wales’ support for the Public Law Project and Rights of Women, in a case challenging legal aid cuts.²⁵⁹

Another important area where Bars can, and should, coordinate with civil society is for the purposes of providing an input into the UN Human Rights Council’s Universal Periodic Review. This is discussed further in Chapter 7 but, briefly, the Human Rights Council carries out its review of a state’s human rights situation based on a summary of information submitted not just by the state, but also other stakeholders, including civil society actors, national human rights institutions and regional organisations. This provides Bars with an important opportunity to work and coordinate with civil society and NGOs to highlight particular human rights issues at the international level.

6.7. Working with law clinics and paralegals

In jurisdictions where there is a clear shortage of lawyers, Bars should take the lead in encouraging alternative sources of legal assistance. In some countries, law students and paralegals can greatly assist in providing legal redress to the poor, especially when there are so few lawyers able to offer their services. Bars can link up with law students and paralegals to provide access to justice through law clinics or work with paralegals, who

258 See n 29 above, IBAHRI 2007, ‘Phase 3’ (unpublished), Appendix 7: Report of the UN/DFID Workshop on Justice.

259 See n 220 above, *R (on the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016].

can advise and assist individuals, for example, in prisons and at police stations. In some cases, Bars may have to consider whether new legislation needs to be introduced to allow law students and paralegals to provide legal assistance.

For example, the University of Zimbabwe has a long-established law clinic, which is compulsory for third and fourth-year law students.²⁶⁰ In Kenya, law clinics are an integrated part of the law course at two universities and, in Tanzania, there is a four-year clinical programme at the University of Dar es Salaam.²⁶¹ In Swaziland, a legal aid clinic was established through the university and, in Ghana, a Law Society pilot legal aid project enabled final-year law students to gain practical experience in consulting with clients, and under the supervision of their tutors, providing legal advice.²⁶²

It is noteworthy that, in Zambia, law students at the Zambian Institute for Advanced Legal Education who have been sponsored by Government Legal Aid are required to remain with legal aid for three years. This is an example of where it may be necessary for Bars to consider whether legislation has to be amended to include provision for a minimum number of years' service for lawyers entering the government legal aid department. This would greatly assist the legal aid department in countries such as Malawi where staff turnover is extremely high.²⁶³

It is clear that students, trainee lawyers and paralegals can help to provide access to justice to the poor. This can complement the work of Bars in promoting access to justice and human rights and, as such, Bars should encourage and work with them. Initiatives such as student law clinics are also a way of motivating students – and therefore future lawyers – to undertake legal aid or pro bono work, as well as participate in access to justice initiatives.

260 *Ibid*, Annex 1.

261 *Ibid*.

262 See n 59 above, interview with Cyril Mphanga 2007; and paper presented by Sam Okudzeto on Legal Aid in Ghana at the Commonwealth Lawyer's Association Conference 2007.

263 David McQuoid-Mason, 'Assessment of Legal Aid in the Criminal Justice System in Malawi: Final Report', (Centre for Socio-Legal Studies, University of Kwazulu-Natal, for Penal Reform International, funded by UNICEF, June 2006), p 11.

Case study: South Africa

South Africa is an excellent example of law students making a difference. There are 21 South African law schools that run independently funded law clinics and by 1994, the South African Legal Aid Board had entered into partnership agreements with five universities to run additional public defender clinics for law graduates. Participation in the law clinic is compulsory for final-year students who work under the supervision of attorneys. At the end of the year, students take examinations, which are administered by an external examiner and 40 per cent of their mark comes from clinic work, which demonstrates the importance of the practical experience gained. Bars may find it a useful example when encouraging law schools within their jurisdictions to undertake legal assistance work.²⁶⁴

Case study: Somaliland

In Somaliland, there are two legal aid clinics operating from the Hargeisa and Amoud Universities. The Hargeisa University Legal Aid Clinic, established in 2002, comprises director, lawyers and paralegals. It is divided into five units dealing with: women and children; human rights; civil law; criminal law; and access to justice. It also has two other regional offices. Paralegals identify cases through outreach work in internally displaced persons' camps, police stations, prisons and courts. They also receive walk-in clients and carry out initial interviews. Cases are then referred to lawyers.

²⁶⁴ 'Report on the First All-Africa Colloquium on Clinical Legal Education', organised by the Association of University Legal Aid Institutions of South Africa, the Open Society Justice Initiative and the University of Natal (23–28 June 2003).

The Hargeisa Clinic works with the Somaliland Lawyers Association and refers cases when necessary and appropriate. A means test is administered for everyone by asking the client to bring two witnesses to confirm, under oath, that the client is unable to afford the services of a lawyer. In some cases, such as where the offender is a child, the matter is mediated. The Hargeisa Clinic can deal with up to 1,000 cases a year.

The Amoud Legal Aid Clinic currently has 13 official legal aid providers composed of four legal aid lawyers and nine paralegals, including community-based paralegals. People requiring legal aid may attend the Amoud Clinic, and paralegals also visit police stations and prisons. They obtain a list of inmates held in custody, together with information on the charges, dates of arrest, and dates and location of court appearances. This allows them to prioritise cases and gain easy access to police stations and prisons.²⁶⁵

Case study: UK

The Law School at the University of Kent in the UK runs a law clinic for members of the public. The initiative is the result of a partnership between students, academics, solicitors and barristers. Its objectives are to: provide a public service for local people who need legal advice and representation but cannot afford to pay for it; and enhance the education of students in the Kent Law School through direct experience of legal practice.²⁶⁶

265 Horizon Institute's Somaliland Justice Sector Project 2014 to 2016
www.thehorizoninstitute.org.

266 www.kent.ac.uk/law/clinic.

More specifically, paralegals in Africa provide an indispensable service to prisoners. In Malawi, for example, thanks to the Paralegal Advisory Service, paralegals play an essential role in advising prisoners on their rights and how to make bail applications as so few lawyers are able to assist.²⁶⁷ Such work is crucial where there is a dire shortage of legal assistance available to the poor and to prison populations, particularly in developing countries. The importance of this is evident in the example of Uganda, where in 1996, the Kampala Declaration on Prison Conditions described the level of overcrowding as inhumane. Penal Reform International has since reported that prison populations have continued to grow throughout Central, East and Southern Africa. In Kenya, the prison population exceeds capacity by more than 300 percent, in Zambia by more than 250 percent and in Malawi, Uganda, and Tanzania, by more than 200 percent.²⁶⁸

However, in some jurisdictions, lawyers are not supportive of paralegals and the formal recognition of their work through formal qualifications and perhaps even, limited rights of audience, has been opposed.²⁶⁹ Nonetheless, Bars must be open to finding ways to support the work of paralegals, and coordinate with them to provide access to justice. In some jurisdictions, it may be necessary for Bars to support legislation recognising paralegals. For instance, in South Africa, the Law Society was involved in a new draft bill that recognised formal training and qualifications for paralegals. The Bill has now become law in the form of the Legal Practice Act 2014, and provides that the South African Legal Practice Council must, within two years, investigate and make recommendations on the statutory recognition of paralegals.²⁷⁰

267 <http://pasimalawi.org>.

268 Penal Reform International – www.penalreform.org/central-east-and-southern-africa.html.

269 See n 29 above, IBAHRI 2006, 'Phase 2' (unpublished), p 57.

270 Section 34 (9) (b), Legal Practice Act 2014.

Chapter 7: International Work and Relations

7.1. Working with international organisations

7.1.1. Introduction

Establishing regional and international links can lead to fruitful relationships for Bars. Using and working through such links can help them to do work they may otherwise not be able to do, especially when a Bar may be functioning in a climate of fear or intimidation from the state. For example, a regional organisation or lawyers' association can speak out and act without intimidation. Relationships can be developed with Bars or organisations in other jurisdictions, as well as with regional or international Bars or organisations that can help encourage the ratification and incorporation of important international human rights treaties, conduct fact-finding missions and public interest litigation, etc. This section considers the range of regional and international actors that Bars can link up with, and how this can assist them in achieving their objectives.

7.1.2. Other Bars

There is a wealth of experience among Bars – particularly those that are well-established – and twinning or linking with them can lead to technical assistance, as well as possible funding for important projects relating to CLE, human rights and the rule of law. Several more established Bars reach out to developing law associations, particularly where human rights and the rule of law are under threat.

Indeed, larger Bars arguably have an important obligation to support lawyers in other jurisdictions where the rule of law is threatened. For example, the Law Society of England and Wales has strongly criticised the targeting of lawyers in China, Honduras and Turkey.²⁷¹ The ABA also has an extremely active international law section, which includes

271 The Law Society of England and Wales, 'Human rights interventions', <http://communities.lawsociety.org.uk/human-rights>.

coordination with foreign Bars for joint projects, and an international exchange programme, among other activities.²⁷²

In Latin America, the Brazilian Bar Association is by far the largest in the region, and is actively engaged in international activities, including rule of law and human rights issues. It has, for instance, been very vocal in support of the legal profession in Venezuela. In 2011, it co-launched a report on the independence of the judiciary in Venezuela with the IBAHRI in order to mobilise support within the Brazilian legal community for Venezuelan colleagues who face threats, harassment and arrest in their everyday work. The event was broadcast on Brazilian national television and gained widespread coverage in the press as panellists discussed the many challenges facing the independence of the judiciary, and the administration of justice in Venezuela.²⁷³

There are a variety of other ways in which Bars can benefit from linking up, and BRAK is a good example of the range of activities that can be undertaken to assist the legal profession in other jurisdictions (see box).

Case study: the German Federal Bar (BRAK)

BRAK nurtures relationships with other national Bars to assist in promoting independence of the legal profession, as well as the rule of law and human rights. For example:²⁷⁴

Russia. BRAK and the Federal Chamber of Lawyers of the Russian Federation (the 'Federal Chamber') have been important partners for nearly 15 years. BRAK supports the Federal Chamber in its projects, such as: the regulation of the legal services market in Russia; the unification of the legal profession; strengthening the legal aid system in Russia; and incorporating jurists, who are currently not members of the Bar, into the Bar.

272 ABA's International Law Section, www.americanbar.org/groups/international_law/initiatives_awards.html.

273 Information provided by the IBAHRI.

274 See n 123 above, Filges and Horrer.

Ukraine. BRAK has a strong relationship with the National Association of Advocates of Ukraine since enactment of the Advocates Act of Ukraine and the establishment of the Association in 2012. Experts from BRAK participated in consultations with members of Ukraine's Parliament on the drafting of the Advocates Act. Several recommendations from BRAK, regarding the structure of the self-regulatory bodies and professional responsibilities of Ukrainian lawyers, were adopted in the new Act. Current projects with the National Association of Advocates of Ukraine include the introduction of professional indemnity insurance for lawyers in Ukraine; reform of the legal aid system; and regulation of the legal services market.

Georgia. Over recent years, the Georgian Bar Association, a self-regulatory body of the Georgian legal profession, has become a close partner of BRAK in the South Caucasus region. BRAK supports the Georgian Bar Association through working to strengthen rights of criminal defence lawyers and sharing best practices for CLE. The certification system used by BRAK for CLE is also being implemented by the Georgian Bar Association.

China. BRAK is partnering with China through the German-Chinese Rule of Law Dialogue that started in 1999. The rule of law dialogue is coordinated by the Federal Ministry of Justice and Consumer Protection, and in China, by the State Council Legislative Affairs Office. The dialogue is designed to offer a long-term approach to promoting the rule of law and implementing human rights in China.

Bars can further share experiences, which may especially benefit associations that have recently established, or are in the process of developing into a fully functioning Bar Association.

Case study: Malawi and Zambia

Malawi and Zambia share many similarities in their legal systems. As part of the IBAHRI capacity-building project in 2005–2006, the Malawi Law Society ED and the IBAHRI legal specialist visited Zambia to meet with the Law Association of Zambia’s Secretariat staff and members from various committees, such as the human rights, international relations and legal aid committees, as well as the Zambian Institute for Advanced Legal Education. The Malawian ED benefited from learning about how the Secretariat in Zambia was managed; how complaints were handled; the work conducted by subcommittees; and how the Zambian Institute for Advanced Legal Education was established and how it functions.²⁷⁵

In addition, when members of the legal profession from different jurisdictions gather, it can encourage Bars to undertake specific activities with regards to the rule of law and human rights. For example, in October 2005, the ED of the Mozambican Bar attended a meeting organised by Zimbabwean Lawyers for Human Rights, which led to an agreement that each Bar in the region should organise a prison visit on 10 February 2005 to mark Human Rights Day. This was duly carried out by the Mozambican Bar.²⁷⁶

7.1.3. International and regional bar associations

There are several international and regional lawyers’ associations, some of which focus on particular areas of practice, through which developing Bars can network, share experiences and obtain support for their work. Examples include the IBA; Commonwealth Lawyer’s Association; EALS; SADC Lawyers Association; Law Association for Asia and the Pacific

275 See n 29 above, IBAHRI 2007, ‘Phase 3’ (unpublished), ‘Appendix 3: Report on Trip to Zambia to meet Law Association of Zambia’.

276 IBAHRI, ‘Capacity Building of the Mozambique Bar Association: Report on the Implementation of Part II of the Project’ (IBAHRI 2005), p 23.

(LAWASIA); and Federation of European Bars (Fédération des Barreaux d'Europe).²⁷⁷

International or regional lawyers' associations may stipulate, as their criteria for membership, that Bars or individual lawyers are from a particular region, part of an economic union or represent particular interests such as criminal justice, women's rights or business – such as the European Criminal Bar Association and the European Company Lawyers Association.²⁷⁸ Becoming a member of such associations, or simply establishing links through attending meetings, arranging visits and exchanges or sending out alerts, is essential to advancing the work of Bars. The following section illustrates how such associations can assist in promoting human rights and the rule of law, improve and harmonise standards, promote development and allow Bars to share experiences.

INTERNATIONAL ASSOCIATIONS

International lawyers' associations such as the IBA and the Commonwealth Lawyers' Association are important vehicles for raising awareness about human rights and the rule of law within a country, and also to gain support to exert pressure on respective governments. The IBA, for example, works through several committees and has worldwide membership. It has assisted in the capacity building and establishment of several Bars through the IBAHRI, as well as spoken out in support of members of the legal profession; issued guidelines on several areas of law; and conducted trial observations and fact-finding missions in support of national Bars, as well as several other activities. In recent years, it has supported the establishment of independent bar associations in Afghanistan and Myanmar, and is currently working with the government, parliament and legal professionals in East Timor to set up the country's first independent Bar.²⁷⁹

The IBA also carries out extensive work through the BIC, which has more than 200 bar association and law society members spanning over 160 countries. It has considerable expertise in providing assistance to

²⁷⁷ See Useful Online Resources.

²⁷⁸ www.ecba.org/content; www.ecla.org.

²⁷⁹ IBAHRI, 'About' (IBAHRI website, no date) www.ibanet.org/Human_Rights_Institute/IBAHRI_About.aspx.

member Bars and, in particular, developing Bars. This includes: arranging conferences and events to discuss issues that affect the legal profession globally; setting up working groups that develop resources and guidelines for Bars; and a Policy Committee advising Bars and the IBA Council on key IBA resolutions and statements. The IBA BIC provides an invaluable forum for IBA member organisations worldwide to discuss all matters relating to law at an international level.²⁸⁰

The IBA's International Principles on Conduct of the Legal Profession 2011, Resolution on the Rule of Law 2006, Anti-Corruption Guidance for Bar Associations 2013, and Policy Guidelines for Training and Education of the Legal Profession Part I (2011) and Part II (2014), are just a few examples of how international associations can help to standardise principles for the legal profession globally.

REGIONAL ASSOCIATIONS

The SADC Lawyer's Association (SADCLA) is a good example of how regional associations can assist national Bars. Among its objectives, SADCLA aims to provide a framework of cooperation with other bar associations within the region in order to facilitate support and interdependency. It has supported local Bars through conducting fact-finding missions for the purposes of advocacy work, issuing public statements and facilitating symposiums.²⁸¹ In the past, it has also been instrumental in encouraging local Bars to promote human rights and the rule of law. For example, in March 2003, Bars from ten states in the SADC region met and adopted the Mbabane Declaration, which emphasised the legal profession's rule of law obligations imposed by the SADC Treaty and the African Union's Constitutive Act 2000, as well as made recommendations.

In the past, the Law Society of Lesotho has written to SADCLA to undertake a mission verifying the allegations of human rights violations by the state and its use of the army. A fact-finding mission was conducted and resulted in a report that recommended: thorough investigations of allegations of abductions, illegal detention, torture

280 www.ibanet.org/barassociations/bar_associations_home.aspx.

281 www.sadcla.org/new1.

and harassment by the military; the improvement of personal security for the judiciary; corrective measures to ensure lawyers are allowed to exercise their professional mandate without hindrance; and restoration of respect for the rule of law and the administration of justice.²⁸²

SADCLA has also sent delegations to investigate issues relating to the human rights situation in Zimbabwe.²⁸³ It has issued statements condemning human rights violations and calling for respect for fundamental rights in Zimbabwe.²⁸⁴

Moreover, SADCLA has been a good networking association for Southern African Bars. For example, the Law Society of Swaziland started a project that networked with the Mozambican, South African and Botswana law societies through SADCLA to link up with the Media Institute for Southern Africa. This led to cooperation on a legal defence fund for journalists attacked for comments critical of government.²⁸⁵

The East Africa Law Society has been similarly vocal in advancing human rights among its member states. It has in the past supported the Uganda Law Society to protect the independence and integrity of the judiciary and legal profession, and in promoting good governance, rule of law, access to justice and human rights.²⁸⁶

The East Africa Law Society is also an example of how regional and international Bars can work towards the harmonisation of training, education and laws governing the legal profession, to improve standards. For example, one of the purposes of the East Africa Law Society is to fulfil the aims of the Treaty for the Establishment of the East African

282 The fact-finding mission took place on 20 July 2007. SADC Lawyers Association, 'Report of the Southern African Development Community Lawyers Association Fact Finding Mission to Lesotho' (South African Regional Poverty Network 2007).

283 Mmegi Online, 'Botswana Lawyer Leads Zim Probe' (Mmegi Online 14 May 2007).

284 President of SADCLA statement of 29 March 2007, strongly condemning, among other things, the conduct of the Zimbabwean authorities banning demonstrations, assemblies and processions and lawyers being denied access to their clients and calling upon the Zimbabwean Government to respect fundamental rights and the role of lawyers.

285 See n 176, IBAHRI 2005, p 8.

286 Donald Deya, 'EALS Celebrates 10th Anniversary' (The East African Lawyer March 2006).

Community (the 'EAC Treaty').²⁸⁷ Article 126 (1) of the EAC Treaty provides that partner states shall take steps to harmonise their legal training and certification and encourage the standardisation of court judgments within the Community. And Article 126 (2) requires that states, through their appropriate national institutions, take all necessary steps to: (i) establish a common syllabus for the training and common standards to be attained in examinations to qualify and be licensed to practise as an advocate; (ii) harmonise all national laws appertaining to the Community; and (iii) revive publication of the East African Law Reports or publish law reports and law journals that promote the exchange of legal and judicial knowledge and enhance harmonisation of legal learning. Adopting this approach, the East Africa Law Society aims to harmonise ethical standards amongst the legal profession in East Africa and has published a compendium of codes of legal practice, conduct, ethics and etiquette in East Africa, to facilitate good practice in the region.²⁸⁸

In Europe, the Council of Bars and Law Societies of Europe represents the Bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than one million European lawyers. The Council of Bars and Law Societies of Europe has been in the forefront of advancing the views of European lawyers and defending the legal principles upon which democracy and the rule of law are based. Working through specialist committees, it deals with a wide range of issues affecting the European legal profession, such as ethics, competition, the free movement of lawyers, training, international trade in legal services and

287 The Treaty entered into force on 7 July 2000 and envisages the eventual unification of the EAC partner states and outlines a comprehensive system of cooperation in a large number of areas. Also see T O Ojenda, 'The First 150 Days of Region-Wide Legal Practice in Kenya' (The East African Lawyer March 2006), in which he discusses how initiatives can be said to have sprung due to recognition and appreciation that for effective growth and development of the EAC, professional and business interests must be integrated. The establishment of the East Africa Law Society was an indication that for regional development to be effected, a fundamental tool based on legal aspect must be in place. The EALS is a legal tool aimed at promoting cross-border integration for the East African people. It is through the legal frameworks put by it that will facilitate development in political, social and economic spheres of EAC.

288 East African Law Society Compendium of Codes of Legal Practice, Conduct, Ethics and Etiquette in East Africa, EALS Practice Manual Series – Number 1.

human rights. In terms of harmonisation, it has also produced a Code of Conduct and through its close relationship with the European Commission and European Parliament, is able to influence legislation.²⁸⁹

7.1.4. Regional and international organisations

There are several regional and international organisations keen to work with local Bars to build their capacity and assist in the promotion of human rights and the rule of law. At the national level, Bars should establish links with the donor community or international organisations working in the field of law that are based in the same country. Similarly, organisations at the regional level can offer important support to local Bars.

Case study: International Commission of Jurists Kenya

The Kenyan section of the International Commission of Jurists (ICJ) has assisted lawyers in the region to undertake human rights litigation, ensure the independence of the judiciary and promote international human rights standards through domestic courts. It has funded a number of cases, as well as offered technical support, to lawyers and civil society organisations in the region. For example, it has assisted cases in:

- Uganda, on the right to a fair trial and access to justice;
- Zambia, challenging the Criminal Procedure Code on non-bailable offences;
- Nigeria, regarding the right to health (particularly in relation to children); and assisted a case by murder convicts serving capital punishment in prison awaiting execution;²⁹⁰ and
- Zambia, a challenge to the derogation from the right to vote and right to participate in governance by persons in custody which flows from the fundamental right of expression guaranteed under the Constitution. It was argued that it was unconstitutional to

²⁸⁹ www.ccbe.eu.

²⁹⁰ ICJ Kenya African Human Rights and Access to Justice (AHRAJ) programme. See AHRAJ Newsletter (June 2007), available at www.icj-kenya.org/ahraj/ahraj_june_07.pdf.

disenfranchise prisoners or those in custody and constituted unfair discrimination. The case was being litigated with a view to either domesticate the right to vote and/or develop jurisprudence around the right to vote.²⁹¹

Case study: Southern African Litigation Centre

The Southern African Litigation Centre (SALC) works in partnership with local lawyers and NGOs to identify constitutional and human rights issues that can be strategically litigated before domestic courts. This is another example of how lawyers can take advantage of support that is available in the region for the purposes of protecting fundamental rights through domestic courts.²⁹² SALC has supported several cases, including cases in:

- Namibia, of a man detained for almost two years without charge or trial;²⁹³ and
- Malawi, in which it supported lawyers to take cases on behalf of women challenging mandatory HIV testing, as well as assisted a local human rights organisation submit an *amicus* brief in litigation to decriminalise sexual acts between persons of the same sex.²⁹⁴

A number of civil society initiatives have also been developed at the regional level, and particularly in relation to Africa, including the African Centre on Democracy and Human Rights Studies, and the Institute for Human Rights and Development in Africa.²⁹⁵ These have tended to work

291 AHRAJ Newsletter (March 2007) available at www.icj-kenya.org/ahraj/ahraj_mar_07.pdf.

292 www.southernafricalawcenter.org.

293 Denver Isaacs/The Namibian, *Detention Case to High Court* (Legal Assistance Centre website 22 November 2007) www.lac.org.na/news/inthenews/archive/2007/news-20071122.html.

294 www.southernafricalitigationcentre.org/cases/completed-cases/malawi-mandatory-hiv-testing-of-alleged-sex-workers; and www.southernafricalitigationcentre.org/cases/ongoing-cases/malawi-litigation-to-decriminalise-consensual-same-sex-sexual-acts.

295 www.acdhhs.org; and www.africaninstitute.org.

on or around the African Commission for Human and People's Rights, through educating and empowering African civil society organisations at the regional, national or community levels in order to understand and access the African Commission. Bars should establish links with, as well as utilise, such initiatives.

Developing Bars can also gain from linking up with the Rule of Law Programme in the UK, a new initiative funded by the Department for International Development (DFID) that aims to improve the rule of law in DFID priority countries by facilitating access to UK legal and judicial expertise. Specialists from the legal sector – judges, solicitors, barristers, legislative draftsmen and magistrates – offer specialist information, advice, mentoring, training or other assistance to improve the policies, capacity and practices underpinning the rule of law in 27 jurisdictions around the world. Working across 27 countries, the programme will also share learning and best practice to improve the coordination of the international pro bono legal sector in the UK.²⁹⁶

There are also coalitions that aim to encourage states to ratify treaties – for instance, the Coalition for the International Criminal Court (discussed further in section 7.5.) and the Coalition for an Effective African Court of Human and Peoples' Rights.²⁹⁷ Bars arguably have a responsibility, as part of their obligation to assist the public and promote the rule of law, to work with such organisations and coalitions to raise awareness of human rights mechanisms available to the public, as well as exert pressure on their own governments to incorporate international human rights norms, and stand up against the erosion of the rule of law in other states.

²⁹⁶ Afghanistan, Bangladesh, Myanmar, Democratic Republic of Congo, Ethiopia, Ghana, Kenya, Kyrgyzstan, Liberia, Malawi, Mozambique, Nepal, Nigeria, Occupied Palestinian Territories, Pakistan, Rwanda, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Tajikistan, Tanzania, Uganda, Yemen, Zambia and Zimbabwe. More information is available at www.roleuk.org.uk.

²⁹⁷ www.africancourtcoalition.org.

7.2. International trade in legal services

7.2.1. Introduction

Legal services underpin all economic and social activity in organised societies. The World Bank's Global Governance Index defines the rule of law as:

'The extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.'²⁹⁸

Legal services, therefore, have a role beyond facilitating the administration of justice and the rule of law. A well organised legal services sector is a multiplier and enabler for economic growth and stability. It can help to promote business confidence by providing certainty of contract and an impartial mechanism for resolving disputes. Economies cannot, therefore, grow and prosper, trade with each other, and attract inward investment without an effective legal services sector.

As foreign trade and investment grows, so foreign lawyers will increasingly 'accompany' their clients in some way, to provide them with the support and reassurance they need to do business across borders. This may simply involve advising on the client's home country law, and not on legal issues arising in the foreign jurisdiction. However, at this point, it is not only the client's goods or services that may be traded, but trade in legal services may also be taking place.

Legal services can be traded in four different ways, as identified by the Treaty on the General Agreement on Trade in Services (GATS), which entered into force in 1994 and today has 192 signatory countries. These different modes of trading are as follows:

- **Mode 1: cross-border supply**, which is when a lawyer provides advice or opinion from his or her own country to a client in another country.

²⁹⁸ This section has largely been contributed by Alison Hook, Deputy Chair, IBA BIC's International Trade in Legal Services Committee and Director at Hook Tanganza, and Nankunda Katangaza, Partner at Hook Tanganza.

- **Mode 2: consumption abroad**, which occurs when a client physically travels to another country to consult a lawyer.
- **Mode 3: commercial presence**, which is when a law firm or individual lawyer opens an office in another country. It only covers the right of the legal entity to ‘set up shop’, and does not necessarily grant any rights to the law office concerned to staff that office. For example, it covers situations in which a foreign law firm may invest in a local law firm through a merger or alliance but all the lawyers on the ground remain locally qualified.
- **Mode 4: presence of natural persons**, covering scenarios in which individual foreign lawyers are present in other jurisdictions to deliver legal services, either on a temporary or permanent basis.

Accordingly, many lawyers may already be engaging in international trade in legal services without realising it, when they deal with clients in other jurisdictions or law firms that refer them work from abroad. The role that bar associations play in this issue will depend to a great extent on whether they perform a regulatory role, have a representational function, or some combination of the two.

7.2.2. The role of Bars

There are a number of triggering events that may involve Bars in questions of trade in legal services, particularly if they have a role in regulating the local profession. For instance:

- If their country has not previously been a member but joins the World Trade Organization (WTO). Very few countries are not yet members but it is important to note that virtually all accessions to the WTO have required new members to open up access to their legal markets to foreign lawyers, at least for the provision of legal advice on foreign and international law.
- Many countries around the world are embarking on trade negotiations on a bilateral or multilateral basis. The Trans-Pacific Partnership agreement and the Trade in Services Agreement are important examples of the multilateral type of agreement. Trade in legal services are not always included in such agreements or in bilateral trade treaties but almost certainly will be if one of the parties has a strong interest in this area.

Australia, the US, the European Free Trade Association and the EU will always request better market access in any trade deals they negotiate.

- If the Bar's country is part of an economic community, such as the North American Free Trade Agreement (NAFTA); Asia-Pacific Economic Cooperation (APEC); Association of Southeast Asian Nations (ASEAN); EAC; and SADC. These communities are increasingly emphasising greater economic integration and the need to build functioning 'single markets'. In some cases, this has involved the negotiation of agreements between the parties on the recognition of qualifications, which are needed to facilitate the freedom of movement of lawyers between the parties of the economic community. The EAC is a good example of this phenomenon and the various law societies and Bars – together with their regional representative body, the EALS, have been working together with the EAC Secretariat to put in place an agreement that will achieve greater lawyer mobility in the region to support regional economic integration.
- Where their government undertakes unilateral action to liberalise the legal sector. This is usually the most common route to greater market access for foreign lawyers and is often triggered by the government's wish to promote or develop some part of the economy, such as financial services, which requires specialist expertise not available in the local market.

In such circumstances, Bars may find themselves being asked to react to government proposals, regardless of their role. It is, however, equally possible that Bars may decide unilaterally to put forward schemes to permit greater foreign lawyer access, even where this is not being pressed for by the government or other sectors of the economy. They may wish to do this in order to promote more opportunities for their members through greater integration into the global legal market.

If Bars are approached to consider issues in relation to trade in legal services, they may start by setting up a dedicated committee to look at all the issues and, especially if they have a regulatory role, to think through the different options for permitting or expanding foreign lawyer practice in ways that are beneficial for local practitioners. There are plenty of previous examples of other jurisdictions that have done this.

Case study: United States

The ABA has a Task Force on International Trade in Legal Services, which:

- monitors the GATS negotiations and the negotiations of other international trade agreements that involve the US and the provision of legal services;
- educates and engages in outreach to interested entities relating to the status of the GATS and other international trade agreement negotiations and provides those entities with a mechanism for input to the ABA for consideration and study; and
- coordinates ABA entities on issues and activities related to trade in legal services.²⁹⁹

Case study: Australia

The Law Council of Australia has a Transnational Practice Division that aims to enhance the international presence and increase the international participation of Australia's legal and related service providers. A significant element of the Division's work focuses on gaining a right for Australian lawyers to work overseas with domestic lawyers to provide fully integrated legal services (legal services covering the laws of multiple jurisdictions) from the one source to both domestic and international clients.³⁰⁰

Bars may also develop an international strategy focusing on their role in the promotion and regulation of international trade in legal services, as done by the Australian Law Council.³⁰¹

299 www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/internationaltradetf/taskforceabout.html.

300 www.lawcouncil.asn.au/lawcouncil/index.php/divisions/transnational-practice-division.

301 www.lawcouncil.asn.au/lawcouncil/images/2015_08_International_Strategy_website_version.pdf.

7.2.3. Useful resources

The IBA also has a dedicated committee in the form of the BIC Trade in Legal Services Committee, which supports Bars to look at these questions. There is a wealth of useful information for bar associations on the dedicated BIC Trade in Legal Services (BICTLS) website.³⁰² The following resources are of particular use:

- The *GATS Handbook*, which sets out how trade in legal services is regulated through the WTO. Since the WTO model has been used as the template for most regional and bilateral agreements, this has a much wider application than simply acting as a *vade mecum* for GATS.
- The cross-border legal services report, which is an interactive database showing how nearly 100 countries around the world regulate foreign legal practice.
- A series of resolutions that have been adopted by the IBA over a number of years, which set out some best practice standards in relation to trade in legal services. These include: recommendations for foreign law firms, which establish in other jurisdictions to engage in skills transfer; recommendations on how legal services liberalising commitments can be made; and some general principles on the establishment of foreign lawyers.³⁰³

7.3. International development and human rights

While the role of Bars in supporting the legal profession and access to justice has been considered in detail, they also have a part to play in defending human rights more generally, and promoting development abroad. As well as speaking out in defence of lawyers, Bars can make representations to other governments and organisations with regard to other human rights abuses. For example, the Law Society of England and Wales has an active human rights section that, among other things, wrote

302 www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/Default.aspx.

303 *Ibid.* See also www.wto.org.

to the Iraqi Prime Minister in 2016 condemning rocket attacks on Camp Liberty, where unarmed residents were killed and injured.³⁰⁴

In Ireland, the Law Society and Bar undertook a joint initiative through ‘Irish Rule of Law International’, which works to promote the rule of law in developing countries. It operates in several countries, including Bosnia and Herzegovina, Ethiopia, Kenya, Kosovo, Malawi, South Africa, Vietnam and Zambia. For example, in Malawi, trained Irish lawyers work as paralegals to help unrepresented vulnerable persons facing the criminal justice system. They also work closely with the Legal Aid Bureau and train magistrates, police officers, social workers, advocates and paralegals in human rights and due process, restorative justice and diversion, case management and client care, as well as the protection of children and young offenders who come into conflict with the law.³⁰⁵

The ABA Rule of Law Initiative was established in 2007 to consolidate its five overseas rule of law programmes, including the Central European and Eurasian Law Initiative. Working with in-country partners in a consultative manner to build sustainable institutions (both government and NGOs) is a hallmark of ABA Rule of Law Initiative programmes. In 2012, the ABA Rule of Law Initiative was implementing legal reform programmes in more than 40 countries in Africa, Asia, Europe and Eurasia, Latin America and the Caribbean, and the Middle East and North Africa. One example of the ABA Rule of Law Initiative’s work assisting institutions and organisations abroad, other than Bars, is through its anti-corruption activity. This has seen the Initiative cooperate with national governments to draft and implement anti-corruption legislation; partner with national anti-corruption commissions; and provide technical assistance to law enforcement and court personnel responsible for investigating and prosecuting corruption.³⁰⁶

International associations play a crucial role in development and in promoting human rights in national jurisdictions. As has been discussed at various points in this publication, the IBAHRI has worked to develop the capacity of, or establish new, bar associations in several countries, such as

304 <http://communities.lawsociety.org.uk/human-rights/interventions/2016/iraq-camp-liberty/5054839.article>.

305 <http://irishruleoflaw.ie>.

306 www.americanbar.org/advocacy/rule_of_law.html.

Afghanistan, East Timor, Kazakhstan, Malawi, Myanmar and Tajikistan. It has spoken out in support of the legal profession, including the judiciary, in various jurisdictions, with a view to strengthening and promoting the rule of law.³⁰⁷

7.4. International and regional mechanisms

7.4.1. Introduction

There has been an emergence of new court structures at the international and regional levels, which lawyers should be aware of and use because domestic mechanisms may often not be sufficiently equipped for resolving complex human rights, or other specialised legal issues. In some cases, the judiciary may not be able to operate independently and impartially. And, in cases where domestic remedies are unavailable and procedures have been exhausted, international or regional mechanisms may provide a solution.

Decisions or judgments from international or regional bodies may also have a much greater impact than just on the individual complainant and their country, but can provide a precedent for all States Parties. It is, therefore, essential that those leading the way with regard to human rights and the rule of law are well versed in the laws and procedures of regional and international human rights mechanisms. This section considers some of the most important international and regional frameworks.

7.4.2. UN treaty bodies

Bars have an important role to play in raising awareness among lawyers on the rights and duties set out in several UN treaties, as well as when and how to make a complaint on behalf of an individual whose rights have been violated. The following are some of the main UN treaty bodies that are made up of independent experts, which Bars should consider using to promote human rights within their jurisdiction, as well as in the region and internationally.

³⁰⁷ www.ibanet.org/ibahri.aspx.

HUMAN RIGHTS COMMITTEE

The Human Rights Committee monitors the implementation of the ICCPR by States Parties. States are obliged to submit regular reports to the Human Rights Committee on how the rights are being implemented. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of ‘concluding observations’.³⁰⁸

In addition to the reporting procedure, Article 41 of the ICCPR provides for the Human Rights Committee to consider inter-state complaints, and the First Optional Protocol gives it competence to examine individual complaints with regard to alleged violations of the ICCPR by States Parties.

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Committee on Economic, Social and Cultural Rights (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). States Parties are obliged to submit regular reports to the CESCR on how the rights are being implemented. The CESCR also now has a complaints mechanism. In May 2013, the Optional Protocol to the ICESCR came into force and provides the CESCR with competence to receive and consider communications from individuals claiming that their rights under the Covenant have been violated. The CESCR may also undertake inquiries and consider inter-state complaints.³⁰⁹

COMMITTEE AGAINST TORTURE

The Committee Against Torture monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its States Parties. States are obliged to submit reports to the Committee Against Torture on how the rights are being implemented. Under certain circumstances, the Committee Against Torture may also: consider individual complaints or communications from individuals claiming that their rights under the Convention have been violated; undertake inquiries; and consider inter-state complaints.

308 www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIIntro.aspx.

309 www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx.

The Optional Protocol to the Convention, which entered into force in June 2006, creates the Subcommittee on Prevention of Torture, which has a mandate to visit places of detention – a further tool to be utilised by Bars and human rights organisations.³¹⁰

COMMITTEE ON THE RIGHTS OF THE CHILD

The Committee on the Rights of the Child monitors implementation of the Convention on the Rights of the Child by States Parties. It also monitors implementation of two Optional Protocols to the Convention, on involvement of children in armed conflict, and on sale of children, child prostitution and child pornography. Since December 2011, pursuant to the UN General Assembly's approval of a Third Optional Protocol, there is now a communications procedure allowing individual children to submit complaints regarding violation of the Convention and its first two Optional Protocols.³¹¹

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

The Committee on the Elimination of Racial Discrimination monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by States Parties. States must submit regular reports to the Committee on how rights are being implemented. The Convention also establishes three other mechanisms: the early-warning procedure; the examination of interstate complaints; and the examination of individual complaints.³¹²

COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

The Committee on the Elimination of Discrimination against Women monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women. As with other treaty bodies, States Parties are required to submit reports to the Committee on the Elimination of Discrimination against Women. The Optional Protocol to the Convention mandates the Committee to: receive communications from individuals or groups of individuals submitting claims of violations

310 www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx.

311 www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx.

312 www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx.

of rights protected under the Convention; and initiate inquiries into situations of grave or systematic violations of women's rights. However, these procedures are only available where the State Party concerned has accepted them.³¹³

Other treaty body committees to note include the committees on: migrant workers; rights of persons with disabilities; and enforced disappearances.³¹⁴

7.4.3. Universal Periodic Review

Established in March 2006, the Universal Periodic Review (UPR) is a process that looks at the human rights records of all UN Member States.³¹⁵ It is a state-driven process, conducted under the authority of the Human Rights Council. Each state is given the opportunity to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.

Importantly, as well as receiving information from the state itself, the Human Rights Council also reviews a summary of information submitted by other stakeholders, including civil society actors, national human rights institutions and regional organisations. This provides Bars with an important opportunity to have an input in the UPR process.

To date, however, the role of the legal profession in the UPR mechanism has been limited. Recommendations relating to the independence of the legal profession have accounted for a very small percentage of overall recommendations. Out of the 38,298 recommendations made to the UPR between 2008 and 2014, only three per cent relate to the independence of the legal profession. Accordingly, this mechanism has paid little attention to a fundamental component in human rights protection.³¹⁶

The IBA has explored the UPR's potential to strengthen the international human rights framework in relation to human rights in the administration of justice, and has recommended that Bars in all

313 www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx.

314 www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.

315 General Assembly Resolution 60/251.

316 IBAHRI, 'The Role of the Universal Period Review in advancing human rights in the administration of justice' (IBAHRI 17 March 2016), at www.ibanet.org/Article/Detail.aspx?ArticleUid=742c8431-9c25-4d0b-bb05-f7950b22b5c4.

jurisdictions make full use of the opportunity to contribute to the UPR for their state. They may also coordinate with civil society and NGOs. The IBA has recommended that national Bars perform an important monitoring function in relation to the independence of the judiciary, as well as carry out regular self-assessments to ensure independence of the legal profession.³¹⁷

7.4.4. *UN special procedures*

Bar associations also need to be aware of the Special Procedures of the UNHRC, which are independent human rights experts with mandates to examine, monitor, advise and publicly report on human rights in relation to specific country situations or thematic issues in all parts of the world. There are 28 thematic, and ten country, mandates, which can also respond to individual complaints – hence why Bars must be alert to the Special Procedures as important mechanisms to raise human rights issues at the international level. Special Procedures also conduct studies, provide advice on technical cooperation at country level, engage in general promotional activities, conduct country visits and send urgent appeals or letters of allegation to governments.

Special Procedures will have either: (i) an individual such as a Special Rapporteur, Special Representative of the Secretary-General, Representative of the Secretary-General or an Independent Expert; or (ii) a Working Group. Some examples, which Bars need to be aware of as relevant to the work they do include the Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on the Situation of Human Rights Defenders, the Working Group on Arbitrary Detention, the Special Rapporteur on Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, and the Independent Expert on the Freedom of Opinion and Expression. For example, the Special Rapporteur on the Independence of Judges and Lawyers has been instrumental to promoting the independence of the legal profession and speaking out in support of national Bars through:

- identifying and recording attacks on the independence of judges, lawyers and court officials and protecting and enhancing their independence;

³¹⁷ *Ibid.*

- making recommendations, including the provision of advisory services or technical assistance when they are requested by the state concerned; and
- studying, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary, lawyers and court officials.

The Special Rapporteur acts on information submitted concerning alleged violations to the independence and impartiality of the judiciary, and the independence of the legal profession, by sending allegation letters and urgent appeals to governments to clarify and/or to bring these cases to their attention. The Special Rapporteurs' communication reports, country visit reports and annual thematic reports provide a wealth of information and guidance for Bars on practical factors to consider in ensuring independence and fulfilling their objectives.³¹⁸

7.4.5. Regional mechanisms

Bar associations can also make use of regional mechanisms. Examples include, but are not limited to: the African Commission and Court on Human and People's Rights; the SADC Tribunal; the East African Court of Justice; the Inter-American Court of Human Rights; and the ECHR.³¹⁹ Within these regional mechanisms, there are also specialist committees and special procedures. For instance, the African Commission has established Special Procedures to supplement its initial mandate. Among others, these include the Special Rapporteur on Prisons and Conditions of Detention in Africa, Working Group on the Death Penalty, Working Group on Robben Island Guidelines (adopted guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa), and a Special Rapporteur on the Rights of Women in Africa. They can receive information from individuals, national and international organisations and institutions, as well as conduct monitoring, make recommendations, conduct studies, and recommend preventive measures.

³¹⁸ For more information on the Special Rapporteur on the Independence of Judges and Lawyers, see www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIIndex.aspx.

³¹⁹ See Useful Online Resources section.

One notable example of the use of regional mechanisms involves the Law Society of Zimbabwe and the SADC Tribunal, which has jurisdiction over disputes between states and between national or legal persons and states.³²⁰ The Law Society of Zimbabwe took action in a case challenging the acquisition of agricultural land by the Government of Zimbabwe. The SADC Tribunal ordered the Zimbabwean government to take no further steps to evict the applicants from, or interfere with, their right to peaceful use of their land.³²¹

Another interesting development that Bars should take advantage of is the African Court on Human and People's Rights. The jurisdiction and mandate of the Court is wide and far-reaching: actions can be brought on the basis of *any* international instrument, which the relevant State Party has ratified.³²² This includes any international human rights treaty – even under the UN system – and regional treaties such as those establishing regional economic communities (eg, EAC and SADC). Such a far-reaching mandate offers individuals and groups an opportunity to be significantly empowered against their governments if there is local support and expertise available.

Despite such developments, in the context of Africa, the Charter on Human and People's Rights has not resulted in anywhere near the same amount of information and output of recommendations or decisions, state reports, communications or complaints from individuals, studies or investigations, as other systems such as the European or Inter-American system.³²³ This is arguably due, in part, to the lack of capacity at the domestic level. It has been noted that there is:

320 Art 15(1) Protocol of the SADC Tribunal.

321 *Mike Campbell (PVT) Ltd & William Michael Campbell v. The Republic of Zimbabwe*, SADC Tribunal, Case No SADCT: 2/07.

322 Art 3 of the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights.

323 Steiner and Alston, *International Human Rights in Context: Law, Politics and Morals* (2nd edn, OUP 2000) p 920. Steiner and Alston suggest this is due to the nature of the Organisation of African Unity (OAU) and the OAU Charter, which, unlike the UN Charter, does not provide for enforcement of principles and focuses more on cooperation among member states and peaceful settlement of disputes and includes, among its purposes in Article II (1) the promotion of 'unity and solidarity' of African states, as well as defence of 'their sovereignty, their territorial integrity, and independence'. This inviolability of territorial borders expressed through the principle of non-interference in internal affairs of member states has been one of the OAU's central creeds that has contributed to the reluctance of member states to promote human rights aggressively. The most visible failure in this regard has been the reluctance of member states to criticise one another about human rights violations.

‘A glaring absence of the formal law societies of the continent in most of the monumental developments taking place, whether at the intergovernmental or at the non-state actor level. Lawyers within civil society (NGO lawyers) and academia (legal scholars) tend to be more dynamic [...] But presence of a law society is the exception rather than the rule.’³²⁴

Bars, particularly in the African region, must make a real effort to become more involved in such developments and use the support available to them. They can use links with other organisations and Bars, as already discussed, and encourage training on and awareness of regional and international mechanisms. For example, local Bars can work to ensure that CLE events on this topic take place every year with other organisations in support. Workshops can also be held in conjunction with other Bars to share experiences about litigating through regional and international mechanisms, and funding support can be obtained from donors or human rights organisations. For instance, the Zimbabwean Lawyers for Human Rights, in conjunction with OSISA and SADCLA, organised Regional Training on Litigation at the African Commission on Human and People’s Rights. The two-day practical workshop trained 18 young lawyers from SADC countries on how to litigate before the African Commission.³²⁵ Bars should use such opportunities and encourage those who attend to then pass on what they have learnt to their colleagues.

7.5. International criminal justice

7.5.1. Introduction

The International Criminal Court (ICC) was established to investigate and try individuals charged with the gravest crimes of concern to the international community: genocide, war crimes and crimes against humanity.³²⁶ Along with the ICC, there have been several ad hoc international and hybrid tribunals that have been set up to investigate and

³²⁴ ‘Regional Initiatives in the Enforcement of Human Rights: A view from East Africa’ Paper delivered at the 15th Commonwealth Law Conference, 9-13 September 2007, Nairobi, Kenya.

³²⁵ The workshop was held from 24–25 February 2007. For further information see www.zlhr.org.zw/intl_litigation/index.htm.

³²⁶ www.icc-cpi.int.

try crimes committed in specific jurisdictions.³²⁷ There are several ways that national Bars can, and have, supported the ICC and the development of international criminal justice more generally in addition to its activities promoting international criminal law principles at the domestic level.³²⁸

7.5.2. Implementation of the Rome Statute in national jurisdictions

Some national Bars have long-standing relationships with the ICC through established programmes. For example, the ABA's International Criminal Court Project continues to petition the US government to forge greater support for, and engagement with, the ICC, through projects, advocacy and research.³²⁹ It should be noted that the ABA participated in the negotiations of the Rome Statute as an observer, advocated for the treaty's adoption and urged the US to become a State Party.

National Bars may also be involved in specific projects to develop the support and understanding of the ICC in their jurisdictions. In July 2015, for instance, the Malaysian Bar Association participated in a workshop targeting parliamentarians, civil society actors and other key stakeholders from Indonesia and Malaysia with the goal of revivifying the ICC processes in these countries.³³⁰

Bars can play an active role in encouraging the incorporation and/or compliance with international treaties. For instance, lawyers in Zambia established a Zambian Coalition for the ICC, which held a workshop agreeing that lawyers should produce a bill on implementing legislation and submit this to the government.

327 For example, International Criminal Tribunal for the former Yugoslavia www.icty.org; International Criminal Tribunal for Rwanda (now the UN Mechanism for International Criminal Tribunals) <http://unictr.unmict.org>; Special Panels of the District Court of Dili; Special Court for Sierra Leone (Residual Court for Sierra Leone) <http://rscsl.org>; Special Tribunal for Lebanon <http://rscsl.org>; Extraordinary Chambers in the Courts of Cambodia www.eccc.gov.kh/en.

328 This Chapter was largely contributed by Aurélie Roche-Mair, Director of the IBA Hague Office.

329 The ABA's ICC Project – www.aba-icc.org.

330 Details gathered following a consultation with the Malaysian Bar Association (with the Director of the IBA Hague Office). See also www.malaysianbar.org.my/press_statements/press_release_1_at_the_crossroads_of_the_rule_of_law_malaysia_must_confront_challenges_to_international_and_domestic_justice_now.html.

7.5.3. Working with civil society organisations

Civil society organisations, such as the Coalition for the International Criminal Court and Parliamentarians for Global Action (who co-organised the workshop in Malaysia, mentioned in the previous section) can be essential partners for national Bars in their role in supporting and promoting the ICC at the domestic level.³³¹

For instance, the Coalition for the International Criminal Court continues to support civil society organisations, Bars and other stakeholders at the national level to promote the work of the ICC. Complementarity is one of the central principles of the ICC: it is a court of last resort in cases where national jurisdictions are unable or unwilling to prosecute the crimes falling under the jurisdiction of the ICC. This means that national jurisdictions and Bars have an important role to play in the system of international criminal justice put in place by the ICC.

7.5.4. Relationship with war crime tribunals' Bars

A good example of the impact that the work of Bars of war crimes tribunals can have on national Bars, is that of the Association of Defence Counsel (ADC) practising before the International Criminal Tribunal for the former Yugoslavia (ICTY). In 2011, the UN International Crime and Justice Research Institute produced, together with the ICTY's Association of Defence Counsel, a Manual on International Criminal Defence. The Manual provides an overview of some of the most effective and innovative practices developed by defence counsel representing accused persons before the ICTY. The publication is intended to be a reference tool for defence counsel in cases of war crimes, crimes against humanity and genocide before national courts in the former Yugoslavia. In particular, the Manual deals with several problematic issues common to the various jurisdictions of the former Yugoslavia, such as the use and challenging of ICTY-generated evidence, conducting an effective plea bargaining, dealing with various kinds of witnesses, and other relevant topics.³³² National Bars, therefore, have a role in promoting such work among their members to assist counsel defending war crimes cases before domestic courts.

³³¹ www.coalitionfortheicc.org and www.pgaction.org/campaigns/icc.

³³² UNICRI website, <http://wcjp.unicri.it/deliverables/manual.php>.

In the context of the ICC, recent years have seen a decrease in the involvement of national Bars of countries that are already States Parties to the Rome Statute with the ICC, arguably because there is a lack of interface at the ICC for national bar associations. In November 2015, the IBA's Hague Office published a discussion paper in November 2015 on the creation of an ICC bar association, a step which the IBA considers to be key to promoting equality of arms and improving the efficient operation of the ICC. After 13 years, it is certainly not premature that ICC counsel, the ICC and the Assembly of States Parties to the Rome Statute play their respective parts to ensure that an effective, democratic, influential and well-funded body, long-envisaged by the legal framework of the Court, finally comes into being.³³³

333 IBA, 'IBA ICC and ICL Programme' (IBA website, no date) www.ibanet.org/Article/Detail.aspx?ArticleUid=c3269715-3135-4524-a891-3585f046d7b8.

Chapter 8: Monitoring and Evaluation

8.1. Introduction

A comprehensive and useful definition of monitoring and evaluation (M&E) is provided by the World Bank. In relation to the development of any organisation, ‘monitoring’ can be described as:

‘A continued function that uses systematic collection of data on specified indicators to provide management and the main stakeholders of an ongoing development intervention with indicators of the extent of progress and achievement of objectives and progress in the use of collected funds.’³³⁴

‘Evaluation’ is a:

‘[P]rocess of determining the worth or significance of a development activity, policy or program [...] to determine the relevance of objectives, the efficacy of design and implementation, the efficiency of resource use and the sustainability of results. An evaluation should provide information that is credible and useful, enabling the incorporation of lessons learned into the decision-making process of both partner and donor.’

Monitoring is, therefore, essential to being able to evaluate the work of an organisation as the latter can only be done when all relevant data is available. This section considers the importance of M&E for Bars and the various tools that they can use to improve their work and more effectively achieve their objectives.

8.2. Importance of M&E

M&E is key to the success of an organisation as it enables the assessment of progress, performance and problems throughout its operation, and provides the opportunity to consider the future activities and approaches in light of

³³⁴ World Bank Independent Evaluation Group, ‘What is Monitoring and Evaluation?’ (World Bank, no date) www.worldbank.org/ieg/ece/what_is_me.html.

these. It allows an organisation to improve and refine its work, as well as take steps to reduce any risks, and in this way is an essential management tool.

M&E is also a central element of accountability, as it provides information on how effectively resources are being used to achieve objectives. Moreover, and related to the issue of accountability, is participation: through monitoring (eg, data collection) beneficiaries and stakeholders will have an avenue by which to provide input. This can help engender a sense of ownership over the direction of the work, and provides an opportunity for them to air views on the successes or shortcomings of the organisation. The latter is particularly relevant with respect to Bars as two of their fundamental roles are to represent their members and assist the public.

Usually M&E systems are also an important requirement for donor-funded work, as they help to ensure funds are being used effectively towards achieving project, programme or activity outcomes. Such systems also mean that problems can be identified and remedied promptly.

As well as setting benchmarks for the capacity-building of Bars, it is therefore essential to make provision for monitoring of their development and evaluating the extent to which they are fulfilling these benchmarks.

8.3. M&E tools

Bars may use a number of M&E tools, which include but are not limited to:

- **Performance indicators.** These are measures of inputs, processes, outputs, outcomes and impacts in relation to development projects, programmes or strategies.³³⁵ They will assist Bars in tracking the progress of their development and take corrective action where necessary. Performance indicators also often require the involvement of stakeholders and beneficiaries through the collection of data on the impact of the Bar's work. To illustrate, as part of its Strategic Plan, the Law Society of Lesotho identified 'Critical Performance Indicators' (such as establishment of committees to fulfil different functions) along with the 'Stakeholders in Need of the Monitoring Data' (members of the law society) and the 'Interval of Reporting' (yearly).³³⁶

³³⁵ World Bank, 'Monitoring and Evaluation: Some tools, methods, and approaches' (World Bank, no date), available at www.worldbank.org/oed/ecd/tools.

³³⁶ The Law Society of Lesotho, Strategic Plan 2006-2009, produced with funding support from OSISA.

- **Formal surveys.** These can provide baseline data with which performance can be compared. For example, at the outset, surveys may be done in relation to public opinion of a Bar's work, how members perceive the Bar to be fulfilling its objectives, or how stakeholders view the Bar's work. Thus, beneficiaries and stakeholders can have an input and, based on the survey, a formal evaluation of the impact of a Bar's work can be done.
- **Rapid appraisal methods.** These are quick, low-cost ways of gathering views and feedback of beneficiaries and stakeholders to respond to decision-makers' needs for information.³³⁷ This may be done through interviews, holding focus group discussions or small surveys or questionnaires.

Another way of facilitating participation and input from stakeholders in a Bar's work is through inclusive methods where, for example, stakeholders provide analysis or beneficiaries conduct assessments through systematic consultations.³³⁸ For example, a Bar could establish a system for regular consultations with civil society groups, the donor community or relevant state institutions to get to understand what they think of the Bar's work in the areas of human rights and the rule of law.

Moreover, an important M&E function is to conduct cost-benefit and cost-effective analyses. This involves assessing whether or not costs of an activity can be justified by its outcomes and impacts. A cost-benefit analysis measures both inputs and outputs in monetary terms and a cost-effective analysis estimates inputs in monetary terms and outcomes in non-monetary, qualitative terms.³³⁹ This tool is essential to ensuring funds are being allocated effectively and are accounted for in accordance with the objectives of a particular activity.

Bars need to consider what sort of information is to be collected in monitoring progress and where it is to be collected from, as well as how the information will be analysed and how results will be used (for example, internally to members and/or externally to other relevant stakeholders).

³³⁷ www.worldbank.org/oed/eed/tools.

³³⁸ *Ibid.*

³³⁹ *Ibid.*

8.4. Implementing M&E

M&E is an important component to the success of a Bar in achieving its objectives and as such must be taken seriously. Often Bars will be working through office bearers who have busy practices and may not dedicate time for M&E. In addition, where individuals can devote time to this, they may not possess the necessary skills or administrative support. For example, data collection, analysis and reporting skills will be required, and so it may be worth sending an individual or individuals from the Bar to be trained in these areas. To illustrate, as part of the IBAHRI capacity-building project in Malawi, the ED of the Malawi Law Society attended project management training, which included how to monitor and evaluate projects.

Bars can also consider establishing a subcommittee to carry out M&E work. For example, the Law Association of Zambia's Strategic Plan of 2013 to 2018 recognised the importance of having a functional M&E framework to help ensure success and planned to establish an M&E Committee to review progress in the implementation of the strategic plan.³⁴⁰

Case study: Law Society of Kenya's M&E framework

As a way of mitigating risks, the Law Society of Kenya has put an M&E framework in place for all departments to ensure that its Strategic Plan implementation is according to schedule, and in the event of any deviation, appropriate and timely action can be taken. The framework includes an M&E Committee (which comprises all heads of departments), M&E Directorate and a National Integrated M&E System.

The Strategic Plan provides for the involvement of all departments in the M&E and reporting process. Monitoring, follow-up and control systems are to be established at all levels. These include review meetings, regular review of the budget systems and development progress reports from the Society's M&E Committee.

³⁴⁰ Law Association of Zambia, www.laz.org.zm/wp-content/uploads/2014/07/LAZ-Strategic-Plan-2013-to-2018.pdf.

Quarterly review meetings are to be held between the Law Society's management and council. During these meetings, the council will receive and review reports indicating overall progress made on key strategic objectives. The nature and scope of reporting will include: progress made against the Strategic Plan; causes of deviation from the Plan, if any; areas of difficulties that may adversely affect implementation, and suggested solutions to these; and corrective measures to be undertaken. Feeding in to these quarterly council meetings will be reports from the M&E Committee and outputs from fortnightly management meetings. Quarterly and annual M&E reports will then be submitted to the M&E Directorate for inclusion in the National Integrated M&E System.

Monitoring is to involve routine data collection and analysis on the progress of the Strategic Plan implementation. The results from the analysis will then be used to inform decision-making, including taking corrective action where deviations in implementation have been noted. The Strategy and Planning Department will coordinate collection of M&E data, analysis and reporting. It will provide technical support and facilitate M&E capacity-building in liaison with the human resources department. Funds are allocated for M&E activities.

The M&E Committee is to take full responsibility for overseeing the implementation of the Plan over the entire strategic planning period. The M&E Committee will continually monitor and evaluate all strategies, activities and outcomes with a view to advising the Law Society's management on the implementation status and Strategic Plan. A system for sharing the lessons learnt will be developed as part of the M&E strategy. The M&E Committee, as part of its overall M&E coordination, will be expected to monitor the documentation and effective use of lessons learnt. Annual service delivery or customer satisfaction surveys will be undertaken to gauge the achievement of the set objectives.

The Law Society will also promote ownership of the Strategic Plan by all departments: teams will monitor programmes and projects

administered within their respective jurisdictions, and subsequently submit quarterly and annual M&E reports to the finance and planning department, who will in turn submit these to the M&E Committee. These reports will be reviewed regularly against the set targets to measure progress.

The Strategic Plan will be evaluated during and after implementation to gauge the extent to which the Law Society has achieved its objectives. The evaluation will be carried out using relevance, efficiency, effectiveness, sustainability and impact measures. A mid-term review will also be carried out. The implementation matrix will help track and monitor progress in the implementation of the Plan.³⁴¹

341 Law Society of Kenya, Strategic Plan 2013–2017, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/StrategicPlan.pdf>.

Conclusion

In any context, the legal profession should be working at all times towards a just society, based on the rule of law. The benchmarks set out in this publication aim to enable Bars to fulfil this objective, which is crucial to the protection of human rights for all.

Independence allows the legal profession to fulfil its obligations – many of which are articulately laid out in the UN Basic Principles. An independent Bar ensures a legal profession that can speak out in support of human rights and the rule of law – both at home and abroad – support colleagues whose rights may be violated or threatened, and act as an important check on state powers. It enables lawyers to fulfil their professional and ethical duties towards their clients, the courts and the general public. Indeed, without an independent and accountable legal profession, faith in the entire justice system would be undermined.

The benchmarks necessary for a fully functioning Bar are all steps towards achieving such independence. A representative structure, led by a democratically elected executive, ensures independence from the state and provides the membership with a say in how the Bar is run. A financially responsible Bar can provide sustainability, thereby avoiding reliance on state or other funding, which could open the door to external influences.

Also critical to an independent legal profession is the ability to self-govern, regulate and represent. Bars should be able to decide for themselves the requirements for admission to the profession and have a significant input in determining the necessary educational and training standards. Where this is controlled by the state, and not an independent professional body, lawyers are, from the very outset of their career, left exposed to government influence or pressures.

Bars must ensure that effective disciplinary mechanisms are in place, as well as rules of ethics or conduct so that lawyers adhere to the high standards of professionalism expected of them as agents of the administration of justice, and can be – and are – held accountable. A fundamental component of ensuring professional standards is the provision of CLE for all lawyers, which Bars have a duty to administer.

Without CLE, lawyers cannot continue to advance their skills or remain abreast of legal developments. It is essential to providing competent legal services and, therefore, to fulfilling a lawyer's professional and ethical duty towards their client, as well as the court and the general public. Whether Bars implement mandatory or non-mandatory CLE will depend very much on the resources available and the size of the Bar. Either way, they must consistently emphasise the importance of CLE to members, and formulate initiatives that encourage lawyers to undertake a range of CLE activities.

Where independence is attained, a Bar can proceed to provide the invaluable services that are expected of it in any society. Importantly, this encompasses the duty to promote the rule of law and access to justice, as well as human rights. Bars must not shy away from speaking out against human rights abuses, both domestically and in other jurisdictions. Where they or their members are facing intimidation, threats or attacks, they can reach out to other Bars, or regional and international organisations for support; globally, there is a wealth of knowledge and experience, as well as a will to assist. Such assistance might be in the form of technical assistance, financial support or learning exchanges, all of which can strengthen smaller or developing Bars, as well as those being targeted or threatened by the state or other actors.

Bars can also use existing mechanisms such as the UPR to highlight rule of law and human rights challenges within their jurisdictions. To do so, however, they must perform an important monitoring role that can serve as a check on the independence of the judiciary, and the legal profession, as well as the rule of law and human rights more generally.

These fundamentals can be achieved over time where Bars carry out effective and regular strategic planning, identify risks, monitor developments, evaluate their work and have a system of budgetary planning that ensures self-sustainability – critical to independence and to fulfilling essential functions. When Bars reach the various benchmarks set out in this publication, they can lead the way in effecting important changes to law, policy and practice not only within their jurisdictions but on a global scale.

Useful Online Resources

International Bar Association

www.ibanet.org

International Bar Association's Human Rights Institute

www.ibanet.org/Human_Rights_Institute/IBAHRI_About.aspx

International Bar Association's Bar Issues Commission

www.ibanet.org/barassociations/bar_associations_home.aspx

IBA BIC Trade in Legal Services (BICTLS) Committee

www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/Default.aspx

IBA Rule of Law Resolution adopted in September 2005 available at

http://www.ibanet.org/PPID/Constituent/Rule_of_Law_Forum/Default.aspx.

IBA's Rule of Law Directory, which lists over 1,000 organisations devoted to the rule of law, including bar associations

www.roldirectory.org

Commonwealth Lawyers Association

www.commonwealthlawyers.com

East African Law Society

www.ealawsociety.org

South African Development Community Lawyers Association

www.sadcla.org

Law Association for Asia and The Pacific (LAW ASIA)

www.lawasia.asn.au

Federation of European Bars

www.fbe.org/?lang=en

European Court of Human Rights case law database

<http://hudoc.echr.coe.int/eng#>

African Commission on Human and People's Rights

www.achpr.org

Inter-American Commission on Human Rights

www.cidh.oas.org

Inter-American Court of Human Rights

www.corteidh.or.cr

International Criminal Court

www.icc-cpi.int

UN Treaties' body database

www.ohchr.org/EN/PublicationsResources/Pages/databases.aspx

International Covenant on Civil and Political Rights

www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

European Convention on Human Rights

www.echr.coe.int/Documents/Convention_ENG.pdf

African Charter on Human and Peoples' Rights

www.achpr.org/instruments/achpr

American Convention on Human Rights

www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf

Special Rapporteur on the Independence of Judges and Lawyers

www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx

Universal Periodic Review

www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

UN Human Rights Committee

www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx

UN Committee on Economic, Social and Cultural Rights

www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx

UN Committee Against Torture

www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx

UN Committee on the Rights of the Child

www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx

UN Committee on the Elimination of Racial Discrimination

www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx

UN Committee on the Elimination of Discrimination against Women
www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx

UN Principles and Guidelines on Access to Legal Aid in Criminal
Justice Systems

[www.unodc.org/documents/justice-and-prison-reform/UN_
principles_and_guidelines_on_access_to_legal_aid.pdf](http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

International Commission of Jurists

www.icj.org

UK Department for International Development's Rule of Law Programme

www.roleuk.org.uk

Southern African Litigation Centre

www.southernafricalitigationcentre.org

University of Minnesota Human Rights Library

www.lumn.edu/humanrts

World Legal Information Institute, an online international legal
resource including case-law and journals from throughout the world

www.worldlii.org

Legalbrief Africa Judgments, a website of judgments from the region

www.legalbrief.co.za/pages/about-leglabrief

Law reports of England and Wales

www.iclr.co.uk/case-law (particularly useful for common law
jurisdictions).

Acronyms and Abbreviations

| | |
|--------|--|
| ABA | American Bar Association |
| ACHPR | African Charter on Human and People's Rights |
| AFF | South African Attorney's Fidelity Fund |
| AGM | annual general meeting |
| AmCHR | American Convention on Human Rights |
| ASL | Asociación de Servicios Legales |
| ATJ | Resource Center for Access to Justice (of the American Bar Association) |
| Bars | bar associations and law societies |
| BIC | Bar Issues Commission |
| BRAK | German Federal Bar |
| BSB | Bar Standards Board |
| CBA | Canadian Bar Association |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CLE | continuing legal education |
| CPD | continuing professional development |
| DC | Disciplinary Committee |
| DFID | Department for International Development |
| EAC | East African Community |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| ED | executive director |
| EU | European Union |
| FLSC | Federation of Law Societies of Canada |
| GATS | Treaty on the General Agreement on Trade in Services |
| HRPC | Human Rights Protection Committee (of the Japan Federation of Bar Associations) |
| IBA | International Bar Association |
| IBAHRI | International Bar Association's Human Rights Institute |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |

| | |
|----------|--|
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Commission of Jurists |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IT | information technology |
| LAWASIA | Law Association for Asia and the Pacific |
| LAZ | Law Association of Zambia |
| LPC | Law Association of Zambia Legal Practitioners' Committee |
| LRP | Long Range Planning |
| LSB | Legal Services Board |
| LSK ABA | Law Society of Kenya's Advocates Benevolent Association |
| M&E | monitoring and evaluation |
| NGOs | non-governmental organisations |
| NYSBA | New York State Bar Association |
| NZCLE | New Zealand Council of Legal Education |
| OSISA | Open Society Initiative for Southern Africa |
| SADC(LA) | Southern African Development Community (Lawyers' Association) |
| SALC | Southern African Litigation Centre |
| SBA | Solicitors Benevolent Association |
| SRA | Solicitors Regulation Authority |
| SWOT | strengths, weaknesses, opportunities and threats |
| UK | United Kingdom |
| UN | United Nations |
| UNHCR | United Nations High Commissioner for Refugees |
| UNHRC | United Nations Human Rights Council |
| UPR | Universal Periodic Review |
| US | United States |
| USAID | United States Agency for International Development |
| WTO | World Trade Organization |

BENCHMARKING BAR ASSOCIATIONS

In 2003, the International Bar Association (IBA) and the Open Society Initiative for Southern Africa (OSISA) began an ongoing collaboration to build capacity for bar associations and law societies in Southern Africa. The foremost objective of the partnership was to assist them in developing and implementing projects that supported and advocated for the rule of law, access to justice and human rights. In order to achieve this, it was recognised that bars and law societies must attain certain benchmarks and best practices and that the effort to attain such benchmarks would require ongoing commitment.

The work of the IBA and OSISA culminated in the original publication *Benchmarking Bar Associations* in 2009. Due to the success of the original book, as well as the further work by the IBA in assisting and establishing bars and law societies not just in Southern Africa, but in countries such as Afghanistan, East Timor and Myanmar, it was considered apt to update the original edition.

This edition considerably expands on the original book, and is broader in reach, covering jurisdictions from around the globe. It includes examples from a variety of bars and law societies and has benefited from input from a range of legal professionals. In essence, it is intended to serve as an indispensable resource for anyone working with or within bar associations or law societies.

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