

## The Lawyer's Independence

The Law on the Bar defines the Bar as an independent institution [Art 1] and it goes on to provide in Article 43 that 'a lawyer shall be independent.....' and Article 44 sets out specific guarantees underwriting that independence.

The provisions are similar to those in the laws on the bar in other jurisdictions.

'Independence' is the very first item in the Bar's Code of Ethics. Whilst the Code emphasises the need for the advocate to ensure independence, the advocate does not have complete control in achieving that ideal.

What though is the reality not just in Moldova but worldwide? Are lawyers truly independent, can such independence be achieved and if so, how? Does the insistence on the advocate being 'independent of civil society' as the Law on the Bar provides, mean that the advocate like the judge is answerable only to the rule of law?

The first question, though, is from whom should the lawyer be independent – the state, clients, the demands of large commercial interests, one's own law firm, the lure of profit?

As Article 44 implies, the answer normally assumed is the state itself which has created the Bar, but lawyers like everyone else are subjected to many other external pressures, and for most lawyers these threaten the lawyer's independence more.

Whilst all governments claim to uphold the concept of an independent legal profession, all too frequently governments are quick to put pressure on individual lawyers or the Bar itself, where the government takes the view that its own interests are being subjected to too much scrutiny.

The judiciary, prosecution service, police etc are just as vulnerable to all these pressures.

Organisations like the CCBE or the IBA are all too frequently called upon to write letters of protest to individual governments concerning the pressure being put upon a lawyer or the profession itself.

Politicians and state officials everywhere find it easy to talk about grand concepts of the rule of law, but just as easy when it suits them to be expedient and try and short circuit proper legal process.

This places those lawyers caught up in such a situation, in difficulty and even in prison.

How then can one individual stand up against the power of the state?

David Keating, co-chairman of the CCBE PECO Committee

This dilemma has faced many a lawyer in the past and sadly will continue to do so.

I often wonder how brave I would be. Would I stand up for the rule of law and take the consequences? Or would I quietly back away? In the long established western democracies, such a bold step is easier because there is a strong legal profession ready to support its members and with the ability to exercise effective influence. There is also well established media ready to alert the public at large to any injustice.

Here in Moldova it is, therefore, essential to build a strong Bar with good international contacts, in the same way that it is important to establish a strongly based judiciary, prosecution service and police force which can act impartially secure from external pressure.

Such a Bar can only be built by its members, but this can never be achieved by its membership overnight. Those Bars in other jurisdictions that are strong and soundly based, have achieved this over many decades even centuries.

This is where, I think, politicians in Moldova and other new democracies, the European Commission, and other agencies have made a very big mistake. They have looked at the establishment of a soundly based judiciary, prosecution service, and police force, all of which are essential, but have failed to realise that the establishment of a strongly and soundly based Bar is all part of the same issue, and that until this is achieved a weak Bar will undermine the whole process.

The reason usually given is that the profession of advocacy is a private enterprise and should not therefore be funded by public funds. What is forgotten is that the Bar is providing a public service, and that it should have the capability to ensure that advocates are properly trained, are then effectively regulated and where necessary disciplined and receive on going training during their careers. All of this is essential to ensure that the public is protected, and that advocates display the same level of skill in their dealings with the judiciary, the prosecution and the police, all of whom have benefitted substantially from external funding.

It is too simplistic to point at a few lawyers who appear to make a lot of money, as a reason for not applying external funds into the strengthening of the Bar. The great majority do not.

A weak Bar cannot enforce any discipline. Untrained lawyers with inadequate guidance, and under ineffective disciplinary control, are more likely to be tempted to pursue only profit, and fail to play the role they should be playing in safeguarding the rule of law.

There is, though, a problem affecting the profession everywhere which is recognised in the Code of Ethics and indeed similar codes worldwide.

David Keating, co-chairman of the CCBE PECO Committee

In the world at large how many people join the legal profession to champion human rights, and work in legal aid? Fortunately a few do but most people joining the profession wish to be commercial lawyers, and avoid representing clients in the criminal courts. Such lawyers feel that it is unlikely that they will ever have a confrontation with the state in any particular case. They look on the Bar as a necessity but otherwise ignore it and begrudge paying it any money, yet these lawyers are usually better able to pay than their colleagues whose work is primarily in the criminal courts.

Indeed how many people pursue a career in the judiciary, the prosecution service or the police to promote the rule of law? For most it is a good career where they will make a comfortable living and enjoy some status in society and, in the process, we all hope that the rule of law will be promoted

We are all humans and most of us seek out the easier path for a comfortable life.

This is why we are all susceptible not just to subtle pressures but also to corruption. It is why we also need continuous training, guidance and disciplinary control.

Can a lawyer be independent and also take part in corrupt activities? Surely not, yet lawyers in Moldova have said to me that there are some who do, and some even admit to it. Several lawyers have asked what they should do if the clients instructs them to offer an 'expedition fee' or in other words a bribe. They say that if they refuse then the client will go to another lawyer who will.

Now here in Moldova I have spoken with people who tell me that bribes are paid only when they are demanded, while others say that corruption only occurs when bribes are offered. However, as the old saying goes, 'It takes two to tango'. Substantial external funding has been provided in the training of the judiciary, prosecution service and police on this very issue. This is why I keep stressing that the same level of external funding is needed for the profession.

The rule of law can not survive where there is corruption, and neither can a lawyer's independence. The rule of law depends on that independence.

It is no good just telling someone that corruption is bad. If that were the case then the EU could have saved itself a large sum of money which it has spent on this very issue. Combatting corruption and ensuring independence depends not on good intentions but the provision of good training and good structures.

Corruption can be a very expedient way of resolving a problem but it is a cancer which soon undermines the fabric of society, and in the end everyone loses.

David Keating, co-chairman of the CCBE PECO Committee

Individual lawyers would find it much easier to resist any request to offer a bribe etc if he or she were confident that no other lawyer would do so and no bribe were demanded.

This can only be achieved if the Bar is strong enough to take swift disciplinary action, and expel from membership anyone involved in a corrupt activity.

Having a strong bar costs money to ensure that the profession is effectively regulated and when necessary disciplined. It requires people to make enquiries, study files prepare reports etc. It requires people to administer the disciplinary process. This all costs money. The Moldovan Bar has no money and it is unlikely to build up sufficient funds on its own

Once the Moldovan Bar has been effectively structured and trained, a decision will then need to be taken that as from a certain date any allegation of misconduct will be thoroughly and professionally investigated and where necessary action taken.

In the meantime wishful thinking will achieve nothing.

A profession, that respects the rule of law and has the strength to promote it, will gain the respect of the public. This applies to the judiciary, the prosecution service and the police as well.

A strongly based Bar representing such a profession will be better able to influence the government, and to safeguard the profession's independence, but above all to protect the public interest.

Once this has been achieved then Moldova will be far better able to attract bona fide foreign investors. Foreign investment in any country will only develop significantly for the benefit of the whole community if it can enjoy the security given when the rule of law is promoted by all agencies who have the strength to do so effectively.

I started by asking from whom the lawyer should be independent and have concentrated my answer on the government, and corruption, but there are pressures that can influence the lawyer's independence and do so more subtly.

The demands or interests of a large commercial client, the pressure of work within one's own office, the pursuit of profit and many more such influences can just as easily cause a good lawyer to look the other way when it suits him or her, or even take inappropriate action.

At the end of the day lawyers like anyone else are citizens who will have their own political ideas, their own personal and family interests, as well as being subjected to a wide variety of interests and pressures all of which can affect the lawyer's independence.

It is the good lawyer who recognises when this is happening and stands back.

In reality we do not always recognise when this is happening, though good training and disciplinary control do much to help such recognition.

David Keating, co-chairman of the CCBE PECO Committee

No lawyer is ever truly independent. It is an ideal for which we must as a profession all strive, but we need the support of society as a whole.