

## Questionnaire for civil society and bar associations

**1. Taking into consideration the guarantees for the functioning of lawyers, contained in [principles 16-22 of the Basic Principles on the Role of Lawyers](#), please describe the constitutional, legal, administrative and policy measures adopted in your country to enable lawyers to exercise their professional activities in favor of their clients in a free and independent manner**

Generally speaking, the 1988 Constitution of the Federative Republic of Brazil provides in article 5, item 13, the freedom to pursue any occupation, trade, or profession, as long as the professional qualifications under the law are met. However, still within the constitutional scope, Chapter IV – "The Functions Essential to Justice" considers the legal profession indispensable and guarantees to lawyers certain protections for their actions and demonstrations when fulfilling their duties, within the limits of the law.

Furthermore, article 7 Law n° 8.906 of 1994, which provides for the Legal Profession Statute and the Brazilian Bar Association (OAB), sets as lawyers' rights the freedom to practice law within the Brazilian territory, inviolability of their workplace, unimpeded access to courts and other bodies as well as access to legal or administrative proceedings upon their availability.

Finally, OAB's General Rules of the Legal Profession Statute ensures the provision of assistance in police investigations or criminal prosecution to lawyers who are the investigated party, defendant, or plaintiff in cases in which the subject matter in question arose from the lawyer's legal practice.

**2. What entities and/or mechanisms are in place to prevent and/or punish interferences with the free and independent exercise of the legal profession? Please briefly describe them and specify whether they are independent bodies or if they belong to the administrative structure of the State. Please briefly describe them and specify whether they are independent bodies or if they belong to the administrative structure of the State.**

According to article 44, Law n° 8.906, of 1994, the Brazilian Bar Association aims to: defend the Constitution, the legal order of the Rule of Law, human rights, social justice, the good administration of laws, enhancement of tradition and legal institutions, as well as promote, exclusively, the representation, defense, selection and disciplinary measures of all lawyers in the Federative Republic of Brazil.

It is comprised of 4 bodies:

I - the Federal Council: the highest body of the OAB, has its own legal personality and a seat in Brasilia. The Council shall work towards the achievement of the institution's goal as well represent, before a court or out of it, the collective or individual interests of lawyers and uphold the dignity, independence, prerogatives, and value of the legal profession.

II - the Chapter's Councils: a legal entities which have authority across the territory (States and Federal Districts) where they are located;

III - the Subchapters: independent bodies of the Chapter Council;

IV - Lawyers' Assistance Funds: legal entities created by the Chapter Councils when over 1500 members have subscribed.

Apart from the aforementioned bodies, the Judiciary Branch, a government body, exercising its judicial duties is capable of preventing interferences in the practice of law, ensuring the independence and autonomy of the Brazilian Bar Association, as decided by the Brazilian Supreme Court in the Direct Action for the Declaration of Unconstitutionality 3026.

**3. Please indicate if there are any legislative, administrative, or institutional barriers that have hindered the work of lawyers and the exercise of the legal profession in your country, and describe them.**

The Brazilian Supreme Court Binding Precedent No. 5, provides that "the absence of a technical defense by a lawyer in a disciplinary process does not violate the Constitution. Such a mechanism weakens the legal profession considering that civil servants might be punished in the administrative process and, therefore, the constitutional principles of the due process of law, fair hearing, and adversary procedure must be observed.

In this vein, the Federal Council of the Brazilian Bar Association proposed a Binding Precedent Proposal 58 in 2011, with a view to overthrow or amend Binding Precedent n° 5. Since the majority of the court rejected the proposal, the Precedent remains in force.

**4. Please describe the role of the national bar association(s) in protecting lawyers and the free exercise of the legal profession. Is the bar association de jure and de facto independent from the State? Is the bar association de jure and de facto independent from the State?**

Aiming to defend the special rights that are inherent to lawyers, the Federal Council of the Brazilian Bar Association, its Chapter and Subchapters have Prerogative Committees, through which lawyers can follow up on cases in which they have been prevented from practicing law or have been coerced by Judiciary, Office of the Public Prosecutor or other private or public institutions.

As for the independence of the Brazilian Bar Association, the Federal Supreme Court denied the request for a Direct Action for the Declaration of Unconstitutionality 3026 to interpret article 37, item 2, of the Brazilian Constitution *head of article* 79, Law 8.906, which determines the implementation of labor practices to OAB staff, since it is an independent body and is not subject to the dictates of the government, as the following decision reads:

*DIRECT ACTION FOR THE DECLARATION ON UNCONSTITUTIONALITY. Paragraph 1, Article 79 of Law n° 8.906, part 2 Staff of the Brazilian Bar Association THE PRINCIPLE*

ALLOWS FOR LABOR UNDER THE CONSOLIDATION OF LABOR LAWS. COMPENSATION FOR CHOOSING THE LEGAL REGIME UPON RETIREMENT. AWARD OF DAMAGES. IMPOSITION OF RULES INHERENT TO THE GOVERNMENT Competitive civil-service examination( Art. 37, 2, Brazilian Constitution). NON-REQUIREMENT OF COMPETITIVE CIVIL-SERVICE EXAMINATION TO HIRE OAB STAFF SPECIAL AGENCIES OAB'S LEGAL NATURE INDEPENDENT PUBLIC SERVICE PROVIDER. UNMATCHED INSTITUTION IN THE CAST OF LEGAL PERSONALITIES IN THE FIELD BRAZILIAN LAW. AUTONOMY AND INDEPENDENCE OF THE ENTITY. MORAL PRINCIPLE VIOLATION OF ARTICLE 37 OF THE BRAZILIAN CONSTITUTION. NON-OCURRENCE.1. Due to Law no. 8,906, article 79, paragraph 1 OAB staff, whose previous labor relations were governed by the Public servant relations, could choose to be employees subject to the Consolidation of Labor Laws. Choice compensation: compensation to be paid at the time of retirement. 2. **The claim that the Brazilian Bar is subject to the rules imposed by the Government is not valid.** 3. The Brazilian Bar Association is not a Government entity. The Bar is an independent public service, a unique category in the list of legal personalities in the field of Brazilian law. 4. **The Bar does not fall under the category of "Special Agencies", belying the so-called independence of such "agencies". Since the Bar is not a governmental body, it is not under the control of the Brazilian government nor is it bound to it in any form.** This arrangement is formally and materially necessary. 6. The Bar deals with activities related to lawyers, who exercise a constitutionally privileged function, as they are essential to the administration of Justice [Article 133 of 1988 Constitution]. It is an entity whose purpose is related to the attributions, interests, and selection of lawyers. There is no relationship or dependence between the Bar and any public agency. 7. **The Brazilian Bar Association, an independent body, cannot be deemed as a counterpart to other professional regulatory bodies.** The Bar is not exclusively dedicated to corporate purposes. It has an institutional purpose. 8. Although it stems from a legal determination, the Public Service Labor Relation imposed on OAB employees is not compatible with the entity, which is autonomous and independent. 9. The applicant's request for an interpretation based on article 37, item II, of the Brazilian Constitution, head of article 79 of Law n. 8,906, which determines the application of the labor relation to OAB employees is not valid. 10. The requirement of a public examination for those hired under the labor regime by the Bar is not applicable. 11. Moral principle Ethics of legality and morality. Confining the moral principle to the scope of the ethics of legality, which cannot be stretched, under penalty

*of the dissolution of the system. Misuse of power. 12. I dismiss the request.*

*(SUPREME COURT – ADI: 3026 DF, Rapporteur: EROS GRAU, decision date: 06/08/2006, Full Court, publication date: DJ 09-29-2006 PP-00031 EMENT VOL-02249-03 PP-00478).*

**5. Please provide detailed information on the number of lawyers that have been subject to criminal, administrative or disciplinary proceedings in the last five years for alleged violations of standards of professional conduct. How many of them were found guilty? How many of them were ultimately disbarred? How many of them were found guilty? How many of them were ultimately disbarred?**

According to art. 70 of Law No. 8.906/94, which provides for the Statute of the Legal Profession and the Brazilian Bar Association, only the Chapter Councils where the violation occurred, unless the fault has taken place before the Federal Council, have the authority to discipline those affiliated to the Bar. As OAB's decentralized bodies, with their own legal personality, the Chapters are responsible for reporting the number of criminal, administrative, or disciplinary procedures.

Generally speaking, there is no aggregated record of these procedures.

**6. Please provide information on any case where lawyers in your country have been subject to intimidation, hindrance, harassment or improper interference, whether from State authorities or non-State actors, for action taken in accordance with their recognized professional duties. Please also describe the measures that State authorities have taken to investigate and bring perpetrators to justice.**

The Federal Council of the Brazilian Bar Association, by means of its Sub-Commission of International Affairs on Human Rights, opened a consultation in August, 2021 with the OAB Chapters to collect and send reports of physical and verbal aggression against lawyers. This consultation resulted in the receipt of eight reports from the chapters of Alagoas, Goiás, Mato Grosso, Mato Grosso do Sul, Pará, Piauí, Rio Grande do Sul, and São Paulo, where it was possible to verify, for example, cases of aggression against lawyers by state agents. The objective of the data collection is to write a report to be sent to the UN Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán, with whom the Subcommission met and presented an overview of the cases of violence against lawyers in the country. In the same context, aiming at a greater engagement of society, an event on Human Rights, Democracy and Advocacy will be held on December 15, in partnership with the International Association of Lawyers - UIA.

In any case, there is no precedence of cases of this nature in the Brazilian case Law. Having said that, we present the following case in the Supreme Court:

*Habeas corpus . Criminal. Criminal procedure. 2. (...) 3. An arrest warrant is issued in case of overt criminal coercion. Possibility. Hypothesis of concrete case does not take place. 4. As important as the*

*prerogatives of defense and lawyers are to the Guarantees System, their violation does not result in the immediate acquittal of the accused. Judicial violation of the prerogatives of the defense and the lawyers responsible for it produces procedural consequences of three orders. First, it is the basis for the annulment or invalidation of the judicial act. Second, the relationship with the offense is the foundation for the invalidation of subsequent procedural acts related to it. Thirdly, if the violation points to the judge's bias, there will be grounds for the magistrate's refusal. 5. Cassation or invalidation of the judicial act - phone interception of the defendant's lawyer in criminal proceedings. Destruction of evidence determined in the first instance, at the request of the defense. There is no nullity to be decreed, as the act has already been rendered ineffective. 6. Invalidation of subsequent acts. The regime of invalidation of subsequent procedural acts is governed by legislation. Pursuant to article 573, paragraph 1, of the Brazilian Code of Criminal Procedure, the nullity of an act affects acts that "directly depend on it" and those that "are a consequence of it". Subsequent acts are not acts that violate the prerogatives of the defense or lawyers, but that depend on and are a consequence of the infringing act. Therefore, as for them, defensive and legal guarantees are not at stake. Therefore, the importance of these guarantees does not exempt the demonstration of the link between the violating act and the contaminated act. In the case under trial, there are, at least apparently, no acts connected with the interception. Nothing relevant was revealed in the diligence. At the time of the interception, no acts of instruction were carried out. Contamination does not reach other evidences. Invalidation of subsequent acts for damage to the defense. Lawyer intercepted who "provided occasional services to the patient". Defense intimidation. Duty of the lawyer to "act fearlessly" [...]. 7. Grounds for the magistrate's refusal. Context that suggests that the interception resulted from an unfounded suspicion of participation in criminal activity by the telephone terminal owner, without realizing the capacity as lawyer. 8. Telephone interception. Identification of the investigated. Law 9,296/96 requires the identification of those investigated as precisely as possible – article 2, single paragraph. This device has not been interpreted as a requirement that, prior to the interception, the registration data of all intercepted terminals be broken. 9. Habeas corpus not known.*

*(HC 129706, Rapporteur: GILMAR MENDES, Second Panel, judged on 06/28/2016, ELECTRONIC PROCESS DJe-168 DISCLOSED 07-31-2017 PUBLISHED 08-01-2017)*

**7. What activities does your organization carry out to promote the independence of the legal profession? Do you co-ordinate with other organizations with similar functions in other countries or regions? Are you part of a network for this purpose? Please give examples.**

As a way to promote the independence of the law firm and spread knowledge about the professional prerogatives of lawyers, the Federal Council of the OAB has the

[Prerogatives Channel](#) , an informative website that seeks to simplify the understanding of the special and so important rights of lawyers. By means of this content channel, lawyers have access to news, educational brochures, OAB actions and, mainly, models of petitions, studies and court decisions to assist lawyers and OAB Chapter Councils in defending the professional legal prerogatives available to *download* .

In addition, each Chapter may have Prerogatives Committees to assist the lawyer of the respective Member State of the federation. In this sense, we can mention as examples some excerpts from the Federal District Chapter and the Paraná Chapter of the Brazilian Bar Association, respectively:

***PREROGATIVES WITH NEW CALL CENTER AND FOLLOW-UP FROM START TO END: THIS IS OUR STRUGGLE<sup>1</sup>***

*In an unprecedented move, the Federal District Chapter of the Brazilian Bar Association constituted a special working group and mapped the functioning of 145 notary offices and offices in the courts with jurisdiction in the Federal District and in the higher courts. It found that 36.36% acted with closed doors for lawyers during the pandemic. This study was taken to each of the courts and gave rise to normative acts published by the Court of Justice of the Federal District and Territories (TJDFT, in Portuguese) and the Federal Regional Court of the 1st Region (TRF-1, in Portuguese).*

*Hence came the acts of regulation of virtual assistance by judges. 2020 was a tough year. But it was also the year in which the Federal District Chapter of the Brazilian Bar Association accentuated the fight against structural racism, against verbal and even physical aggressions that legal professionals faced, going far beyond the repudiation notes and grievances and taking measures with the internal affairs offices, the Brazilian National Justice Council and the Brazilian National Council of Public Prosecution.*

*In another sphere, but still on the issue of prerogatives, we were with the Association of Labor Lawyers of the Federal District (AAT/DF, in Portuguese) bringing together lawyers in a successful front for the resumption of face-to-face hearings in the jurisdiction of the Regional Labor Court of the 10th Region (TRT 10, in Portuguese).*

*The Federal District Chapter of the Brazilian Bar Association will remain intransigent whenever the lawyer has his/her prerogatives disrespected. It's a management commitment.*

***Lawyer has the right to consult closed records<sup>2</sup>***

*In response to a request from the Paraná Chapter of the Brazilian Bar Association, the General Court of Justice of Paraná issued a*

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<sup>1</sup> Available at: <https://oabdf.org.br/prerogativas/> . Accessed on: Nov. 24 2021.

<sup>2</sup> Available at: <https://prerogativas.oabpr.org.br/advogado-tem-direito-de-consultar-autos-conclusos/> . Accessed on: Nov. 24 2021.

*recommendation to a magistrate who had published an ordinance conditioning the examination of the case file concluded in its office to a written request. The magistrate, judge Lauro Augusto Fabrício de Melo, considered that there must be a balance, based on common sense, between lawyers and jurisdictional services. In the decision, the magistrate also requests that the magistrate promote the adequacy of item B of the service order, informing the magistrate within 15 days.*

*"In the same way, I recommend that the magistrate promote the necessary adequacy in Service Order No. 01/2013, to authorize that requests for view of the concluded records or requests for urgent processing may also occur upon request of the lawyers, whether verbal or written , because the search for the necessary procedural speed is not compatible with the excess of bureaucracy implemented by the aforementioned normative act", says the judge in an excerpt of the decision. [Click here for full access](#)*

*In the understanding of the vice president of the Paraná Chapter of the Brazilian Bar Association and president of the Chamber of Rights and Prerogatives of the Chapter, Cássio Telles, common sense should guide these situations. "The lawyer must not exaggerate in the exercise of the prerogative, at any time, requesting view of concluded records, without a justified reason, and the magistrate must also understand that the lawyer often needs to have access to the records for a variety of reasons. The lawyer with view upon written request only makes it difficult. There is no need to bureaucratize such simple issues," said Telles, recalling that many lawyers face delays in the return of the case files.*

The Brazilian Bar Association has no connection with organizations with similar functions in other countries or regions.

**8. To what extent has, the legislation and/or measures adopted in your country because of the Covid-19 pandemic, affected the exercise of the independence of the legal profession or security of lawyers. Please explain.**

Since 2016, the Brazilian New Code of Civil Procedure provides for the practice of procedural acts, confrontation, oral argument, personal testimony and testimony of witnesses who reside in a place other than the one where the process is processed by technological resource of real-time transmission of sounds and images or videoconferences. However , only with the Covid-19 pandemic was it possible to carry out entire hearings by these means, under the terms of [Resolution No. 330, of August 26, 2020, of the Brazilian National Justice Council.](#)

Thus, not being able to go to Forums and Courts, the lawyers continued to exercise their professional activity without any risk of contagion by the coronavirus, also ensuring their subsistence and maintenance of income in times of health crisis. Furthermore, given the impossibility for lawyers to deal with magistrates, the justice portals created the "Virtual Desk", which serves as a mechanism for direct access to the judicial units, implementing the provisions of article 7, item VIII, of Law No. 8,906/94.

**9. Please describe the measures and policies you would suggest to better protect and guarantee the free exercise of the legal profession.**

In January 2020, the law against abuse of authority came into force (Law No. 13,869/2019). As determined in its article 43, article 7-B was included in the Statute of the Legal Profession and of the Brazilian Bar Association, which says: "it is a crime to violate the right or prerogative of lawyers provided for in items II, III, IV and V of the *caput* of article 7 of this law", under penalty of imprisonment , from 3 (three) months to 1 (one) year, and fine. Furthermore, it is necessary to implement measures to enforce the law.