

In our global environment and modern society lawyers are an important pillar of the effectively functioning justice system and as human rights defenders play a vital role in and for our democracies. The rights of the lawyers and the rights of persons are closely interlinked and complement each other. For example, to ensure the right to a fair trial, a person has to be able to find a lawyer (his right to access a lawyer, right to communicate, right to choose, additional legal representation guarantees when in custody), whereas the lawyer has a right to inform about his services, to reach out to his potential client, right to confidential communication, etc.

The new legal instrument the Committee of Experts on the Protection of Lawyers (CJ-AV) is currently working on, although dedicated to the protection of rights of the lawyers, so that they are able to provide their services without interference, at the same time it would have an impact for strengthening the protection of individuals and their rights. It would also create an indirect effect to the societies by creating a sense of comfort for everybody and the belief that if they need legal assistance, legal services provided by skilled professionals are available.

The challenges of a new legal instrument.

*Binding vs non – binding nature.*

The Committee of Experts on the Protection of Lawyers (CJ-AV) had an extensive discussion on the advantages and disadvantages of a binding and non-binding legal instrument. A binding legal instrument – a convention, received a clear support as it would ensure stronger legal guarantees for lawyers and fill in the existing legal gaps.

CJ-AV also discussed the possible risk which comes with a binding legal instrument, i.e., the possibility of non-ratification, for example if the scope of the Convention is too broad, requires extensive changes of national policies or merely because a country perceives itself as already ensuring a high-level protection for lawyers. However, we have come to the conclusion that although some states may be reluctant to ratify the convention, the pressure from NGO's and lawyer organizations as well as society may have a positive incentive and press the state toward the accession.

Another possible challenge related to an international legal instrument is that the adoption and the ratification process takes time, and in the fast-changing world the final text might be lacking flexibility or not be contemporary enough to address modern day issues, for example, technological developments. The possible use of artificial intelligence might have an impact to the role of the lawyer and his rights.

*Identifying the rights of lawyers.*

Another relevant aspect is the identification of lawyer specific rights. Certain rights are absolute and cannot be limited or infringed under any circumstances, e.g. Art. 3 of ECHR, whereas others may have limitations in their ordinary application. The same aspect of non derogable rights or guarantees and rights subject to exceptions arise when lawyer-specific rights are discussed. For example, guarantees for lawyers not to be subject to any form of physical attack, threat, harassment or intimidation due their work, would impose a clear obligation to the states to prohibit this behaviour and act when this behaviour is identified. Other rights, for example, right to access to a client, right not to accept a client, access to the casefile might be limited.

As the new instrument aims at providing direct impact to the states by imposing certain positive and negative obligations, it is necessary to ensure that the text of the convention is a well-balanced one. It should stress the rights of the lawyers, assist states in their task of promoting and ensuring the role of

lawyers, but not undermine the capacity of the states to fulfil other obligations, for example, determine the rules of qualification as a lawyer, rules of conduct in court proceedings for the purpose of good administration of justice, determine the rules for legal aid.

Furthermore, due to the special position lawyers have in the justice system, a multilevel protection model is required. If we take the obligation of the state to investigate crimes as one element (“bubble”) and legal professional secrecy as another element, the need of the state to be active in the first “bubble” may have an impact to the second element, that is professional secrecy may be subject to limitations. However, here another layer of protection comes into effect. The second element has an outer layer of guarantees that puts additional safeguards, which require that restrictions are described by the law, are necessary for a legitimate aim (to protect the rights or interests of other persons or the interest of justice) and are appropriate and proportionate.

#### *Difficulties of drafting the text.*

Another important aspect when drafting the text of a Council of Europe legal instrument is the need to consider the differences between the continental and common law legal systems as well as sometimes subtle nuances of different national legal systems. As CJ-AV has a task to draft the text aiming at strengthening the protection of the profession of lawyer, it is essential to define who is the person called lawyer for the purpose of the legal act. At first glance, it might seem an easy task, however, this definition requires a lot of deliberations due to the fact, that national systems may have different types of legal professionals and practitioners, who can be identified as lawyers, furthermore, some states do not require a mandatory membership in lawyers associations or bars. Therefore, this definition needs to be precise but not too narrow at the same time. Furthermore, the definition of a lawyer is closely linked with scope of the legal instrument. If a lawyer, who is qualified or has a licence to practice according to national law, falls within the scope of the legal instrument, should it be also applicable when, for example, the qualification of a lawyer or licence to practice is not issued or it is revoked or suspended without any grounds or appropriate justification.

#### *Implementation mechanism.*

The effectiveness of the legal instrument is closely linked with a necessity for a implementation mechanism. A convention requires an implementation mechanism which ensures an effective redress for the persons it is intended to aid, in this case lawyers, but at same time it should not be too costly and extensively burdensome for the states, which could lead to unwillingness to support it.

CJ-AV has had the opportunity to receive first-hand information on possible modalities of implementation, follow-up procedures and methods used for monitoring according to other Council of Europe conventions. This is extremely valuable for CJ-AV, as we can assess the best practices and try to mutatis mutandis adapt them into our legal instrument.

Discussions of CJ-AV regarding the complaint mechanism involved the issues of who could lodge the complaint (the lawyer, his professional associations, NGO’s), how it could be lodged (ordinary and emergency procedures). From the perspective of the states a need for a filtering system to identify manifestly ill-founded complaints would be necessary.

CJ-AV is still in the phase of gathering the experience and lessons learnt from other mechanisms to have a complete view on this point before deciding on the mechanism for the draft legal instrument for the protection of lawyers.