

THE URGENT NEED FOR THE ADOPTION OF A EUROPEAN CONVENTION ON THE PROFESSION OF LAWYER

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Abstract: *Lawyers play an essential role amongst professions as primary actors in the system of justice and so by their contribution to protecting the Rule of Law, ensuring access to justice for citizens and protecting fundamental rights and freedoms. In this respect, the profession of lawyer can come under considerable pressure from the executive and legislative powers, as well as from the judiciary or non-state actors. The continuing attacks on the role of lawyers since the Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer was adopted, that have accelerated lately, emphasize that The European Convention on the Profession of Lawyer is urgently needed.*

Key words: *Lawyer, European Convention, legally binding instrument on the profession of lawyer.*

1. Introduction

Lawyers play an important role throughout individuals' interaction with the authorities in relation to the exercise and protection of their rights.

Thus, lawyers play a vital role in the administration of justice and the free exercise of the profession of lawyer is indispensable to the full implementation of the fundamental right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. This is particularly so within the judicial system.

The role played by lawyers in ensuring effective protection of individual rights extends beyond the judicial system. They provide legal advice prior to judicial proceedings and in alternative dispute resolution proceedings, when important issues may be resolved without recourse to often over-burdened domestic judicial systems.

Given the importance of lawyers to ensuring respect for human rights and the rule of law, it is a matter of utmost concern that harassment, threats and attacks against lawyers, that occurred in many Council of Europe member States and even increased in

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some must be stopped through an effective protecting instrument that should contain stronger guarantees for preserving the mission of lawyers in society.

2. Preexisting Standards of Protection for the Profession of Lawyer

There are several instruments already in existence that are concerned with the profession of lawyer, some of them specifically focused on it and others that have some practical and significant relevance for it. Generally, these instruments are soft law, like the *United Nations Basic Principles on the Role of Lawyers of 1990 (The Basic Principles)*, *Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer* as well as certain standards adopted by international professional organizations and some standards concerned with human rights defenders. The right to a fair trial is protected by Article 6 of the *European Convention on Human Rights* and Article 14 of *The United Nations International Covenant on Civil and Political Rights (ICCPR)*, that represent binding, treaty-based standards, that directly address several issues of relevance to the exercise of the profession of lawyer, but other rights of the lawyer do not have a binding nature. The most obvious added value of a convention on the profession of lawyer, therefore, would be its binding nature.

2.1. *The Basic Principles* adopted in 1990 within the framework of the United Nations comprised the first soft law instrument specifically concerned with the profession of lawyer, including access to legal services and special safeguards in criminal justice matters, qualifications and training, duties and responsibilities, freedom of expression and association, professional associations of lawyers and disciplinary proceedings. The Basic Principles have been considered in various proceedings before the European Court, they have been cited by international non-governmental and professional organizations in support of expressions of concern about problems faced by lawyers and they have also been referred to in submissions to the United Nations Human Rights Council in the course of its periodic review of the human rights situation in certain countries. However, unsurprisingly for a statement of principles, their formulation is marked by a level of generality, which means that it is easy to agree with them without being certain that particular acts or omissions would necessarily be considered as inconsistent to them (McBride, 2020, p.21).

2.2. *Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer* covers a range of issues: general principles on the freedom of exercise of the profession of lawyer, which take as their starting point that “all necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public”; legal education, training and entry into the legal profession, role and duty of lawyers, access for all persons to associations and disciplinary proceedings are also covered by the Recommendation.

2.3. Lawyers' associations have also been active in promoting standards in this area. The IBA, for example, has issued *Standards for the Independence of the Legal Profession*, *International Principles on Conduct for the Legal Profession* and a *Guide for Establishing and Maintaining Complaints and Discipline Procedures*. The CCBE (The Council of Bars and Law Societies of Europe) has adopted a *Charter of Core Principles of the European Legal Profession*. The UIA has produced the *Turin Principles of Professional Conduct for the Legal Profession* in the 21st Century. Most of these instruments were adopted after the Committee of Ministers Recommendation No. R (2000) 21.

3. The Case for a European Convention on the Profession of Lawyer

The case for drafting a European Convention on the profession of lawyer started in 2016 when the author, Bernd Fabritius and other several members of the Parliamentary Assembly of the Council of Europe (PACE) tabled a motion for a recommendation – Doc no.141818 of 13 October 2016 - inviting the Committee of Ministers to initiate work on the drafting of a European Convention on the profession of lawyer. The signatories consider that lawyers contribute to the respect for the rule of law by defending individual freedoms, and in particular by ensuring that the right to a fair trial, guaranteed by Article 6 of the European Convention on Human Rights (ECHR) is upheld, but when the rule of law is threatened, the rights associated with the exercise of this profession are often also restricted. The initiators considered that even though there are preexisting texts serving as benchmarks in this field, such as *Recommendation No. R (2000)21 on the freedom of exercise of the profession of lawyer* and the *United Nations Basic Principles on the Role of Lawyers of 1990*, these texts are nevertheless seen as „soft law“ instruments, not having binding legal force while the rules on the exercise of the profession of lawyer vary from one state to another.

CCBE that represents the bars and law societies of 32-member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers – welcomed the motion of 13 October 2016 and considered that such an instrument is needed in order to respond to the attacks against the role of lawyers which have grown over the recent years. The CCBE considers that there are three key reasons why a Convention is needed. The first one is the essential role of lawyers in the system of justice, ensuring access to justice for citizens and protecting fundamental rights and freedoms and so the Rule of Law, a role which comes with a considerable pressure from the executive and legislative powers, as well as from the judiciary and non-State actors from time to time.

Secondly, another reason is the lack of effectiveness of the preexisting instruments exhorting the protection of the role of lawyers, such as Recommendation No. R (2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer as long as the attacks on the role of lawyer since the Recommendation had been adopted have accelerated recently.

Thirdly, although the European Convention on Human Rights (ECHR) protects various critical rights associated with the lawyers' role in maintaining the Rule of Law, other

rights, such as those identified in the Recommendation, are outside the scope of the ECHR and need a protection mechanism at European level too.

Regarding the content of the Convention, CCBE suggest that those aspirations in the Recommendation should be converted into concrete obligations, coupled with a practical, rapid and public means of exposing deficiencies in national practice and this can be achieved by including those aspects of the Recommendation in a Convention with binding force, coupled with a twin track mechanism for their enforcement.

Through Recommendation 2121(2018) adopted on 24 January 2018, The Parliamentary Assembly declare the need to reinforce the legal status of Recommendation No. R (2000) 21 by translating its provisions into a legally binding convention, with an effective control mechanism. Such a convention could also become a source of binding standards on the wider international level by allowing non-member States to accede to it. The Assembly considers that there is also a need for an early-warning mechanism to respond to immediate threats to their safety and independence and to their ability to perform their professional duties effectively. In this connection, the Assembly reiterates the call made in its *Recommendation 2085 (2016) on strengthening the protection and role of human rights defenders in the Council of Europe* member States to establish a platform for the protection of human rights defenders, which would include lawyers. The Parliamentary Assembly calls on the Committee of Ministers to draft and adopt a convention on the profession of lawyer, based on the standards set out in Recommendation No. R (2000) 21, also taking into account other relevant instruments, including the Council of Bars and Law Societies of Europe's Charter of Core Principles of the European Legal Profession, the International Association of Lawyers' Turin Principles of Professional Conduct for the Legal Profession in the 21st Century and the International Bar Association's Standards for the Independence of the Legal Profession, International Principles on Conduct for the Legal Profession and Guide for Establishing and Maintaining Complaints and Discipline Procedures.

The Committee should ensure that guarantees in relation to fundamental issues such as access to a lawyer and lawyers' access to their clients, legal professional privilege, civil and criminal immunity for statements made in the course of their professional duties and the confidentiality of lawyer-client communications are reinforced as necessary in order to respond to developments in the surrounding legal and regulatory context, including measures introduced to counter corruption, money laundering and terrorism. The convention should include an effective control mechanism, considering the option of a committee of experts examining periodic reports submitted by States parties, with the possibility for civil society organizations, including lawyers' associations, to make submissions.

The Committee of Ministers replied to the previous Recommendation instructing its European Committee on Legal Co-operation (CDCJ) to prepare a feasibility study upon the proposed Convention, meant to examine the added value and effectiveness of such a binding instrument, and even to explore other possible avenues.

On 31 March 2021, at its 1400th meeting, the Committee of Ministers' Deputies of the Council of Europe took note of the *Study on the feasibility of a new, binding or non-binding, European legal instrument on the profession of lawyer – possible added-value*

and effectiveness, carried out by the European Committee on Legal Co-operation (CDCJ) as well as the draft terms of reference of a subordinate committee of experts tasked with drawing up a draft instrument to be proposed in the context of the examination of the next Council of Europe programme and budget (2022-2025). The study recommended that the Committee of Ministers initiate the preparation of a new legal instrument which would offer an effective protection to lawyers allowing them to exercise their profession independently, freely and safely, without prejudice or restraint.

4. The Urgent Necessity and Need for Adoption of the European Convention on the Profession of Lawyer

The study identified legal protection gaps and problems faced by the profession of lawyer and underlined a clear need for an improved minimum set of standards applicable to lawyers in relation to their professional activities.

Indeed, attacks on the role of lawyers have increased in recent years as highlighted in the motion for a resolution of 29 June 2017 tabled by several members of PACE on the principles and guarantees of advocates, or in the Lahaye-Battheu Report – Doc. 14453 of 15 December 2017 and in the Bashkin Report – Doc. 15152 of 29 September 2020.

Harassment, threats, imprisonment, surveillance, enforced disappearances and murders of lawyers continue to occur in many Council of Europe States, and are even on the rise in some of them. These attacks include, amongst other things: killings, which are sometimes inadequately investigated by the authorities; physical violence, including by public officials; threats, unjustified public criticism and identification of lawyers with their clients, including by leading politicians; abuse of criminal proceedings to punish lawyers or remove them from certain cases; violation of legal professional privilege through unlawful monitoring of clients' consultations with their lawyers; search and seizure in the course of unlawful investigations; interrogation of lawyers as witnesses in their clients' criminal cases; abuse of disciplinary proceedings; and various structural and procedural failures to establish and implement effective guarantees of lawyers' independence. According to Recommendation 2121(2018) these attacks have become widespread and systematic and are apparently the result of deliberate policy.

A new instrument is now needed to ensure the effective protection of the profession of lawyer, whose mission is crucial for access to justice and the protection of human rights and fundamental freedoms, in particular the right to defense and the guarantee of a fair trial.

On the other hand, the experience with the Recommendation shows that 'exhortation' is not enough. Some of its provisions are effectively guaranteed at European level by the ECHR especially by Articles 6, 8 and 10, but other provisions which serve to protect the Rule of Law need reinforcement as binding obligations too, rather than merely a recommendation. The inadequacy of the Recommendation lies not in its content, but in its lack of binding rules, which has led to a disappointing pattern of national failure to comply with the principles which the Recommendation set out. In this regard, the future Convention would be a further step towards the effective protection of the Rule of Law. Adopting a suitable enforcement procedure would serve to anchor the protection of

these rights at a European level, just as the Convention would also reassert them in domestic law. A rapid mechanism for enforcement at the European level is needed to supplement domestic compliance.

A further advantage of undertaking intergovernmental work on a draft convention would be the opportunity to update the standards of the now 21-year old Committee of Ministers' recommendation in the light of the numerous texts that have been elaborated in the intervening period, including developments in the case law of the Court.

Furthermore, if the Convention is open to ratification by non-Member States of the Council of Europe as well as by members, the text could operate as a means to enlarge the territorial scope of the effective protection of the Rule of Law to other likeminded States. The new Convention will provide the opportunity for extending good practice in those vital areas of protecting the Rule of Law and so, progressively, the range of the protection of the Rule of Law would be enlarged.

5. Conclusions

Lawyers must be defended because they are guarantors of humanity. Today, it is clear that lawyers are increasingly the target of attacks of all kinds, that put the practice of their profession in difficulty, even in danger. A new European Convention is now needed to ensure the effective protection of the profession of lawyer, whose mission is crucial for access to justice and the protection of human rights and fundamental freedoms.

The most obvious added value of a convention on the profession of lawyer, therefore, would be its binding nature. Transforming existing non-binding standards into a binding instrument would send an important political message concerning the importance of the legal profession and the need for the authorities in member States to take more effective action to guarantee its safety and independence.

References

- CCBE contribution on the proposed European Convention on the profession of Lawyer - https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_CONVENTION/CONV_Position_papers/EN_CONV_20170915_CCBE-contribution-european-convention-profession-lawyer.pdf
- McBride, J. (2021). *Profession of lawyer: study on the feasibility of a new European legal instrument*, - <https://rm.coe.int/eng-examen-de-faisabilite-d-un-instrument-juridque-europeen-couv-texte/1680a22790>
- Recommendation 2085 (2016) on strengthening the protection and role of human rights defenders in Council of Europe*
- Recommendation 2121 (2018) – The case for drafting a European convention on the profession of Lawyer*
- Recommendation No. R(2000)21 on the freedom of exercise of the profession*
- The United Nations International Covenant on Civil and Political Rights (ICCPR)*
- United Nations Basic Principles on the Role of Lawyers of 1990 (The Basic Principles).*