

ICJ Recommendations to the Azerbaijan Bar Association on the Role and Independence of Lawyers

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International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

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Introduction

On 15-16 November 2018 the International Commission of Jurists (ICJ), the Council of Europe (CoE) Office in Baku and the Azerbaijan Bar Association (ABA) held a Conference on the Independence of the Legal profession in Baku.¹ The Conference created much-needed space for a dialogue on the issue of independence of lawyers in Azerbaijan with both national and international stakeholders, as lawyers from Azerbaijan, Georgia, Kazakhstan, the Netherlands, the Russian Federation, Switzerland, Turkey, Ukraine, the United Kingdom and Uzbekistan shared their experiences and good practices in addressing challenges to the independence of lawyers. Drawing on the discussions at the Conference, and taking into account key findings of the ICJ report of 2016 "Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan"² as well as more recent legislative and administrative developments, the ICJ makes recommendations aimed at strengthening the role and independence of lawyers and improving access to justice in Azerbaijan. The recommendations are informed by international law and standards on the role of lawyers and cover four main aspects: adequacy of the number of lawyers to ensure access to justice; the examination procedure for qualification as a lawyer; professional ethics of lawyers and disciplinary proceedings against lawyers.

Adequacy of the number of lawyers in Azerbaijan

Access to a lawyer and to competent legal advice is a necessary element for ensuring many rights protected by international human rights law, including the right to a fair hearing under the International Covenant on Civil and Political Rights (ICCPR) (Article 14) and the European Convention on Human Rights (ECHR) (Article 6), the right to liberty (Article 9 ICCPR and Article 5 ECHR) and the right to an effective remedy for violations of human rights (Article 2.3 ICCPR and Article 13 ECHR). The UN Basic Principles on the Role of Lawyers in its Principle 1 enshrines that: "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." It provides that "[g]overnments shall ensure that efficient procedures and responsible 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...."³

It is a matter of course that access to lawyers may not be fully achieved without a sufficient number of legal professionals. And it is Bar Associations that have an essential role in ensuring that through the qualification process a sufficient number of its members address the needs of the public in legal representation and legal aid. In this regard, the UN Basic Principles on the Role of Lawyers state in their Preamble that "professional associations of lawyers have a vital role to play in [...] providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest".⁴

In Azerbaijan, the low number of lawyers is a problem of long standing. According to the CEPEJ report of 2014, Azerbaijan had the lowest number of lawyers per capita among the Council of Europe countries: the average number of lawyers per 100,000 people was 139, while in Azerbaijan

¹ Azerbaijan: international conference on the role and independence of lawyers organized in Baku, <https://www.icj.org/azerbaijan-international-conference-on-the-role-and-independence-of-lawyers-organized-in-baku/> (Accessed on 21 March 2019).

² ICJ Report. "Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan ICJ Mission" 2016, <https://www.icj.org/wp-content/uploads/2016/11/Azerbaijan-Systemic-problems-Legal-Prof-Publications-Reports-Mission-reports-2016-ENG.pdf>. (Accessed on 21 March 2019).

³ UN Basic Principles on the Role of Lawyers UN Doc. A/CONF.144/28/Rev.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, Principle 1; Also see: Montreal Declaration Universal Declaration on The Independence of Justice unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) on June 10th, 1983, para. 3.04.

⁴ Ibid, Preamble; Also see: European Parliament resolution on the legal professions and the general interest in the functioning of legal systems, 23 March 2006, P6_TA(2006)0108, section C.

it was about 10 per 100,000.⁵ In May 2016, the UN Working Group on Arbitrary Detention visited Azerbaijan and concluded that the situation where some detainees had not even been aware of the possibility to be legally assisted during judicial proceedings or of their right to appeal a court decision could have been

“the results of either the low number of lawyers in the country that could represent accused persons before the courts, the lack of expertise of lawyers to properly advise the individuals facing the criminal justice at all stages or their possible lack of independence”.⁶

The UN Human Rights Committee, in its most recent Concluding Observations on Azerbaijan, of 2016, expressed concern at the shortage of lawyers⁷ and recommended that it

“redouble its efforts to address effectively the shortage of lawyers in the country, including by ensuring that admission to the Bar can only be denied on the basis of objective criteria such as relevant knowledge and qualification.”⁸

In its report of 2016, the ICJ concluded that “A drastic shortage of advocates, such as exists in Azerbaijan, plainly fails to satisfy the need of the public for legal services. The present *status quo* poses a serious challenge for the justice system as a whole and impedes protection of the right to a fair trial and access to justice, including for victims of violations of human rights”.⁹

One of the main reasons for the shortage of lawyers was the failure of the Bar Association to organise regular and sufficiently frequent qualification examinations.¹⁰ In 2018 and at the beginning of 2019, a number of qualification examinations were conducted, increasing the number of members of the Bar Association by one third.¹¹ According to the information made available by the Bar Association, at present, the number of members of the Bar Association in Azerbaijan is 1,503: 1,110 in the capital, and 393 in the regions.¹² This signifies a significant increase in the number of the members of the Bar Association in a sufficiently short period of time.

While the increase in the number of lawyers is a clearly positive development *per se*, the increase of membership of the Bar Association needs to be seen in the context of the almost complete monopoly¹³ imposed on representation of individuals before the Courts by the law of 31 October 2017, confining court representation of individuals in all cases to members of the Bar Association.¹⁴ Until this reform, such a monopoly only applied in criminal cases, and large numbers of individuals, including lawyers, practiced law and represented clients in civil and administrative cases, without being members of the Bar Association. The legislative reform, by imposing a monopoly, automatically excluded a large number of practicing lawyers who are not members of the Bar Association from representing clients in courts, with a significant negative impact on the access of the public to legal advice and representation. No survey has been conducted either by the State bodies, NGOs or by international organizations to assess the consequences of these amendments,

⁵ CEPEJ Report. “*European judicial systems—Edition 2014 (2012 data): Efficiency and quality of justice*”, http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, p. 377.

⁶ Working Group on Arbitrary Detention Statement upon the conclusion of its visit to Azerbaijan (16-25 May 2016), Para III,4.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=%2020021&LangID=E>. (Accessed on 21.03.2019).

⁷ UN Human Rights Committee, Concluding Observations on the forth periodic report of Azerbaijan, CCPR/C/AZE/CO/4, 16 November 2016, para. 25.

⁸ Ibid.

⁹ “*Defenceless Defenders*”: Systemic Problems in the Legal Profession of Azerbaijan ICJ Mission Report 2016, op. cit., page 19.

¹⁰ Ibid., page 12.

¹¹ Azerbaijan Bar Association, official website: <http://www.barassociation.az/en/azecollegium> (Accessed on 2019).

¹² The number of lawyers in the regions of Azerbaijan is 393, of which 143 are individually practicing lawyers. The number of advocates in the capital is 1110, of which 105 are individually practicing lawyers. There are 27 advocate offices in Baku and 15 in the regions, source: <http://www.barassociation.az/en/azecollegium>.

¹³ The exceptions from that rule are close relatives of the person facing trial and legal representatives of legal entities by lawyers employed by them (Articles 69.1-1, 69.2 of the Civil Procedure Code of the Republic of Azerbaijan and Article 31.1 of the Code of Administrative Procedure of the Republic of Azerbaijan).

¹⁴ ICJ publication: “*Azerbaijan: briefing paper on new legislation restricting court representation by lawyers*” page 2, <https://www.icj.org/wp-content/uploads/2017/12/Azerbaijan-legalsubmission-accesstoalawyer-2017-eng.pdf> (Accessed on 21 March 2019).

however, it should be noted that the reform did not foresee adequate transitional arrangements that would help address this specific issue.

Therefore, in practice, although the increase in the number of members of the Bar Association resulting from the new examinations in 2018 is very welcome, it could not and has not yet compensated for the dramatic overall drop in practicing lawyers, exacerbating the lack of access to legal representation especially in the regions outside the capital.¹⁵ Furthermore, the reform had a direct impact on the protection of human rights through the courts: amongst the lawyers particularly affected by the reform were those litigating human rights cases before the national courts, with a view to making applications to the European Court of Human Rights (ECtHR), as they often could represent clients in civil and administrative courts without necessarily being members of the Bar Association. The impact of the increase of members of the Bar Association even by one third was therefore undermined by the reduction in overall capacity due to the ban on representation by non-members of the Bar Association having been implemented without sufficient transitional arrangements.

The ICJ welcomes the recent more frequent organisation of qualification examinations by the Bar Association and recommends that the Bar Association should continue its efforts to increase the number of its qualified members. In particular, the Bar Association should strive to ensure, through promotion of the profession and the qualification process for lawyers, that there is a sufficient number of advocates providing legal advice in all regions in Azerbaijan.

The examination process for qualification of lawyers

Governments, professional associations of lawyers and educational institutions must “ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, color, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status.”¹⁶ The UN Basic Principles on the Role of Lawyers note that professional associations should take all necessary measures to facilitate access to the profession of the unrepresented or disadvantaged groups.¹⁷ Recommendation R(2000)21 of the Council of Europe’s Committee of Ministers to member States on the freedom of exercise of the profession of lawyer suggests 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, in particular in the light of the relevant provisions of the European Convention on Human Rights”¹⁸. Further it notes “[d]ecisions 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”. It notes that, “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. ...”¹⁹

Thus, the legal profession is best placed to determine whether the candidate meets the criteria set for membership of the professional association. In that regard the UN Special Rapporteur on the Independence of Judges and Lawyers recommended that entry to the legal profession should not be influenced by the executive or judicial branches of governments including “[i]n those situations [where] State authorities may use their prerogatives to prevent certain individuals from entering the legal profession or to exclude the lawyers who they deem problematic (for example those who represented “political opponents” or worked for human-rights NGOs)”.²⁰

¹⁵ Ibid., page 3.

¹⁶ UN Basic Principles on the Role of Lawyers, *op.cit.*, Principle 10.

¹⁷ Ibid, Principle 11.

¹⁸ Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Council of Europe, Adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers’ Deputies, Principle I.1.

¹⁹ Ibid, Principle II.

²⁰ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc No A/73/365 (5 Sept. 2018), paras 60-61.

In Azerbaijan, the process for qualification as a lawyer is comprised of two stages. The first stage of the qualification examination consists of a written test where a prospective member is given 100 multiple choice questions.²¹ This examination is automatized and is conducted by the State Examination Centre of the Republic of Azerbaijan.²² Successful candidates move on to the next stage of the exam – the oral test.²³

During the oral exam, candidates are given 5 questions by the members of the Examination Commission.²⁴ The Commission consists of 11 members (five members of the Bar Association, three judges and three academics).²⁵ Commission members representing the Bar Association are appointed by the Presidium of the Bar Association, members of the judiciary are appointed by the Plenum of the Supreme Court and academics by the Ministry of Justice.²⁶ Thus, the majority of members of the Qualification Commission are not appointed by the legal profession itself but by other State authorities such as the executive and the judiciary. Each member of the Commission evaluates the answer to the question by marking it as “satisfactory” or “not satisfactory”.²⁷ In order for a candidate to be admitted the majority of the Commission should grade the answers as satisfactory.²⁸ Failure to have the majority of satisfactory answers makes a candidate unqualified for the admission to the Bar Association.²⁹

Based on the candidate’s performance in the written and oral examination, the Qualification Commission takes a decision in the absence of the candidate and notifies him or her about the decision in the written form.³⁰ Successful candidates are invited to the interviews in groups of 15 persons per day. On each day, the questions are renewed. The candidates are asked similar questions if they are in the same group. Five questions can be asked from different fields of law. The Committee can ask additional and clarifying questions. Then based on the answers each member of the committee fills in an evaluation form, where he/she indicates if the answer was adequate.

While the ICJ welcomes the introduction of a computer based examination test, which should contribute to transparency and objectivity of the examination process, it has heard multiple concerns expressed over the adequacy of safeguards to ensure fairness and non-discrimination in the oral part of the examination process. In its 2016 report the ICJ stated “complaints from a number of lawyers that the process of qualification is not well organized and allows for arbitrary decisions to be taken when examining candidates. For example, no guidelines exist providing the criteria which the panel of examinations should use to objectively assess the knowledge and skills of the person whose qualification is being checked.”³¹ The ICJ has heard consistent testimony from those who underwent the examination that these problems had not been fully addressed and the oral part of the examination can be used as a barrier to prevent highly qualified and independent lawyers especially those working on human rights issues from joining the Bar Association.

It is axiomatic that the Qualification Commission is placed best to assess a candidate’s qualification and ability to meet the criteria. In particular, the ICJ has heard allegations that certain lawyers may face bias of the examiners. In one such reported instance, all lawyers from the so-called “Group of Practicing Lawyers”, an informal network of independent lawyers who are not members

²¹ Vəkilliyə qəbul üzrə keçiriləcək yazılı test imtahanının qaydaları açıqlanıb [Rules on written test to access the legal profession have been declared] (original in Azerbaijani) <https://az.trend.az/azerbaijan/gundem/2850033.html>. (Accessed on 21 March 2019).

²² The State Examination Centre (SEC) is a public legal entity, which conducts exams for state agencies, legal entities and individuals on a contractual basis for recruitment of civil service personnel. http://barassociation.az/uploads/attachments/vekillerin_davranish_qaydalari_haqqinda_asasname_2245c0c648bbfbdaccc5ff171bd0a691.pdf. (Accessed on 21 March 2019).

²³ Vəkillər Kollegiyasına namizədlər üçün tələblər [Requirements for the admission to the Bar Association] (Original in Azerbaijani): <http://www.barassociation.az/en/recruitment>. (Accessed on 21 March 2019).

²⁴ Lawyers Qualification Commission <http://www.barassociation.az/specialization> (Accessed on 21 March 2019)

²⁵ Vəkillər Kollegiyası Üzvlüyünə Qəbulla Bağlı İxtisas İmtahanlarının Keçirilməsi Qaydaları [Rules for conducting professional exams for admission to the Bar Association] (Original in Azerbaijani), Article 2. http://barassociation.az/uploads/attachments/qebul_qaydalari_1320a5c9a3521ee12f2f9f07d2438df4.pdf (Accessed on 21 March 2019).

²⁶ Ibid.

²⁷ Ibid, Article 5.4.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid, Article 6.

³¹ *Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan op.cit.*, page 22.

of the Bar Association and who often specialise in human rights cases, successfully passed the computer-based stage and failed the oral stage of the examination.³² It is particularly striking that the vast majority of all other lawyers who sat the examination at that time succeeded in passing it³³. Furthermore, the ICJ was informed that some candidates had been asked to refrain from online critical statements towards the Bar Association or law enforcement institutions as a condition for their membership. These allegations point to the need to ensure a greater transparency and confidence in the examination process and its organisation in a way which, in practice, seeks to eliminate personal bias or preference in the evaluation of professional skills of candidates. Indeed, while the written examination is evaluated by the automated anonymous system, there is no clear methodology or guideline on how the answers are to be evaluated.

To ensure that the public has confidence in the examination process and that indeed it is free from arbitrary decisions or any influence or bias to ensure that everyone who meets the objective, publicly known criteria can join the legal profession, and in light of concerns about past and current practices in the specific context of Azerbaijan, the ICJ recommends abolition of the oral examination, retaining only a written examination evaluated by electronic means the objectivity of which does not raise doubt. Should this preferred solution not be feasible for immediate implementation, the ICJ recommends that:

- **detailed guidelines for the conduct of the oral examination, including the types of questions and other guidelines for the due conduct of the examination board to ensure fair and objective examination should be developed and made public. These guidelines for the oral examination should be strictly followed in a non-discriminatory manner regardless of political, social and other background.**
- **a detailed system of grading of candidates' performance should be developed and made public. This will help both to inform members of the qualification bodies and candidates for membership regarding the required knowledge, skills and other criteria to pass the examination to avoid any doubt as to the objectivity of the evaluation. The ICJ recalls that the admission process must be transparent, open and equitable.**
- **The oral examination process should be video recorded and the recording should be available to the candidates upon request to be used in any appeal procedure.**

The ICJ further recommends that, in order to best guarantee its independence, the Qualification Commission should consist of a majority of members of the legal profession appointed by the Bar Association.

Upholding professional ethics

According to the Basic Principles on the Role of Lawyers, "professional associations of lawyers have a vital role to play in upholding professional standards and ethics".³⁴ It is an important function of the lawyer's association "to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession."³⁵ The Basic Principles on the Role of Lawyers state that codes of professional conduct for lawyers should be established by the organs of the profession, and they should establish the principles and rules of conduct that lawyers should at all times follow in fulfilling their professional responsibilities and in order to preserve the dignity of, and respect for, the legal profession.³⁶ CCBE recommendations elaborate that "codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by

³² Left without a defence: Azerbaijan's purge of human rights lawyers <https://oc-media.org/left-without-a-defence-azerbaijans-purge-of-human-rights-lawyers/>. (Accessed on 21 March, 2019).

³³ Vəkillər Kollegiyasının 1 İllik Fəaliyyəti Rəqəmlərdə/ 1 Year Activity of the Bar Association in Figures http://barassociation.az/news/211?fbclid=IwAR2-kf4t8xdtHvldiI37J-tUgFmlPWlJY2EHBkX_gMObSHv8J1haKH6B9c4 (Accessed on 21 March 2019).

³⁴ UN Basic Principles on the Role of Lawyers, *op.cit.*, Preamble.

³⁵ IBA Standards for the Independence of the Legal Profession Adopted in 1990, para 18.

³⁶ UN Basic Principles on the Role of Lawyers, Principle 12.

legislation, in accordance with national law and custom and recognized international standards and norms".³⁷

Ethical principles that apply to lawyers include their duty to maintain the honour and dignity of the profession, the obligation to act independently and diligently in the interests of the client and the duty to uphold human rights³⁸. Compliance with ethical standards is a duty of individual lawyers, however, it is also the obligation of the Bar Association to ensure that lawyers indeed act in an independent and competent manner in the best interests of their clients.³⁹ As the ECtHR has stated,

"professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently, and that respect towards professional colleagues and self-regulation of the legal profession are paramount."⁴⁰

Furthermore, it is the obligation of the Government to ensure that lawyers "shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."⁴¹

"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..."⁴² Recommendation R (2000) 21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer (adopted on 25 October 2000) affirms that "[l]awyers 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."⁴³ Importantly, the ECtHR stated in *Morice v France*:

"[t]he question of freedom of expression is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice. It is only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society".⁴⁴

In this case, the ECtHR affirmed that the defence of a client may be pursued by means of an appearance on the television news or a statement in the press, and through such channels the lawyer may inform the public about shortcomings that are likely to undermine pre-trial proceedings.⁴⁵ The Court noted that even the lightest sanction such as imposition of a fine can have a chilling effect on other lawyers with regard to bringing dysfunctions within the administration of justice to the public's attention.⁴⁶ The Court further highlighted the significance of safeguarding the freedom of expression of lawyers given their position and function in society as intermediaries between the community and the state bodies involved in the administration of justice. For members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation.⁴⁷

In Azerbaijan, a new Code of Conduct regulating issues of professional ethics of the advocates was adopted on 7 December 2017. The new Code is detailed and gives greater guidance to members of the profession than the previous code, which is a welcome development. Nevertheless, some of its

³⁷ CCBE Recommendations on Disciplinary Process for The Legal Profession https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DISCIPLINE/EN_DISC_20070917_CCB_E_Recommendations_disciplinary_proceedings.pdf (Accessed on 21 March 2019).

³⁸ UN Basic Principles on the Role of Lawyers, *op. cit.*, Principles 12 and 14.

³⁹ *Ibid*, Principles 13 (b) and 15.

⁴⁰ See ECtHR *Januskas v. Lithuania* (no. 2), Application no. 50446/09, Judgement of 27 June 2017 para. 78.

⁴¹ UN Basic Principles on the Role of Lawyers, *op. cit.*, Principle 16(c).

⁴² *Ibid*, Principle 23.

⁴³ Recommendation R (2000) 21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, *op. cit.* Principle I.3.

⁴⁴ ECHR *Morice v France*, Application no. 29369/10, Judgement of 23 April 2015 para. 135

⁴⁵ *Ibid*, para. 138.

⁴⁶ *Ibid*, para 176.

⁴⁷ See, for example, ECtHR, *Kyprianou v. Cyprus* [GC], Application no. 73797/01, Judgement of 15 December 2005, para 175.

provisions raise concern in light of the principles outlined above. In particular, according to Article 2.13 of the Code lawyers are banned to disseminate:

“... slanderous and misleading information about the decisions of the Bar Association's bodies that infringe its credibility in media, social networks and public places. Lawyer should not allow the spread of groundless, slanderous information about the state, the non-state actors, its officials and should not engage in non-ethical expressions and behaviors against those individuals in the media, social networks and public statements.”⁴⁸

This wording of the Code appears to introduce a rather broad justification for an interference with lawyers' freedom of expression, regardless if a statement made in court or outside it, for the purposes of the defence of their client, or in order to draw attention to violations of human rights. The ICJ monitoring suggests that many if not most of the human rights lawyers who have recently faced disciplinary sanctions, have done so because of their public statements made in relation to human rights of their clients.⁴⁹

Furthermore, Article 2.5 of the Code of Ethics provides that lawyers should be “objective”. It stipulates that lawyers should ensure objectivity in their work and correspondence. Article 2.11 enshrines that lawyers' political, social and other affiliation should not by any means put in doubt the objectivity of the lawyer. At the same time the term “objectivity” is not defined in the Code, so it is not clear what it should mean in practice. The article also states that a “lawyer should not abuse [his or her- position for political and religious purposes”

While according to international standards on the role of lawyers, they must be honest in their work and should not knowingly mislead a judge or other members of the proceedings⁵⁰, at the same time, zealous protection of the interest of their clients is one of the primary obligations of lawyers,⁵¹ and furthermore, “Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.”⁵²

In this regard, the UN Special Rapporteur on the Independence of Judges and Lawyers has clarified that: “[l]awyers are not expected to be impartial in the manner as judges, yet they must be as free as judges from external pressures and interference.”⁵³ Therefore, while objectivity may be appropriate as a professional standard when it comes to providing confidential legal advice to clients (although “accuracy” may be a better term in this context), a general broad requirement of “objectivity” in the Code of Ethics seems incompatible with the essential role of a lawyer as an advocate for the client and in promoting the cause of justice and human rights. The ambiguous use of the term “objectivity” in the Code of Ethics therefore creates a risk that its enforcement would punish lawyers for having acted in the proper zealous representation of their clients, or otherwise in promoting the cause of justice and human rights, and the risk of such consequences will deter lawyers from rigorously discharging the duty of zealous representation.

⁴⁸ Code of Conduct of the Members of the Azerbaijan Bar Association adopted by Conference of the Bar Association of the Republic of Azerbaijan on 07 December 2017. http://barassociation.az/uploads/attachments/vekillerin_davranish_qaydalari_haqqinda_asasname_2245c0c648bbfbdacc5ff171bd0a691.pdf (Accessed on 21 March 2019).

⁴⁹ See for example case of *Yalchin Imanov*, who was disbarred due to his statement on the media regarding the cases of torture and ill treatment in custody or case of *Irada Javadova*, when she applied with an open letter to the Ministry of Internal Affairs in defence of her client <https://www.icj.org/azerbaijan-lawyer-irada-javadova-disbarment-decided-in-unfair-proceedings/>. (Accessed on 21 March 2019)

⁵⁰ IBA General Principles for the Legal Profession Adopted by the International Bar Association on 20 September 2006, Principle 2.

⁵¹ Ibid, Principle 5.

⁵² UN Basic Principles on the Role of Lawyers, *op. cit.*, Principle 14.

⁵³ Report of the Special Rapporteur on the independence of judges and lawyers, 28 July 2009, *op. cit.*, A/64/181, para. 12. The Special Rapporteur on the Independence of Judges and Lawyers is an independent expert appointed and mandated by the UN Human Rights Council, to inquire into and report on allegations of attacks on the independence of judges, lawyers and court officials and on progress achieved in protecting such independence, see: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx> (Accessed on 21 March 2019).

In order to ensure that lawyers, as essential agents of justice, act in accordance with internationally recognized rules of professional ethics which, in their turn, uphold the independent exercise of professional duties, the ICJ recommends:

- **that the Code of Conduct be reviewed and necessary amendments be made in line with international law and standards, especially in regard to lawyers' right to freedom of expression. Provisions which due to their vague wording may lead to arbitrary interpretations in violation of human rights including freedom of expression should be removed, amended or clarified in line with international law and standards on the independence of lawyers.**
- **lawyers should be duly consulted at all stages of this drafting process of any amendments to the Code of Ethics;**
- **any restrictions on freedom of expression imposed by the Code of Ethics should be in line with international law and standards and should ensure that lawyers are able to effectively defend their clients both in and outside the court, and in particular that they will not face disciplinary action for making public allegations of violations of the human rights of their clients;**
- **Consideration should be given to amending the code of ethics to delete the reference to "objectivity" or, at minimum, to clarify that objectivity (or better "accuracy") should be an aim of confidential legal advice to clients but is not relevant to advocacy the lawyer conducts to advance the clients' interests or other actions for the promotion of the cause of justice or human rights.**
- **Care should be taken that the Code of Ethics is interpreted and applied consistently by the Disciplinary Commission in such a way as to ensure sufficient foreseeability in its application and personal independence of lawyers.**

Prohibition of abusive disciplinary proceedings against lawyers

Disciplinary proceedings against lawyers should be heard by an independent and impartial disciplinary body established by the legal profession, by an independent statutory body, or by a court, and should be subject to independent judicial review.⁵⁴ Such proceedings should be determined "in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of [the UN Basic] Principles⁵⁵ and must be processed expeditiously and fairly in accordance with the right to a fair hearing.⁵⁶ Recommendation No. R (2000) 21 of the Council of Europe Committee of Ministers prohibits arbitrariness of disciplinary action and requires a system 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."⁵⁷ It further states that "[d]isciplinary 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."⁵⁸

In Azerbaijan, disciplinary proceedings against lawyers are carried out by the Disciplinary Commission, a subsidiary body of the Bar Association that consists of members of the Bar Association only.⁵⁹ Therefore, its institutional independence is provided for by law.⁶⁰ The Disciplinary Commission receives complaints about alleged disciplinary misconduct by advocates as well as requests to lift disciplinary measures already imposed against advocates.⁶¹ The complaints are received from the Presidium of the Bar Association⁶² within one month from the day of opening

⁵⁴ UN Basic Principles on the Role of Lawyers, *op. cit.*, principle 28.

⁵⁵ *Ibid.*, principle 29.

⁵⁶ *Ibid.*, principle 27.

⁵⁷ Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Council of Europe, *op. cit.*, Preamble.

⁵⁸ *Ibid.*, Principle VI. 3.

⁵⁹ Problems regarding the disciplinary process for lawyers in Azerbaijan are outlined in more detail in the ICJ report "Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan" *op.cit.*, <https://www.icj.org/azerbaijan-the-independence-and-role-of-lawyers-must-be-respected-icj-report-says/> pp. 25-29.

⁶⁰ *Ibid.* p.26.

⁶¹ *Ibid.*

⁶² The Presidium of the Bar Association is a governing body of the Bar Association, consisting of advocates with at least three years of professional experience. Members of the Presidium including the President and Deputy

disciplinary proceedings.⁶³ The Disciplinary Commission may through the Presidium, obtain information and documents from courts, the police, prosecutors, justice officers, organizations, entities and other entities specified in the Charter.⁶⁴ Through the Presidium, it may request expert opinions.⁶⁵

ICJ interventions as well as the testimony from independent experts and lawyers indicate that the institutional independence of the Disciplinary Commission, however, may not necessarily secure actual independence and impartiality of its decisions in practice, particularly in disciplinary proceedings against human rights lawyers who regularly litigate before the European Court of Human Rights in cases which are considered to be politically sensitive. The ICJ has heard allegations that decisions of the Disciplinary Commission in such cases may be improperly influenced by the interests of law enforcement or other interests not related to an alleged misconduct of the lawyer. Whatever the reasons, a clear pattern of disciplinary cases including disbarments of independent human rights lawyers has marked the recent years of the Azerbaijan Bar Association. Since the end of 2017, the ICJ has raised number of concerns regarding disciplinary charges against lawyers who worked on politically or otherwise sensitive cases. Complaints against lawyers were initiated by the State authorities such as the Ministry of Internal Affairs, judges or the Prosecutor General's Office. In those cases, the disciplinary proceedings usually resulted in disbarment or suspension of lawyers for a one year period.⁶⁶

In its 2016 report the ICJ noted:

"The ICJ heard from many lawyers that in high profile or "politically sensitive" cases the Collegium is unable or unwilling to protect advocates against pressure exerted on them. In the case of lawyers who defend activists, political leaders or human rights defenders, the Bar Association may in fact act as an instrument of retaliation against such lawyers and this may lead to them being disbarred or otherwise disciplined. Moreover, the disciplinary procedure in such cases may fail to guarantee a fair procedure while an appeal does not appear to be an effective check against arbitrary decisions".⁶⁷

These disbarments and other disciplinary sanctions remain in force. In other cases, initiated more recently, disciplinary measures or the threat of such measures continue the unfortunate pattern. For example, in cases of public allegations of violations of human rights of clients in detention, a member of the Bar Association was disbarred⁶⁸ while another was suspended for a similar "misconduct".⁶⁹

In addition, according to the information received by the ICJ from lawyers, on a number of occasions they were unable to present their evidence to the Disciplinary Commission or the Commission did not take evidence presented into account. The reported long delays in disciplinary proceedings, and failure to provide detailed and substantiated reasons for decisions rather than mere indication of the relevant articles of the code of ethics, also raise concerns about the fairness of disciplinary proceedings.

To address these concerns, the ICJ recommends that:

- **The Disciplinary Commission should aim to strengthen its procedural safeguards to ensure that complaints against lawyers, including those initiated by State authorities, are dealt with through transparent and fair proceedings, that independent and impartial decisions are delivered**

President are elected by the General Meeting for a five-year term. (Law of the Republic of Azerbaijan On Advocates and Advocate's Activity of 28 December 1999, No. 783-IQ, Article 11).

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Among those cases: *Yalchin Imanov, Irada Javadova, Fakhraddin Mehdiyev, Asabali Mustafayev, Nemat Karimli, Agil Layij*.

⁶⁷ "Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan" op.cit pages 31 and 32.

⁶⁸ See for example case *Irada Javadova*, when she applied with an open letter to the Ministry of Internal Affairs and was disbarred "<https://www.icj.org/azerbaijan-lawyer-irada-javadova-disbarment-decided-in-unfair-proceedings/>.

⁶⁹ Azerbaijan: Human Rights lawyers Asabali Mustafayev and Nemat Karimli must be allowed to practice their profession <https://www.icj.org/azerbaijan-human-rights-lawyers-asabali-mustafayev-and-nemat-karimli-must-be-allowed-to-practice-their-profession/>.

promptly and are thoroughly reasoned and that the Code of Ethics is consistently applied in light of international human rights law and international standards on the role of lawyers.

- **The government and the bar association should ensure that the Disciplinary Commission is free from any pressure or improper influence in its decision making and that lawyers are not subject to disciplinary penalties for action consistent with their professional duties including advocacy pursued in zealous representation of the client's interests or otherwise in the promotion of the cause of justice or promotion of human rights, including public denouncement of violations of human rights of their clients or other persons.**
- **All Disciplinary Commission decisions should be subject to independent judicial review.**
- **In cases where the European Court of Human Rights has found that lawyers' disbarment or other disciplinary sanctions violated rights under the European Convention on Human Rights, the government should ensure that such cases are executed in full in accordance with the principle *restitution in integrum*, and that the lawyers concerned are re-instated as members of the Bar Association.**



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org