

CM Documents

CM(2000)56 Addendum 28 April 2000

710 Meeting, 18 May 2000

10. Legal questions

10.1 European Committee on Legal Co-operation (CDCJ)

Draft Recommendation of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer and Explanatory memorandum

Part A

Draft Recommendation no. R(2000)...

of the Committee of Ministers to member States

on the freedom of exercise of the profession of lawyer

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to the provisions of the European Convention on Human Rights;

Having regard to the United Nations Basic Principles on the Role of Lawyers, endorsed by the General Assembly of the United Nations in December 1990;

Having regard to Recommendation R(94)12 on the independence, efficiency and role of judges, adopted by the Committee of Ministers of the Council of Europe on 13 October 1994;

Underlining the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the freedom of exercise of the profession of lawyer in order to

strengthen the Rule of Law, in which lawyers take part, in particular in the role of defending individual freedoms;

Conscious of the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason;

Aware of the desirability of ensuring a proper exercise of lawyers' responsibilities and, in particular, of the need for lawyers to receive sufficient training and to find a proper balance between their duties towards the courts and those towards their clients;

Considering that access to justice may require persons in an economically weak position to obtain the services of lawyers,

Recommends the governments of member States to take or reinforce, as the case may be, all measures they consider necessary with a view to the implementation of the Principles contained in this Recommendation.

For the purpose of this Recommendation, "lawyer" means a person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters.

Principle I - General Principles on the freedom of exercise of the profession of lawyer

1. 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, in particular in the light of the relevant provisions of the European Convention on Human Rights.
2. Decisions concerning the authorisation to practice as a lawyer or to accede to this profession, should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority.
3. Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and, in particular, should have the right to take part in public discussions on matters concerning the law and the administration of justice and suggest legislative reforms.
4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.
5. Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to established professional standards.

6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship, including the contents of any files, documents and electronic communications. Exceptions to this Principle should be allowed only if expressly provided in the internal law and in so far as this is necessary in a democratic society in particular in the interest of criminal investigations, under the control of an independent and impartial judicial authority.

7. Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards.

8. All lawyers acting in the same case should be accorded equal respect by the court.

Principle II - Legal education, training and entry into the legal profession

1. Legal education, entry into and continued exercise of the legal profession should not be denied in particular by reason of sex or sexual preference, race, colour, religion, political or other opinion, ethnic or social origin, membership of a national minority, property, birth or physical disability.

2. All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession and to provide for the continuing education of lawyers.

3. Legal education, including programmes of continuing education, should seek to strengthen legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect and promote the rights and interests of their clients and support the proper administration of justice.

Principle III - Role and duty of lawyers

1. Bar associations or other lawyers' professional associations should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly.

2. Professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions.

3. The duties of lawyers towards their clients should include:

a. advising them on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs;

b. endeavouring first and foremost to resolve a case amicably;

c. taking legal action to protect, respect and enforce the rights and interests of their

clients;

d. avoiding conflicts of interest ;

e. not taking up more work than they can reasonably manage.

4. Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards. Any abstention by lawyers from their professional activities should avoid damage to the interests of clients or others who require their services.

Principle IV - Access for all persons to lawyers

1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.

2. Lawyers should be encouraged to provide legal services to persons in an economically weak position.

3. Governments of member States should, where necessary in the interests of justice, ensure that effective legal services by competent lawyers are available to persons in an economically weak position, in particular to persons deprived of their liberty.

4. Any rules or regulations governing the fees or remuneration of lawyers should take into account the need to enable lawyers to earn a reasonable income, as well as the need to provide legal services to the public.

5. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from by public funds.

Principle V - Associations

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

2. Bar associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public.

3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.

4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, *inter alia*, to:

a. promote and uphold the cause of justice, without fear;

- b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity;
 - c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice;
 - d. promote and support law reform and discussion on existing and proposed legislation;
 - e. promote the welfare of members of the profession and assist them or their families if circumstances so require;
 - f. co-operate with lawyers of other countries in order to promote the role of lawyers, in particular by considering the work of international organisations of lawyers and international intergovernmental and non-governmental organisations;
 - g. promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline.
5. Bar associations or other professional lawyers' associations should take any necessary action, including defending lawyers' interests with the appropriate body, in case of:
- a. arrest or detention of a lawyer;
 - b. any decision to take proceedings calling into question the integrity of a lawyer;
 - c. any search of lawyers themselves or their property;
 - d. any seizure of documents or materials in a lawyers' possession;
 - e. publication of press reports which require action on behalf of lawyers.

Principle VI - Disciplinary proceedings

1. Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers, appropriate measures should be taken, including disciplinary proceedings.
2. Bar associations or other lawyers' professional associations should be responsible for or be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.
3. Disciplinary proceedings should be conducted with full respect of the Principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.
4. The Principle of proportionality should be respected in determining sanctions for

disciplinary offences committed by lawyers.

Part B

Explanatory memorandum on the Recommendation No. R(2000)...

of the Committee of Ministers to member States

on the freedom of exercise of the profession of lawyer

Introduction

1. The exercise of the profession of lawyer has always been strictly connected with the cultural, social, political and historical environment of any society and, in any democratic society, lawyers have an essential role to play in the administration of justice, in the avoidance and resolution of disputes, as well as in the protection of human rights and fundamental freedoms. The Code of Conduct for Lawyers in the European Community adopted by the Council of the Bars and Law Societies of the European Community (CCBE) on 28 October 1988, states that "rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilised societies".

2. The practice of the law has changed considerably in the last decades and practitioners are being obliged to adopt a more commercial approach to their activity. However, they are members of an independent profession and must respect rules which ensure that they comply with their duties to the court and to their clients and other persons (see paragraphs 3 and 36 below) and maintain certain professional standards. It is essential to ensure that legal services of the highest quality are provided and that without discrimination.

3. It is clear that lawyers should serve not only the interests of their clients, but also those of the justice system as a whole. In the CCBE Code of Conduct (revised 28 November 1998) it is underlined that:

"In a society founded on respect for the rule of law the lawyer fulfils a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend and it is his duty not only to plead his client's cause but to be his adviser.

A lawyer's function therefore lays on him a variety of legal and moral obligations (sometimes appearing in conflict with each other) towards:

the client;

the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;

the legal profession in general and each fellow member of it in particular; and

the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society".

4. Various steps have been undertaken at an international level to create internationally agreed standards for the exercise of the profession of lawyer.

5. The United Nations has prepared Principles concerning the role of lawyers, which contain uniform provisions for the practice of this legal profession at an international level. The 8th UN Congress on the Prevention of Crime and the Treatment of Offenders (Cuba, 27 August-7 September 1990) adopted the Basic Principles on the Role of Lawyers. These Principles have been prepared to assist States in their task of promoting and ensuring the proper role of lawyers in the society. In its Resolution 45/121 of December 1990, the General Assembly of the UN "welcomed" this instrument adopted by the Congress and invited governments "to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement the Principles contained therein[...]in accordance with the economic, social, legal, cultural and political circumstances of each country".

6. At a European Union level, important developments have occurred as regards the exercise of the profession of lawyer. First the Council of the European Communities adopted Directive 77/249/EEC, which permits a lawyer to provide services in another member State of the European Union on an occasional or temporary basis. Next, the Council of the European Communities adopted Directive 89/48/EEC on a general system for the recognition of higher-education diplomas (which requires lawyers either to sit an aptitude test or to complete an adaptation period before they can establish themselves in another member State of the European Union on the basis of the recognition of their diploma). Then, on 16 February 1998, the European Parliament and the Council of the European Union adopted Directive 98/5/EC which will enable lawyers to practise permanently under their original professional title, in another member State of the European Union, on the same basis as that country's own lawyers.

7. As a result of these important developments in the European Union States including the adoption of the CCBE Code of Conduct it is even more necessary throughout Europe for lawyers to have clear guidelines about the professional standards in the States in which they are practising.

8. It should be noted that an important aspect of a legal system in any democratic society is that the rights of individuals be protected and that they receive a fair and public hearing of their case – within a reasonable time - by an independent and

impartial tribunal established by law (Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms – hereinafter referred to as "the ECHR"). This implies, *inter alia*, the right to have access to evidence and witnesses, as well as the right to legal services at all stages in the proceedings. All member States of the Council of Europe, having ratified the ECHR, should provide for legal remedies to be used.

9. The European Court of Human Rights has rendered numerous judgments on questions relating, directly or indirectly, to lawyers. In particular, these cases have dealt with questions relating to effective assistance of counsel^{footnote 1} and trial *in absentia*^{footnote 2, 3}, confidential communication with counsel^{footnote 4}, appointment of counsel "where the interests of justice so require"^{footnote 5}.

10. Therefore, as it is essential to the protection of Human Rights, as well as to the maintenance of the Rule of Law, that there be an organised legal profession free to manage its own affairs, the Council of Europe, which has as fundamental aims the protection of Human Rights, as well as the establishment and promotion of the Rule of Law at a pan-European level, could not remain insensible to the need for the legal profession to be able to exercise freely its activities, without any undue pressure from any quarter.

11. Indeed, in the framework of its activities of legal co-operation with Central and Eastern European Countries (Demo-Droit and Themis programmes), the Council of Europe has organised various Multilateral Meetings on the theme "The role and responsibility of the lawyer in a society in transition".

12. In the Conclusions of the 1997 Multilateral Meeting on this subject (Budapest, 9-11 December 1997) organised by the Council of Europe in co-operation with the Hungarian Bar Association, the Council of the Bars and Law Societies of the European Community (CCBE) and INTERIGHTS, it was noted – in the part relating to the organisation and administration of the profession of lawyer - that "lawyers in all societies are bound by the following general Principles: independence, moral integrity, confidentiality, respect for ethical rules, avoidance of conflicts of interest, avoidance of activities incompatible with the independent discharge of their duties, advertising and personal publicity (taking into account Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms), protection of the client's interests and respect for the courts"^{footnote 6}.

13. Moreover, in the framework of its intergovernmental activities, the Committee of Ministers of the Council of Europe has adopted numerous Resolutions and Recommendations, dealing with questions relating to justice which also include matters concerning the role and the profession of lawyer^{footnote 7}.

14. In particular, Recommendation No. R(94)12 on the independence, efficiency and the role of judges (hereinafter referred to as "the 1994 Recommendation") deals with some basic Principles to safeguard judicial independence, in the light of the Principle that everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law, in accordance with Article 6 of the ECHR.

15. In the light of the 1994 Recommendation, the Council of Europe decided to prepare a similar Recommendation concerning lawyers, which would take account of all the existing instruments and the case-law of the European Court of Human Rights.

16. Therefore, within the framework of its efforts to improve fairness and efficiency of justice and, in particular, to reduce undue delays in judicial proceedings (in accordance with Article 6 of the ECHR), the CJ-EJ was requested by the European Committee on Legal Co-operation (CDCJ) to prepare a draft Recommendation on the freedom of exercise of the profession of lawyer.

Scope of the Recommendation

17. The Recommendation seeks to state the nature of the independence of the legal profession, the reasons for it, its importance for society, the responsibilities which it entails, the ways in which it can and should be ensured and protected, and the standards and discipline needed in order to maintain it.

18. Therefore, it is important for lawyers to be guided by Principles and rules which regulate the independent exercise of the legal profession, in order to ensure that they comply with the established professional standards.

19. These Principles and rules should include, *inter alia*, the general Principles on the freedom of exercise of the profession of lawyer (Principle I), legal education, training and entry into the legal profession (Principle II), role and duty of lawyers (Principle III), access for all persons to lawyers (Principle IV), professional associations (Principle V) and disciplinary proceedings (Principle VI).

Commentary on the Principles

Principle I – General Principles on the freedom of exercise of the profession of lawyer

20. A fair and equitable system of administration of justice and the effective protection of human rights and fundamental freedoms, depend both on the independence and impartiality of the judiciary (see the 1994 Recommendation) and on the independence of lawyers. The independence of the judiciary and of lawyers are essential elements of any system of justice.

21. Indeed, an adequate protection of human rights and fundamental freedoms, economic, social and cultural, as well as civil and political rights to which all persons are entitled, requires that all persons have effective access to legal services provided by an independent legal profession (Principle I.1).

22. Moreover, the Recommendation provides, in its Principle I.2, that the authorisation to practise as a lawyer or to accede to this profession, should be taken

by an independent body. This includes admission to a professional body or to a register of lawyers or applications for a licence to practice as a lawyer. The independent body referred to in this Principle may be a professional body or a body composed of members of the judiciary, members of the general public and other members, in addition to a number of the representatives of the legal profession. The Recommendation also provides that the decisions concerning the authorisation to practice as a lawyer or to accede to this profession, whether or not they are taken by an independent body, should be subject to review by an independent and impartial judicial authority. However, if the initial decision is taken by a court, there is no need to provide for another judicial control (Principle of the "incorporated control").

23. It should be noted that Principle I.2 does not exclude other forms by which persons are admitted to practice the legal profession, as long as the criteria for admission are fair and objective and the body that administers them does so in a fair and objective way (see also Principle V below).

24. The Recommendation further underlines that lawyers should enjoy the same freedom of association, belief, opinion and expression as other persons in society. In particular, it indicates that lawyers should have the right to participate in public discussions on questions relating to the law and the administration of justice with no legal restrictions other than those applicable to other persons (Principle I.3), and the right to join or form freely and without interference, local or national professional organisations. This Principle should not prevent professional bodies from restricting the right of their members to speak publicly about matters on which they have been engaged to advise. In addition, lawyers should not be subject to any restriction by reason of their beliefs or membership of a lawful association. Indeed, lawyers, as one of the fundamental actors of any judicial system, should not remain insensible to important developments which might occur in the economic and social life and should play an active role in any legislative proposal which might lead to the improvement of the judicial system.(see also paragraph 6 above). The freedoms referred to in this Principle are already

contained in Articles 9, 10 and 11 of the ECHR (freedom of thought, conscience, religion, expression, assembly and association). This Principle is included in the Recommendation for pedagogical and didactical purposes.

25. To enable the legal profession effectively to perform its proper role in the defence of the rights of individuals, lawyers should be able to counsel and represent their clients in accordance with the internal law of the State concerned, as well as with established professional standards, without any restriction, influences, pressures, threats or undue interference from any quarter (Principle I.4).

26. The Recommendation then deals with the question of the client-lawyer relationship (Principles I.5 and I.6). As regards persons deprived of their liberty (Principle I.5), the Recommendation indicates that the right of access of lawyers to their clients should be balanced with the need to guarantee the proper administration of justice and protect public order. Indeed, in certain cases it may be appropriate to limit the access of lawyers to their clients in order to protect, for instance, ongoing criminal investigations or the security of prisons.

27. Furthermore, as regards the question of the confidentiality of the client-lawyer relationship (Principle I.6), the Recommendation requires States to ensure that it be respected, including as regards the contents of any files, documents and electronic communication. However, the confidentiality of the lawyer-client relationship should under no circumstances be used to protect lawyers' criminal acts. An exception to the rule of confidentiality could be made, in particular when criminal investigations so require (e.g. in case of abuse of electronic communication between lawyers and clients for criminal conspiracy). However, the Recommendation indicates that where it is necessary to restrict the confidentiality of communications between lawyers and clients, such restriction should be expressly provided in the internal law and carried out under the control of an independent and impartial judicial authority, in order to enable the latter to ensure the respect of the rights of the defence and of the Principle of equality of arms between prosecutors and the defence counsels. This provision does not imply that lawyers should be forced to testify against their clients. This provision is inspired by paragraph 2 of Article 8 of the ECHR.

28. Furthermore, the Recommendation refers to the need for lawyers, in order to carry out properly their tasks, to have access to all relevant files (Principle I.7) and indicates that no files in the record should be available to one party, but not to the other (Principle of equality of arms during judicial proceedings).

29. Finally, in its Principle I.8, the Recommendation recalls the Principle of equality among lawyers themselves and requires States to provide for the necessary measures to ensure that lawyers acting in the same case be treated equally. This provision is without prejudice from national legislation concerning the situation in which more than one lawyer defend the same client. Indeed, this provision refers to equality of lawyers of different parties. Moreover it should be noted that articles 6,8,10,11 and 14 of the ECHR are relevant in this context.

Principle II – Legal education, training and entry into the legal profession

30. The Recommendation contains important rules which should be implemented by States in order to provide an adequate legal education for lawyers and to regulate their entry into the legal profession.

31. The text indicates that no one should be denied a legal education, entry into and continued exercise of the legal profession by reasons of sex or sexual preference, race, colour, religion, political or other opinion, ethnic or social origin, association with a national minority, property, birth and physical disability (Principle II.1). This provision is inspired by Article 14 of the ECHR. Moreover, the list contained in Principle II is a non-exhaustive one.

32. Legal education should be designed to promote, in addition to technical competence, awareness of the ethical standards inherent in the legal profession, and of human rights and fundamental freedoms, as contained, *inter alia*, in the ECHR (Principle II.2). However, if in certain States Bar associations or other associations of lawyers have the responsibility for the training of lawyers, Principle II.2 should

not be interpreted as requiring these States to carry out such training.

33. Moreover, the Recommendation recognises that legal education, continuing education and practical experience are vital factors to ensure, maintain and strengthen the level of technical competence required to provide legal services. Indeed, the text requires States to take the necessary measures, where appropriate, to reach these aims (Principle II.3).

34. Furthermore, legal education, including programmes of continuing education, should aim at enhancing legal skills, increase ethical standards and public concern, as well as train lawyers in order to respect, protect and promote the interests of both their clients and the justice system as a whole (Principle II.3).

Principle III – Role and duty of lawyers

35. Every person or group of persons is entitled to call upon the assistance of a lawyer to defend or assert their rights and interests within the law and it is the duty of the lawyer to do so in the best possible way and with integrity and independence. As a consequence, it is implicit that lawyers should not be discriminated by the authorities on the basis of their clients (or their clients' cause).

36. Therefore, the Recommendation recalls the importance of professional standards and codes of conduct to be drawn up by Bar associations or other professional associations of lawyers in order to ensure that, when defending the legitimate rights and interests of their clients, lawyers act independently, diligently and fairly (Principle III.1). This includes duties of fairness towards other persons, such as the duty not to deceive or defraud them, whether for the benefit of the lawyer or the client, as well as the duty to act fairly towards the victims of criminal behaviour for which their clients stand accused.

37. All lawyers have a duty to keep their clients' affairs secret (Principle III.2): this is one of the rights of the defence guaranteed by the ECHR. Some exceptions exist to this rule, in general in connection with criminal acts and fraud, as well as statutory exceptions giving powers to tax authorities. It should be noted that the text of the Recommendation (Principle III.2) states that any breach of confidentiality, without the consent of the client, may give rise to disciplinary sanctions for lawyers.

38. In this connection, different procedures exist in States in the context of a court action, where lawyers are required to produce documents which they deem to be confidential. In certain countries (normally, common law countries), it is for clients to decide whether to produce confidential documents. In other countries (mainly, civil law countries), this decision belongs to lawyers who may decide whether or not to produce confidential documents required in judicial proceedings.

39. Moreover, the Recommendation considers the question of the duties of lawyers towards their clients (Principle III.3, sub-paragraphs a, b, c, d and e). In discharging these duties towards their clients, lawyers should always act diligently and fearlessly within the law, in accordance with the wishes of clients and subject to the

established professional and ethical standards.

40. In doing so, lawyers are required first of all to advise their clients of their rights and obligations, as well as of the likely outcome and consequences of the case, including financial costs (Principle III.3.a). In particular, it should be noted that part of the financial costs involved in a case, may arise from lawyers' fees. Therefore, lawyers should inform their clients of the costs involved throughout the proceeding.

41. The Recommendation also requires lawyers, as part of their duties, to endeavour to resolve the case amicably (Principle III.3.b) where it is practical to do so, and to avoid conflicts of interest (Principle III.3.d).

42. Moreover, it should be noted that Principle III.3.e requires lawyers not to take up more work than they can reasonably manage in particular where they could not keep a desirable operational level. Indeed, the evaluation of what lawyers can or cannot reasonably manage is left to their discretion and will depend on the specific circumstances of the case (e.g. types of cases, size of courts, number and experience of lawyers in law-firms). Moreover, clients are free to decide whether or not to seek the services of another lawyer.

43. Furthermore, lawyers should also show proper respect towards the judiciary and contribute to the proper and fair functioning of the judicial system (Principle III.4). This should not prevent lawyers from raising objections, such as questions relating to the jurisdictional competence of a certain judge to decide on the particular case or to the judge's conduct of a hearing.

44. In addition it should be noted in connection with the Principle III.4. that, with a view to ensuring a proper performance of the hearing, judges should make use of any sanctions provided for in the national law (e.g. expulsion of lawyers from court rooms, fines on lawyers).

45. It should be underlined that in some member States, strikes of lawyers have become more and more frequent, thereby causing damage in particular to persons needing their services. For this reason, the Recommendation (Principle III.4.), accepting the legitimate right of lawyers to strike, requires these strikes to be limited in time and not to damage the interests of the clients or persons needing their services.

Principle IV – Access for all persons to lawyers

46. Strictly linked to the question of the freedom of exercise of the profession of lawyer, is the need for lawyers to make their services available to all sectors of the society, and to promote the cause of justice by protecting human, economic, social and cultural, as well as civil and political rights, of individuals (Principle IV). Indeed, equal access to the law for the rich and poor alike is essential to the maintenance of the Rule of Law. It is therefore important to provide effective legal services to all those whose rights and interests are threatened, including persons who are not able to pay for it. The primary obligation to provide these services and

to guarantee their quality is the responsibility of the legal profession and arises from its independence. However, the State (and the community as a whole) has an obligation to assist the legal profession in carrying out this responsibility.

47. The provision of legal services for the poor and disadvantaged does not necessarily include an obligation to represent these persons in court, but refers to the need to educate and counsel them as to their rights, and the ways to defend and secure them (Principles IV.1 and IV.2). One of the means of reaching this goal could be, for instance, for lawyers to be involved in organisations working in poor communities, informing persons about relevant laws and procedures, through which the members of these communities could protect and promote their rights and, where appropriate, ask for the assistance of lawyers.

48. The Recommendation further underlines that it is the responsibility of governments to ensure the availability of legal services programmes. In addition to the contribution of governments, Bar associations or other professional associations of lawyers should endeavour to promote and provide such programmes (Principle IV.3).

49. As regards fees and remuneration of lawyers, the Recommendation indicates (Principle IV.4) that rules and regulations governing them should ensure that legal services be available to the public on the basis of reasonable terms and that, in order to ensure their independence, lawyers should earn an adequate remuneration to ensure a reasonable standard of living.

50. Furthermore, lawyers engaged in legal services for persons in an economically weak position, financed in whole or in part by public funds, should still remain professionally independent (Principle IV.5).

51. Finally, it should be noted that the provisions of Principle IV apply to all lawyers within the meaning of this Recommendation and not only to lawyers defending persons who have been charged with a criminal offence.

Principle V – Associations

52. The Recommendation (Principle V.1) recalls the need for lawyers to establish in each jurisdiction an independent and self-governing association, recognised by the law, which is able to represent their interests, promote their continuing education and training and protect their professional integrity. Moreover, it would be appropriate for the executive body of these associations to be elected by its members, in order for them to carry out their functions without any external interference.

53. The legislation governing the legal profession should enable all lawyers to become members of these associations, if they so wish, and if they fulfil the required professional standards members of these associations, in order for the latter to be able to strengthen and safeguard both the independence and interests of lawyers. Indeed, lawyers can only fully play their role in a State based on the Rule

of Law, if Bar associations are independent, in particular from the State and economic pressure group (Principle V.2). However, Bar associations and other lawyers' professional associations should endeavour to co-operate with governments in order to ensure that every person has effective and equal access to legal services and that lawyers can counsel and assist their clients, in accordance with the law and established professional standards, without any improper interference.

54. The Recommendation (Principle V.3) further recognises the prominent role of Bar associations in upholding and defending the independence of lawyers against any improper restrictions or infringements.

55. Moreover, the Recommendation contains (Principle V.4, sub-paragraphs (a) to (g)) a non-exhaustive list of functions of Bar associations which should contribute to the independence of the legal profession and integrate their role in the society.

56. In view of the importance of the independence of lawyers for their clients and for the public, and in order to enable Bar associations to fulfil their functions of preserving and promoting the independence of lawyers, the Recommendation underlines (Principle V.5, sub-paragraphs (a) to (e)) the need for the latter to have the possibility to take any necessary action to defend lawyers' interests in case of restrictions of lawyers rights and freedoms.

57. Sub-paragraph (d) of Principle V.5 refers, in particular, to the seizure of materials (and not only documents) in lawyers' possession as in most cases lawyers keep relevant information in an electronic form, such as floppy disk or CD-Rom.

58. If one of the situations referred to under sub-paragraphs (a) to (g) arise, Bar associations should be entitled to make representations to the competent authorities.

Principle VI – Disciplinary proceedings

59. The Recommendation recalls the need for Bar associations and other lawyers' professional associations to establish and implement freely a code of professional conducts for lawyers. In case of non-respect by lawyers of their professional standards, as established in codes of professional conduct, disciplinary proceedings can be adopted and applied by Bar associations or other bodies which acts independently of State bodies (Principle VI.1). Bar associations and/or other lawyer's associations should be entitled to be represented if such a separate and independent body is set up (Principle VI.2). Courts, the public prosecutor or any other public authority, or as appropriate, a private individual may report a case to the competent body in order for it to start a disciplinary proceeding. The role of the public prosecution office should be limited in initiating and participating in this proceeding. The provisions of Principle VI apply without prejudice to possible sanctions imposed by the court for professional misconduct

60. Disciplinary proceedings should fully respect the requirements of fair procedures and, in particular, the provisions of Article 6 of the ECHR, including the

possibility for lawyers to lodge an appeal to the competent authority against any adverse decision (Principle VI.3).

61. In particular, for the purpose of this Recommendation, lawyers' rights include, *inter alia*:

- the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This does not preclude lawyers from asking that the hearing be heard *in camera*;
- the right to be informed promptly of the charge and of the nature of the evidence against them;
- the right to have adequate time to prepare their defence;
- the right to defend themselves in person or by a lawyer of their choice;
- the right to be present throughout the hearing.

62. In this context, reference should be made to the relevant case-law of the European Court of Human Rights (see, for instance, the judgements of *H. V. Belgium*, of 30 November 1987, A N° 127-B et *W.R. V. Austria* of 21 December 1999), which is accessible on its internet site.

63. Finally, the Recommendation underlines (Principle VI.5) the need to respect the rule of proportionality when determining sanctions for disciplinary offences. Therefore, a balance should be found between the gravity of the offence committed and the negative consequences of any sanctions adopted against the lawyer concerned.

1. Artico judgment of 13 May 1980, Series A No. 37.

2. Colozza judgment of 12 February 1985, Series A No. 89.

3. See in particular the Poitrimol judgment of 23 November 1993, Series A No. 277-A; Lala Judgment of 22 September 1994, Series A No. 297-A; Pelladoah judgment of 22 September 1994, Serie A No. 297-B.

4. S. judgment of 28 November 1991, Series A No. 220.

5. See, for instance, the Boner judgment of 28 October 1994, Series A No. 300-B; the Maxwell judgment of 28 October 1994, Series A No. 300-C; the Brandstetter judgment of 28 August 1991, Series A No. 211; the Croissant judgment of 25 September 1992, Series A No. 237-B.

6. See document BUDAPEST (97) Concl. of 18 December 1997.

7. Resolution (76)5 on legal aid in commercial and administrative matters, Resolution (78)8 on legal aid and advice, Recommendation N° R (81)7 on measures facilitating access to justice, Recommendation N° R (84)5 on the principles of civil procedure designed to improve the functioning of justice, Recommendation N° R (86)12 concerning measures to prevent and reduce the

excessive workload in the courts and Recommendation N° R (94)12 on the independence, efficiency and role of judges.