

R E C O M M E N D A T I O N S

**On Reform of the Legal Profession
in Tajikistan**

July 2006

INTRODUCTION

The Open Society Justice Initiative (“Justice Initiative”) and the American Bar Association’s Central European and Eurasian Law Initiative (“ABA/CEELI”) are conducting a joint project on monitoring and advancing the independence of the legal profession in Central Asia. This regional initiative has the following objectives:

- Provide independent analysis of the status of the legal profession in Central Asia in accordance with international standards;
- Develop recommendations on improving the status of lawyers to enable them to protect human rights effectively;
- Build constructive dialogue between the legal profession and the government to reach agreement on issues and reform priorities; and
- Support lawyers in developing and implementing a reform program aimed at greater independence of the legal profession.

The project began in Tajikistan in the summer of 2005 with interviews for ABA/CEELI’s Legal Profession Reform Index (LPRI), as a means of assessing the state of the profession and establishing an empirical baseline for subsequent activities, with support from the Tajik Branch of the Open Society Institute-Assistance Foundation (“OSI-Tajikistan”).¹ The LPRI, which reflects developments to September 2005, was based on a review of relevant laws and other documents and interviews of advocates, prosecutors, judges, government officials, and NGO leaders. During the autumn of 2005 the United Nations Special Rapporteur on the Independence of Judges and Lawyers (“Special Rapporteur”) undertook a mission to Tajikistan and prepared a report on the independence of the judiciary.² Because the Special Rapporteur’s report covers the judicial system generally, it provides a useful context for the conclusions of the LPRI. The conclusions and recommendations on the legal profession in the Special Rapporteur’s report are consistent with the findings of the LPRI.³

The Justice Initiative convened an Advisory Committee of regional and international experts to develop recommendations on the basis of the LPRI, the Special Rapporteur’s report, and its own knowledge about the challenges faced by the legal profession in Tajikistan, as well as in the region generally. Leading lawyers from Tajikistan who served as members of a working group organized by OSI-Tajikistan also participated in developing these recommendations as part of their work in drafting a concept paper on reform of the legal profession in Tajikistan.

The main goal of the recommendations is to present a set of guidelines based on norms of international and customary law to address significant issues concerning the process of reform of the legal profession in Tajikistan, and ultimately to strengthen the role of

¹ABA/CEELI, *The Legal Profession Reform Index for Tajikistan September 2005* (2005) (“LPRI”).

²U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Report of the Special Rapporteur on the Independence of Judges & Lawyers: Civil & Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity; Addendum, Mission to Tajikistan*, U.N. Doc. E/CN.4/2006/52/Add.4 (30 Dec. 2005) (prepared by Leandro Despouy) (“Special Rapporteur’s Report”).

³ See Special Rapporteur’s Report ¶¶ 93-95.

lawyers in defending individual freedoms. Although the recommendations address other legal professionals, they are primarily directed at advocates; that is, those professionals who are qualified to provide legal services and have exclusive right of audience in criminal trials.

The Advisory Committee is convinced that improvements in the administration of justice are more likely to be achieved by lawyers who are independent, competent, and accountable. Independence is essential if lawyers are to avoid conflicts of interest and external pressures that might influence their representation. The interests of the client must be paramount, subject only to the proper application of law. Although the need for competence may be obvious, it is of the utmost importance if litigation is truly to be decided on the merits. Lawyers must be accountable not only for their obligations to their clients but also to the courts, other members of the profession, and the effective functioning of the system of justice as a whole. Since members of the public in general and clients in particular may not be able to identify deviations from these core values, it is important that the legal profession be overseen by qualified legal professionals with such experience.

These recommendations were drafted by Thomas F. Cope, a lawyer from the United States with experience in transitional legal systems, particularly those in the Commonwealth of Independent States. The first section discusses the main issues relating the organization and functioning of a professional organization in Tajikistan. It is followed by sections on admission to the profession and professional training. Next are sections on professional ethics and conduct and procedures for ensuring that lawyers comply with such norms. Issues regarding the organization of legal practice and the provision of legal assistance are addressed next, followed by a discussion of how the recommendations might be implemented. Although the Advisory Committee, the OSI-Tajikistan working group, the LPRI, and the Special Rapporteur's report identified issues relating to professional freedoms in the practice of law, this report focuses on reforms in the structure and organization of the legal profession that must first be achieved so that the profession will be better able to assert those professional freedoms.

The following experts, legal practitioners, and staff members contributed to development of the recommendations:

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I. PROFESSIONAL ORGANIZATION

Current Situation⁴

There are three principal organizations for lawyers in Tajikistan. Two of them, the Collegium of Advocates of the Republic of Tajikistan (commonly referred to as the Republican Collegium) and a regional collegium, the Collegium of Advocates of the Sogd Oblast, are independent and self-governing associations of advocates. Although in theory other collegia could be established by groups of at least 40 advocates, this has not happened. The Republican Collegium, headquartered in Dushanbe, is the larger of the two, with some 250 advocates and 15 interns. The Sogd Collegium in Khujand has approximately 130 members. Admission to membership in a collegium constitutes admission to the profession and with it comes the obligation to provide ex-officio legal aid for criminal defendants who cannot afford an advocate. Neither the Republican Collegium nor the Sogd Collegium has sufficient financial resources to provide significant membership services. The third organization is the Association of Advocates, which is registered as an NGO with voluntary membership. It was organized in March 2003 in an effort to unite members of the collegia and private licensed advocates in a single professional organization. With about 240 members, the association includes roughly half the advocates in Tajikistan. Its members include 120 advocates from the Republican Collegium, 100 advocates from the Sogd Collegium, and 20 private advocates. Thus it consists primarily of advocates from the collegia. The Association of Advocates is said to have been hampered by differing interests and lack of coordination among the three groups of members, arising in part from the lack of a single professional organization with mandatory membership for all advocates. Unfortunately, the association's limited financial resources have prevented it from being very active. Although a professional organization for non-advocate jurists exists, it too is inactive.

Recommendation

The legal profession should establish a single, independent, and self-governing body ("Bar Association") with compulsory membership to govern and represent the legal profession. This body should have authority over admission to the profession, issuance and enforcement of professional ethical norms, and continuing legal education in order to ensure high professional standards and to improve the quality of legal services. The state should enact legislation for the establishment of such a body.

Justification

Three common methods for regulating a profession are registration, certification, and licensing. Registration only entails entering information about the applicant in a register and does not require the applicant to demonstrate any particular qualifications. It does not provide any assurance that the applicant possesses the knowledge and skills necessary to provide a high level of professional service. Certification, on the other hand, requires an applicant to demonstrate that he or she meets specified standards, such as education, experience, and passing an examination. A person without such certification may still be able to practice the profession as non-certified practitioner. Because certification can be revoked, a disciplinary process is usually provided to address those whose knowledge or skills fall below the standards or whose conduct violates ethical norms. Although certification can provide significant assurance to the public about the abilities and integrity

⁴ See LPRI, Factor 21.

of certified professionals, it does not protect the public from non-certified practitioners who do not meet the standards for certification or who do not comply with ethical norms. Licensing is similar to certification, but allows only licensed professionals to practice the profession. Licensing is therefore the most restrictive form of occupational regulation. These methods can be implemented through various mechanisms of regulation, such as government, independent and self-regulation by the profession, depending of the nature of the profession.

Under this Recommendation, legislation would give the legal profession authority for self-regulation through establishing a requirement of the mandatory membership in the Bar Association and giving its members exclusive right to practice the profession.

This Recommendation is based on that of the Special Rapporteur, who urged the “establishment of a single, self-governed body with compulsory membership, which would administer issues related to the bar such as access to the profession, removal from the profession, disciplinary measures, respect for ethical rules and continuing legal education. This body should be independent from the executive branch.”⁵ It is also consistent with the United Nations’ Basic Principles on the Role of Lawyers:

Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.⁶

Although not binding on the Republic of Tajikistan, recommendations of the Council of Europe (“CoE”) also support this Recommendation. For example, “Bar associations and other professional lawyers’ associations should be self-governing bodies, independent of the authorities and the public.”⁷ The CoE also emphasizes the importance of such organizations in protecting the independence of lawyers: “Bar associations and other professional lawyers’ associations should be encouraged to ensure the independence of lawyers and, *inter alia*, to: . . . (b) defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity”⁸

Given the present confusion and uncertainty about the legal profession in Tajikistan due to questions about implementation of the Law on Licensing, now is an opportune time to consider a new arrangement for regulating the legal profession. Because it requires all who provide paid legal services to be licensed by the Ministry of Justice (“MoJ”), the Law on Licensing poses a potential threat to the independence of such lawyers by giving the executive branch authority over admission to the profession. This is not to suggest that the MoJ will in fact use its authority over licensing to curtail the independence of lawyers, but merely that self-regulation provides a better means of ensuring the independence of

⁵ Special Rapporteur’s Report ¶ 93.

⁶ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug.-7 Sept. 1990, *Basic Principles on the Role of Lawyers* ¶ 24 (“UN Basic Principles”).

⁷ Committee of Ministers, 727th mtg., Recommendation Rec(2000)21 on the Freedom of Exercise of the Profession of Lawyer, Principle V.2 (25 Oct. 2000) (“Rec(2000)21”).

⁸ *Id.*, Principle V.4; *see also id.*, Principles V.1, V.3.

the legal profession. That is why this Recommendation proposes establishment of “a single, independent, and self-governing body.” For convenience, that body is referred to in this document as the “Bar Association.” The actual name of the body should be selected by those who organize it.

An important issue is which legal professionals should be required to be members of the Bar Association or what professional activities should constitute the practice of law—which only members of the Bar Association could perform. The CoE adopted the following definition of lawyers: “For purposes of this recommendation, ‘lawyer’ means a person qualified and authorized 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.”⁹ Whether that definition is satisfactory for the circumstances of Tajikistan is an issue to be considered.

The generic term for a graduate of a university law faculty is “jurist,” which includes all legal professionals. For purposes of this Recommendation, jurists may be classified into the following general categories:

- Advocates, who provide legal advice and represent clients in criminal and civil litigation, but are the only jurists (with the limited exception of representatives of trade unions or NGOs) authorized to represent defendants in criminal cases;
- Non-advocate jurists who provide the public with legal advice and representation in civil trials on a regular and independent basis (referred to in this document as civil practice lawyers) or who work in commercial enterprises, government ministries, or NGOs;

Although it might seem desirable to require both categories of jurists to be members of the Bar Association, a more limited definition may be more appropriate. For example, commercial enterprises and government ministries are better able to judge the quality of legal services provided by jurists than are members of the general public. Therefore the policy of requiring licensing (compulsory membership in the Bar Association) to protect clients is less likely to apply in those situations. It may not be necessary to require jurists who work in commercial enterprises or government ministries to be members of the Bar Association. Jurists who work in NGOs play an important role in making legal services available to those who could not otherwise afford them. Requiring such jurists to be members of the Bar Association could limit the availability of free legal aid. To prevent that result, jurists who work in NGOs that provide free legal aid (even if the NGO receives funding from international donors or the government) should not be required to be members of the Bar Association. This more limited approach could be accomplished by adopting the formulation of the Law on Licensing and requiring membership in the Bar Association only for those who provide paid legal services; that is, advocates and civil practice lawyers.

A second important issue is what functions should be assigned to the Bar Association. Following is a useful summary of regulatory functions for a professional association:

- entry standards and training;
- rule making;
- monitoring and enforcement;

⁹ *Id.*, preamble.

- complaints; and
- discipline.¹⁰

This Recommendation would give the Bar Association all those functions; that is, “authority over admission to the profession, issuance and enforcement of professional ethical norms, and continuing legal education in order to ensure high professional standards and to improve the quality of legal services.”

II. ADMISSION TO THE PROFESSION

Current Situation¹¹

There are no admission requirements for non-advocate jurists, including civil practice lawyers. Since the Soviet era, admission to the profession of advocate has been through membership in one of the collegia. Under the Constitutional Law on Advocacy of 4 November 1995 (“Law on Advocacy”), law graduates with either two years of legal experience or a supervised internship of from six months to one year are eligible for membership upon passing an oral examination administered by the collegium’s qualification commission. Since 1998, another way to become an advocate was to obtain a license from the Ministry of Justice (“MoJ”), after passing its qualification examination. Two years of legal experience was required to obtain such a license, but the regulation implementing the Law on Licensing (described in the following paragraph) reduced this to one year. Such advocates licensed by the MoJ are referred to as private advocates or private licensed advocates.

Recent developments have led to considerable uncertainty about admission to the profession. On 17 May 2004, Parliament enacted a general law to license some 140 activities and professions, including the provision of paid legal services (“Law on Licensing”). As a result, all advocates and other jurists who offer paid legal services were required to be licensed by the MoJ. Jurists who work as employees of enterprises would not need a license. On 1 September 2005, a licensing regulation was promulgated (“Licensing Regulation”) under the Law on Licensing. The Licensing Regulation is, however, inconsistent with the clear intent of the Law on Licensing, as universally understood by LPRI interviewees, and with the original draft regulations obtained by the LPRI assessment team in June of 2005. In particular, the Licensing Regulation does not require advocates to pass a qualification examination in order to be licensed, as the draft regulation would have. The draft regulation would also have established a Qualification Commission under the MoJ to administer the examinations. Under the Licensing Regulation, however, all reference to the Qualification Commission was eliminated, perhaps because the requirement to pass a qualification exam was also eliminated. The MoJ and collegium advocates have failed to reach a common understanding on what the Law on Advocacy and the Law on Licensing require, and the resulting situation is somewhat confused. Reportedly, collegium advocates are ignoring the requirement of the Law on Licensing that they obtain a license from the MoJ and continue to rely on membership in the collegium for authority to practice as advocates. In addition, the MoJ has ceased to administer examinations when it licenses private advocates. Pending further developments, it is difficult to evaluate the precise impact the new legislation.

¹⁰David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales, Final Report 25-26* (Dec. 2004).

¹¹ See LPRI, Factors 9-10.

Recommendation

The Bar Association should establish objective and transparent requirements and procedures for admission to the profession to ensure that lawyers possess the training, experience, and integrity necessary to provide high quality legal services.

Justification

The CoE recommends that decisions on authorization to practice law “should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, shall be subject to review by an independent and impartial judicial authority.”¹² An explanatory memorandum accompanying the CoE recommendations states that “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.”¹³ This independent body should take “all necessary measures . . . 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.”¹⁴

To implement these recommendations, the Bar Association should establish a Qualification Commission for the admission of members, who will thereby be entitled to practice law as discussed in the previous Recommendation. The Qualification Commission should be composed of members of the Bar Association and representatives from the judiciary and the MoJ. A majority of the Qualification Commission should, however, be members of the Bar Association. Its responsibilities should include the following:

- Confirming that applicants for admission meet objective standards, such as citizenship, education, professional experience, lack of a criminal conviction or prior expulsion from the profession, and other relevant criteria; and
- Preparing, administering, and grading a qualification examination, which should be written and graded anonymously, and should ensure that applicants for admission possess sufficient knowledge and skills (including a knowledge of professional ethics) to provide legal services of a high quality.

To facilitate the transition to the Bar Association proposed in this document, advocates who are already members of the collegia and private licensed advocates should not be required to sit for the qualification examination, since most of them have already passed a qualification examination of the collegium or the MoJ. Furthermore, all of them would have to satisfy the requirement for continuing legal education recommended below. Because civil practice lawyers who would be required to become members of the Bar Association will not have previously passed a qualification examination, they would need to pass the Bar Association’s qualification examination for admission.

¹² Rec(2000)21, Principle I.2.

¹³ Explanatory Memorandum, Recommendation Rec(2000)21 ¶ 23 (2000) (“Explanatory Memorandum”).

¹⁴ Rec(2000)21, Principle II.2.

The MoJ should maintain a list of all current members of the Bar Association. The register should be open to inspection by judges and members of the public. The Bar Association should provide the MoJ with the names and other pertinent information about its members from time to time. The MoJ's role in maintaining the list should be merely ministerial, and the Bar Association shall have sole authority to determine its members.

III. PROFESSIONAL TRAINING

Current Situation¹⁵

There are two aspects to professional training: (1) university legal education; and (2) continuing legal education ("CLE") following admission to the profession.

Since independence, the overall quality of legal education in Tajikistan has declined. During that period, the number of law faculties has grown from one (Tajik State National University, founded in 1949) to eight (four in Dushanbe and four in Khujand), and the number of full-time and correspondence students studying law has grown to an estimated 12,000-13,000. Instruction generally consists of lectures on theoretical issues to large groups of students and smaller seminars in which students are given opportunities to demonstrate rote memorization of their lecture notes. Interactive methods of instruction, with students actively participating in discussions of the material being taught, are rare. Such methods could not only enhance learning, but also give students opportunities to improve their analytical skills. Some professors have practical experience in the law, but many do not. Although there are opportunities in the curriculum for students to gain practical experience such as in government ministries, courts, or prosecutors' offices, the quality of the experience varies greatly. Furthermore, some full-time students reportedly do not attend class and pay bribes for passing grades. Although not universal, corruption in legal education is said to be relatively commonplace. Among LPRI interviewees, there was widespread agreement that advocates as a whole lack the knowledge and skills to practice law effectively. Because the law faculties do not offer a specialization in advocacy, even many graduates who have a good theoretical knowledge of the law are said to lack practical skills necessary to represent clients effectively in court.

Since independence, the vast majority of advocates have had few, if any, opportunities to attend CLE seminars. Outside the cities of Dushanbe and Khujand, the problem is particularly acute. Although a 1996 Presidential Decree established an educational center under the MoJ to provide CLE to all legal professionals, lack of funding has prevented it from accomplishing much. The CLE that is available is almost entirely funded by international donors and is unsustainable without international support. Most advocates have had to rely on informal and ad hoc arrangements to keep abreast of changes in the law. In 2002, the Center for Legal Education was established with funding from the Organization for Security and Cooperation in Europe and the United Nations Development Programme. Its future, however, is uncertain due to funding issues.

Recommendation

The Bar Association should admit only graduates of law faculties that meet minimum standards for legal education, as determined by the Bar Association. It should also require lawyers to participate in a minimum amount of continuing legal education to

¹⁵ See LPRI, Factors 7-8, 14.

ensure that its members maintain and enhance their knowledge and skills. The Bar Association should also provide CLE programs for its members.

Justification

The Special Rapporteur identified professional training as a weakness and “holds the view that more efforts have to be made in the area of training, continuing legal education and the availability of legal information material.”¹⁶ He recommended a mandatory training period before admission to the profession “in order to strengthen the quality of lawyers’ services.”¹⁷

The UN Basic Principles note the importance of professional training for lawyers:

Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.¹⁸

The CoE also recommends that “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.”¹⁹ As for the subjects that should be taught, the CoE recommends that “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.”²⁰

To address concerns about the proliferation of law faculties and the consequent uneven quality of legal education, the Bar Association should seek cooperation with the Ministry of Justice on the issue of accreditation of law faculties.

As a condition to continued membership, the Bar Association should require its members to participate in a specified number of hours of CLE every year (or every two or three years). The Bar Association should appoint a CLE Commission to track compliance with the requirement. The CLE Commission should also certify qualifying CLE seminars and other activities and specify the number of credits earned by participation in them. It should develop procedures to accomplish this that do not place an undue burden on CLE providers. The CLE Commission should also organize CLE programs itself to provide additional opportunities for members of the Bar Association to satisfy the CLE requirement.

¹⁶ Special Rapporteur’s Report ¶ 95.

¹⁷ *Id.* ¶ 93.

¹⁸ UN Basic Principles ¶ 9.

¹⁹ Rec(2000)21, Principle II.2.

²⁰ *Id.*, Principle II.3.

IV. PROFESSIONAL ETHICS AND CONDUCT

Current Situation²¹

There are no uniform rules of professional conduct for the legal profession. Civil practice lawyers are subject to no rules of professional conduct. Some norms of professional ethics and conduct are included in the Law on Advocacy, and thus apply to all advocates. They relate to issues such as zealous representation of clients, maintaining the confidentiality of information received while providing legal services, avoiding conflicts of interest, and not acquiring property that is the subject of the representation. Other norms of professional ethics that apply to all advocates are found in the Criminal Procedure Code. In 1999 the Republican Collegium adopted Rules of Professional Conduct of the Advocates of the Republic of Tajikistan. The Sogd Collegium had also used these Rules of Professional Conduct for its members, but in January 2006 it adopted its own rules. Although the Rules of Professional Conduct of the Republican Collegium purport to apply to all advocates, private licensed advocates are subject only to the norms in the Law on Advocacy. The MoJ did not issue rules of professional conduct for private licensed advocates, and it is uncertain whether the MoJ will issue such rules for those who provide paid legal services. Neither the Law on Licensing, the Licensing Regulation, nor the draft law to amend the Law on Advocacy explicitly addresses the issue of professional ethics.

Although advocates generally recognize the importance of professional ethics, it is widely believed that professional ethics do not greatly influence the conduct of advocates or non-advocate jurists. For many advocates, professional ethics includes matters of etiquette.

Recommendation

The Bar Association should develop a comprehensive and uniform code of professional ethics for all its members, based on tradition and internationally recognized standards of legal ethics, to ensure that members of the legal profession act independently, diligently, and fairly.

Justification

The UN Basic Principles recognize the need for norms of professional ethics for all lawyers: “Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.”²² A code of professional conduct should be enforceable through disciplinary proceedings.²³ According to the CoE recommendations, the purpose of such a code is to “ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly.”²⁴

Adoption of a code of professional ethics by the Bar Association would allow greater flexibility than enactment of a law on professional ethics, which would require action by Parliament to make any changes. Two approaches were considered for implementing this

²¹ See LPRI, Factor 16.

²² UN Basic Principles ¶ 26.

²³ See *id.* ¶ 29.

²⁴ Rec(2000)21, Principle III.1.

Recommendation. The first would be to appoint an ad hoc committee of experts—not all of whom would necessarily be members of the Bar Association—to draft a code of professional ethics for the Bar Association. The second would be to establish a permanent Ethics Commission within the Bar Association to draft the code. An advantage of the second approach is that the commission would be able to propose future amendments to the code in response to changing circumstances and needs of the legal profession. It would also be available to provide opinions in response to questions posed by members of the Bar Association. Finally, it could also be given authority to hear and decide disciplinary cases, following investigation by another body within the Bar Association. Another approach, combining advantages of the first two would be to establish a permanent Ethics Commission that would be assisted in drafting the code by experts and perhaps stakeholders who are not members of the Bar Association and would not be members of the permanent Ethics Commission.

In drafting a comprehensive and uniform code of professional conduct for its members, the Bar Association should begin with the norms included in the Republican Collegium’s Rules of Professional Conduct and the Sogd Collegium’s Rules of Professional Conduct, both of which reflect traditional understandings and practices among advocates in Tajikistan. Those sources should be supplemented with other sources, such as the Code of Conduct for Lawyers in the European Community (28 Oct. 1988), adopted by Council of the Bars and Law Societies of the European Union. The Bar Association’s code should be sufficiently comprehensive to provide guidance on all important issues. It should be uniformly applicable, so that all members of the Bar Association are held to the same high standards. Through legislation, the code could also be made applicable to jurists who are neither advocates nor civil practice lawyers, even though they may not be members of the Bar Association. Such legislation would also have to address the question of how the code could be enforced against jurists.

V. DISCIPLINE

Current Situation²⁵

Advocates who are members of a collegium are subject to discipline for violations of the Law on Advocacy or “norms of professional ethics.” Any interested person may file a complaint concerning an advocate’s misconduct, but complaints must be filed no later than six months after the alleged misconduct, or two years if the alleged misconduct relates to client funds. Each collegium’s Qualification Commission is responsible for investigating complaints against its members, and the collegium’s Presidium is responsible for deciding whether to initiate a disciplinary proceeding and whether to impose a penalty. The Presidium must require a written explanation from the advocate, provide the advocate with materials relating to the complaint, and give the advocate an opportunity to be present when the Presidium considers the complaint. In the event of repeated absence by the advocate, however, the Presidium may proceed without him or her. The sanctions that may be imposed on members of a collegium are reprimand, reproof, severe reprimand, and expulsion from the profession (i.e., membership in the collegium). An advocate may appeal a disciplinary sanction to the general meeting of the collegium. Expulsion may be based on the commission of an offense incompatible with the profession of advocate, repeated violation of the Law on Advocacy or rules of professional ethics, or careless performance of duties. It requires a majority vote by the collegium’s general meeting, on the recommendation of the Presidium.

²⁵ See LPRI, Factor 17.

Under the Law on Advocacy, private licensed advocates are subject to discipline by the MoJ. Penalties differ depending upon the nature of the offense. For violation of the Law on Advocacy or other legislation of Tajikistan or “careless fulfillment of his professional duties,” the term of an advocate’s license may be shortened. For conviction of a crime, judicial determination of incapacity, illegal actions in obtaining the license, or concealment of income obtained from the practice of law (as established by the tax authorities), an advocate’s license may be cancelled. The advocate may appeal the reduction in term or cancellation of license to the Supreme Court. The Law on Licensing also includes provisions for disciplining lawyers with a license from the MoJ. Under that law, the MoJ has authority to investigate noncompliance with the licensing regulations, to issue notices of violation, to suspend licenses for up to six months, and to apply to a court of general jurisdiction for revocation of licenses. Revocation can occur only if a licensee fails to eliminate a violation during the period of suspension and such further period, not to exceed six months, as the MoJ may specify for eliminating the violation before it can apply to a court for license revocation. Licensees will be able to appeal any suspension or revocation. Currently, it is unclear which of these two laws governs the discipline of private licensed advocates.

Recommendation

The Bar Association should establish a framework, independent of the state, for receiving and investigating complaints and disciplining lawyers compatible with international requirements of fair procedures, to ensure accountability of lawyers and their compliance with professional standards. All decisions on imposing sanctions should be conducted in a transparent manner.

Justification

Disciplinary proceedings should be based on violation of “the code of professional conduct and other recognized standards and ethics of the legal profession.”²⁶ An independent body should determine whether discipline should be imposed on a lawyer: “Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.”²⁷ The CoE specifically recommends that “lawyers’ professional associations should be responsible for or, where appropriate, be entitled to participate in” disciplinary proceedings.²⁸

The UN Basic Principles require fair and effective procedures for receiving and investigating complaints: “Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.”²⁹ Although the CoE’s reference to the European Convention on Human Rights is not directly relevant to Tajikistan, its recommendation is in accord with the UN Basic Principles: “Disciplinary proceedings should be conducted

²⁶ UN Basic Principles ¶ 29; see also Rec(2000)21, Principle VI.1.

²⁷ UN Basic Principles ¶ 28.

²⁸ Rec(2000)21, Principle VI.2.

²⁹ UN Basic Principles ¶ 27.

with full respect of the principles and rules laid down by 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.”³⁰ These rights include:

- 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 through a lawyer of their choice;
- the right to be present throughout the hearing.³¹

Finally, the CoE encourages respect for the principle of proportionality when determining the appropriate sanction for disciplining a lawyer.³²

The two functions of (1) investigating and screening complaints and (2) hearing disciplinary proceedings against lawyers should be kept distinct. The body that decides to bring a disciplinary proceeding should be different from the body that conducts the proceeding and decides whether to impose sanctions. One approach would be to appoint a commission to receive and investigate complaints and make the preliminary determination whether to commence a disciplinary proceeding. Another commission, such as the Ethics Commission (if a permanent one is appointed under the previous Recommendation), would then be responsible for conducting the disciplinary proceeding. An advantage of giving the Ethics Commission this responsibility would be its familiarity with the Bar Association’s code of professional ethics. Whatever structure is established for receiving and investigating complaints and imposing discipline, all decisions on imposing discipline should be made by a body composed only of members of the Bar Association. Including members from the MoJ, for example, could erode the independence of the profession. It might be possible to include representatives of government, NGOs, or other stakeholders in the commission that receives and screens complaints, but all decisions on whether to impose sanctions should be made only by members of the Bar Association. Such decisions should be subject to judicial review.

Because travel among different parts of Tajikistan becomes very difficult during the winter, it would be advisable to organize the functions of receiving, investigating, and screening complaints and of hearing disciplinary proceedings on a regional basis, with six subcommissions for each of three regions, to minimize delays in resolving complaints and deciding disciplinary proceedings. To ensure uniformity among the regions, decisions of the regional subcommissions should be appealable to a central commission in the capital, such as the Ethics Commission.

³⁰ Rec(2000)21, Principle VI.3.

³¹ Explanatory Memorandum ¶ 66.

³² Rec(2000)21, Principle VI.4.

VI. ORGANIZATION OF LEGAL PRACTICE

Current Situation³³

Virtually all advocates who are members of a collegium—some four-fifths of the profession—practice in one of the collegiums' legal consultation centers. The Republican Collegium has five legal consultation centers in Dushanbe, as well as regional consultation centers in Khujand, Kurgan Tube, and Rudaki Raion. The Sogd Collegium has nineteen legal consultation centers within the Sogd Oblast. The Presidium of each collegium has authority to establish and close legal consultation centers, determine their location and the number of advocates working at them, appoint a head for each center, establish rules of procedure, and monitor the centers' activities. Practice in a consultation center is regimented, with limited opportunities for individual initiative. For example, collegium charters give the heads of legal consultation centers responsibility for entering into agreements with clients for the provision of legal services, determining the appropriate fees for such services, assigning work to advocates based on their qualifications and workload (including the appointment of advocates to provide free legal aid), monitoring the quality of legal services, investigating complaints, notifying the Presidium of the need for discipline, and managing the finances of the center. Nevertheless, legal consultation centers provide many advocates with the infrastructure for practicing law, and the public with a place to turn for legal services.

Private licensed advocates can practice either individually or as owners or employees of legal entities. Any form of legal entity recognized in the Civil Code may be used, such as partnerships, limited liability companies, or joint stock companies. Jurists who are not advocates can also practice law as employees of such entities. Most law firms are small, with only a couple of lawyers, and deal primarily with commercial and civil law issues, although some handle criminal cases. Advocates and non-advocate jurists can also practice law as employees of NGOs. The Law on Licensing requires the licensing of legal entities that provide paid legal services (i.e., law firms), and, under the Licensing Regulation, a law firm must have at least three persons with a university degree in law. Neither the Law on Licensing nor the Licensing Regulation restricts the kinds of legal entities that could be used for a law firm. NGOs that provide legal assistance would also need a license from the MoJ if they are paid for their services, either by clients or third party donors. The confusion and uncertainty about requirements for implementation of the Law on Licensing described above also apply to issues regarding the organization of legal practice.

Recommendation

Lawyers should be allowed the freedom to choose to practice individually or in association with other lawyers in a variety of legal forms. Legal consultation centers could be continued to provide opportunities for lawyers who wish to practice in them.

Justification

Clients are best served when lawyers are free to choose whether to practice individually or in association with other lawyers. The Bar Association should therefore encourage such freedom to make legal services available. Because of the important role the legal consultation centers have played in making legal services available, they could be

³³ See LPRI, Factors 12-13.

continued to provide advocates who wish to practice in them with the opportunity to do so. Implementation of the Recommendations in this document would transfer the responsibility for regulating the legal profession to the Bar Association. Thereafter, the collegia could still play an important role in organizing legal practice by operating legal consultation centers for the benefit of their members.

VII. LEGAL ASSISTANCE

Current Situation³⁴

Under Article 5 of the Law on Advocacy, the state “guarantees real and equal access to legal assistance to all persons and foreign citizens who live in the territory of the republic.” Article 14, paragraph 4(d) of the International Covenant on Civil and Political Rights provides that a criminal defendant has the right “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” In addition, Article 19 of the Constitution provides that everyone has the right to the assistance of an advocate from moment of arrest, and Article 92 guarantees legal assistance at all stages of investigation and trial. These guarantees are implemented, at least in part, by requiring members of the collegia—but not private licensed advocates—to render free legal assistance (subject to reimbursement by the *khukumats*) in specified instances, most commonly in criminal investigations and trials. Such legal aid is vital to the functioning of the criminal justice system, with an estimated 20-30 percent of those in detention or at criminal trials receiving free legal aid. Private licensed advocates are free to work on legal aid cases on their own accord, and some do so.

Following a request by an investigator or judge for appointment of an advocate in a criminal investigation or trial, the head of the local legal consultation center makes an advocate available to provide the requested legal aid. Advocates may not refuse to provide such representation, but experienced advocates try to avoid taking such cases. Often, young advocates are selected, ostensibly to afford them an opportunity to gain experience, but with the result that criminal defendants may be represented by advocates with little experience. When more experienced advocates are compelled to take such cases, they often do not devote sufficient time to preparation. The amount that advocates are to be paid from state funds is determined by an order of the Council of Ministers, but advocates are rarely in fact paid for these services. Because payment for legal aid is not a separate item in the budget, payments to advocates can be made only out of any unspent funds, and in practice there usually are none. The total arrears for unpaid legal services reportedly amount to some 1 million *somoni* (approximately \$330,000) or more.

Some private licensed advocates perform considerable legal work for the poor. Even law firms that generally do not provide significant amounts of free legal aid sometimes give free legal consultations. Advocates and other non-advocate jurists also provide free legal aid through NGOs, which are usually funded by international donors. Nevertheless, in many areas of the country free legal aid is unavailable.

Recommendation

The Bar Association should encourage its members to provide free legal aid or legal services at reduced cost to those who cannot otherwise afford such services. The state

³⁴ See LPRI, Factors 18-19.

should make sufficient funding available to pay lawyers adequate sums of money for providing free legal aid to those requiring such representation during criminal investigations and trials.

Justification

The guarantees of legal assistance are not fully implemented in practice.³⁵ Therefore, the Special Rapporteur recommends that “an effective structure for the provision of free legal assistance should be elaborated by the State, which would also provide for prompt payment to lawyers for such services.”³⁶

With the privilege of admission to the legal profession comes responsibilities to the legal system and to society. Among these responsibilities is ensuring that legal services are available to all, particularly those who cannot afford to retain an advocate. Under the UN Basic Principles, all persons who are arrested, detained, or charged with a criminal offense and who do not have a lawyer “shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offense assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.”³⁷ The CoE extends the provision of legal assistance to all circumstances in which free legal assistance is needed: “All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.”³⁸ Furthermore, “Lawyers should be encouraged to provide legal services to persons in an economically weak position.”³⁹

The Bar Association should therefore encourage its members to provide free legal aid. As the CoE recommends, “Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.”⁴⁰ The state also has responsibilities: “Governments should ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.”⁴¹

In their opposition to the new licensing regime and the requirement that they pass an MoJ qualification examination, collegium advocates argued that they provide a kind of social assistance because their purpose is not to make a profit, but to defend the rights of citizens. As a consequence of this, they said, they could no longer be required to provide free legal assistance once they are licensed as entrepreneurs by the MoJ. This position raised concerns that the future availability of free legal aid could be significantly reduced. Although there is some merit to their position, it rests on a false dichotomy that characterizes the practice of law as a profession and the practice of law as a business as

³⁵LPRI, Factors 3, 18; Special Rapporteur’s Report ¶¶ 31, 46.

³⁶ Special Rapporteur’s Report ¶ 94.

³⁷ UN Basic Principles ¶ 6.

³⁸ Rec(2000)21, Principle IV.1.

³⁹ *Id.*, Principle IV.2.

⁴⁰ UN Basic Principles ¶ 25.

⁴¹ *Id.* ¶ 3.

mutually exclusive activities. As the Explanatory Memorandum for CoE Recommendation Rec(2000)21 notes, lawyers must reconcile these two apparently contradictory aspects of legal practice:

The practice of 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 . . . and maintain certain professional standards.⁴²

All members of the Bar Association should therefore contribute to satisfying the profession's responsibilities by performing some legal aid. "However, the state (and the community as a whole) has an obligation to assist the legal profession in carrying out this responsibility."⁴³ The legal profession cannot reasonably be expected to provide legal aid in exchange for unfulfilled promises of payment by the state.

VIII. IMPLEMENTATION OF RECOMMENDATIONS

To implement these Recommendations, a steering committee should be formed, consisting of the members of OSI-Tajikistan's working group on reform of the legal profession, with the addition of important stakeholders, such as representatives of the collegia, private licensed advocates, the MoJ, and representatives of legal academia. The steering committee should:

- prepare a concept paper explaining and elaborating on these Recommendations;
- draft the necessary legislation to carry out these Recommendations;
- draft the necessary organizational documents to establish the Bar Association;
- conduct an information campaign to provide the legal profession with information about these Recommendations and win its support for them;
- make all necessary arrangements for a meeting to establish the Bar Association; and
- take all other actions necessary to implement these Recommendations.

All these activities should be conducted in an open and transparent manner to foster public confidence in the Bar Association.

⁴² Explanatory Memorandum ¶ 2.

⁴³ *Id.* ¶ 51.