



Ordem dos Advogados do Brasil
Conselho Federal
Brasília - D. F.

Input for the next thematic report on safeguarding the independence of judicial systems in the face of contemporary challenges to democracy

By the Federal Council of the Brazilian Bar Association

The Constitution of the Federative Republic of Brazil of 1988, known as the "Civic Constitution", is, among other things, a political charter that values and materializes the social element, providing for the participation of civil society and politically important actors. It represents the historical milestone of the end of the authoritarian regime and the restoration of democracy. The Civic Constitution has consolidated the resumption of the right to counsel, the writ of *habeas corpus*, the fundamental rights, the separation of powers and the periodic elections.

The constitutional text expressly mentions the practice of law – the only autonomous professional activity with legal-constitutional ruling – as well as the Brazilian Bar Association (OAB), the entity for representation and regulation of lawyers.

The need to ensure the independence of the legal profession, allowing lawyers to operate freely without fear of reprisals, became evident during the period of persecution faced by the Brazilian Bar Association (OAB) under the military regime. This experience resonated in the constitutional protection of the legal profession. Moreover, it was essential to establish protective mechanisms to shield defenders from facing the same risks as their clients. This way, they could confront arbitrariness and resist those who seek to undermine the right to defense.

The legitimate practice of law, with independence and autonomy, is fundamental to ensure the principles of republic and democracy, foundational pillars of the Brazilian State. Whether in public or private practice, the legal profession is responsible for providing legal assistance and effecting judicial protection, being considered "function essential to justice" and "inviolable for their acts and manifestations in the exercise of the profession", under the terms of article 133 of the Federal Constitution of 1988.

The Brazilian Bar Association, in turn, is expressly mentioned in the Charter on 8 occasions¹, featuring various functions and duties, always serving the

¹Brazilian Federal Constitution

Article 93 A supplementary law, proposed by the Federal Supreme Court, shall provide for the statute of the judicature, observing the following principles:

[...]



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ultimate purpose of achieving democratic and participatory management, as recommended by the original Constituent Assembly.

Most of the provisions deal with the organization and composition of the Judiciary branch and justice organs, assigning to the Brazilian Bar Association (OAB) the duty to oversee the selection processes for entry into the judiciary, for the public prosecution, as well as for general counsel for the government. The OAB is also responsible for appointing members (lawyers) to participate in councils dedicated to regulating and supervising the performance of said institutions.

In addition to those functions, the OAB – by virtue of a constitutional commandment (article 103) – is one of the entities and authorities universally legitimized to file direct actions for declaration of unconstitutionality before the Federal Supreme Court (STF), the country's highest court responsible for safeguarding the Federal Constitution and solving controversies that arise from the application and interpretation of the legal rules recommended therein.

I – admission into the career, with the initial post of substitute judge, by means of a competitive civil-service entrance examination of tests and presentation of academic and professional credentials, with the participation of the Brazilian Bar Association in all phases, at least three years of legal practice being required of holders of a B.A. in law, and obeying the order of classification for appointments;

Article 103-B. The National Council of Justice shall be composed of 15 (fifteen) members appointed for a two-year term of office, being permitted one reappointment, according to the following criteria:

[...]

XII - two lawyers, nominated by the federal board of the Brazilian Bar Association;

[...]

Paragraph 6. The federal attorney general and the chairman of the federal board of the Brazilian Bar Association shall be competent to petition before the Council.

Article 129. The following are institutional functions of the Prosecution Office:

[...]

Paragraph 3. Admission into the career of the Prosecution Office shall take place by means of a competitive civil-service examination of tests and presentation of academic and professional credentials, ensuring participation by the Brazilian Bar Association in such examination, at least three years of legal practice being required of holders of a B.A. in law, and observing, for appointment, the order of classification.

Article 130-A. The National Council of the Prosecution Office is composed of fourteen members appointed by the president of the Republic, after their nomination has been approved by an absolute majority of the Federal Senate, for a two-year term of office, one reappointment being permitted, as follows:

[...]

V – two lawyers, nominated by the federal board of the Brazilian Bar Association;

[...]

Paragraph 4. The head of the federal board of the Brazilian Bar Association shall be competent to petition before the Council.

Article 132. The state and the Federal District prosecutors, organized in a career, admission into which shall depend on a competitive civil-service examination of tests and presentation of academic and professional credentials, with the participation of the Brazilian Bar Association in all of its stages, shall exercise judicial representation and judicial consultation for their respective federal entities.



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Given such important roles – and as the maximum representative of lawyers nationally – it is essential for the OAB to operate independently, detached from any governmental political interest. Above all, it must maintain autonomy in relation to the government, insofar as it is one of the main responsible for safeguarding the Democratic Rule of Law and the fundamental rights enshrined in the Constitution.

The country's Supreme Court has already recognized and validated this legal framework on several occasions, through rulings that affirmed the unique legal nature of the OAB, characterized by independence and autonomy (as stated in the Direct Action for Declaration of Unconstitutionality No. 3026). The Court has also confirmed the non-obligation for the OAB to submit to the control and oversight of the public audit courts, nor to any other external entity (Extraordinary Appeal No. 1182189).

The practice of law is, after all, an exercise of militancy, that is, a craft that always operates in defense of a cause or idea. For this very reason, lawyers are subject to the risks and challenges of dealing with sensitive issues that give rise to significant controversies. Cases related to human rights, environmental agenda, reproductive rights, among others, place the professionals responsible for the defense at the forefront of clashes and discussions.

No wonder, Ruy Barbosa, a noted Brazilian jurist and lawyer, stated that “in all free nations, lawyers constitute the category of citizens who exercise the most power and authority before their society”.

Federal Law no. 8.906/1994, called the Statute of the Legal Profession and of the Brazilian Bar Association, provides that the entity has as its purposes: defending the Constitution, the legal order of the democratic Rule of Law, the Human Rights, Social Justice; and fighting for the good application of the laws, for the quick administration of justice and for the improvement of culture and legal institutions.

The defense of lawyers' prerogatives is defending the guarantees of citizenship. For this reason, it is crucial to strengthen the prerogatives and rights of lawyers in the country, as well as all instruments that ensure the effective performance of these professionals, such as the right to freely use language, access to documents and evidence, the inviolability of work tools, the confidentiality of communication, the absence of hierarchy or subordination among lawyers, judges and members of the Public Prosecutor's Office. All should treat each other with mutual consideration and respect, among other rights listed in Federal Law 8.906/94 – the Statute of Lawyers and the Brazilian Bar Association (OAB).

The Federal Council of the OAB, one of its organs, concerned with the practice of its registered members, has established a specific sector dedicated to handling,



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receiving, and taking measures to uphold the prerogatives of the legal profession. Additionally, it has strengthened its National Prosecutor's Office of Prerogatives and the National Commission of Prerogatives, which work in collaboration with the 27 State Chapters to defend its members and promote the valorization of the legal profession.

The OAB System has held several meetings and cooperation agreements with governmental bodies in order to safeguard lawyers from any treatment that goes beyond cordiality, while also preventing acts of violence. The OAB actively demands genuine respect for the legal profession by pursuing legal actions to support any violated lawyers. This involves seeking proper investigation by authorities, the punishment of offenders, reparations, in addition to being formally repaired when offended in the course of their professional duties.

It is evident that the challenges become even greater when considering social markers such as gender and race. The representation of black lawyers is still relatively small compared to the percentage of black individuals in the Brazilian population. Furthermore, women lawyers are more susceptible to discrimination and unequal treatment in corporate and institutional environments².

The Brazilian Bar Association adopts a gender-critical perspective in seeking equality of rights for female lawyers, who represent over 51% of the total number of lawyers in Brazil. Specific prerogatives of women lawyers serve as a policy of intervention and reparation for the asymmetries resulting from gender relations that affect the working relationships of women lawyers. In this sense, Federal Law No. 13,363/2016 established rights and guarantees for the woman lawyer who is pregnant, breastfeeding, adopting or giving birth, as well as for male lawyers who become fathers.

The advancements enable women lawyers to reconcile motherhood with the practice of law, effectively promoting gender equity and ensuring that no limitations are imposed on their professional activities. Consequently, specific provisions guarantee, for example, the suspension of procedural deadlines for 30 (thirty) days, starting from the date of childbirth or adoption approval, preferential treatment in oral arguments and hearings

²Correio Braziliense. Lawyers reflect on racism and report discrimination in the Judiciary. December 24, 2023 Available at: <<https://www.correiobraziliense.com.br/brasil/2023/12/6775042-advogados-refletem-sobre-racismo-e-relatam-discriminacao-no-judiciario.html>>. Accessed on January 18, 2024
Folha de São Paulo (2013) Black lawyers make headway in law firms, but inequality prevails. April 23, 2023. Available at: <[Federal Council of the Brazilian Bar Association – Department of Legal Advice](https://www1.folha.uol.com.br/poder/2023/04/advogados-negros-avancam-em-escritorios-mas-desigualdade-predomina.shtml#:~:text=H%C3%A1%20cerca%20de%201%2C34,Somados%2C%20eles%20representam%2033%25.>.>. Accessed on January 18, 2024</p></div><div data-bbox=)



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for all pregnant, lactating, adopting, or postpartum female lawyers, and the right to access a daycare or suitable space for the baby.

In addition, the OAB system, as already mentioned, is comprised of several "commissions", at both the national and regional levels. These commissions are organs of the entity with different objects and purposes, serving as forums for discussion and study promoted by lawyers. Their goal is to strengthen not only the rights and guarantees of the legal profession but also those of the entire population. The commissions also serve as spaces for the generation of content and the formulation of guidelines within the specific themes addressed by each commission. As an example, we can mention the following commission. Examples include commissions on human rights, the defense of the rights of children and adolescents, constitutional studies, the rights of people with disabilities, the promotion of equality, women in law, among others.

With regard to racial identity, the National Commission for the Promotion of Equality has advanced in important issues and affirmative actions for black legal professionals. It continues to work towards the realization of effective and widespread participation in the OAB system, with the support of the entire legal community. This acknowledgment reflects the awareness of the commitment made and the solemn oath to defend the Constitution, the legal order of the Democratic Rule of Law, human rights, and social justice—commitments that cannot be associated with racial or gender discrimination.

Conclusively, the work of the OAB and of the legal profession transform the meanings of democracy, access to justice and human rights. The intersection between these fields engages with the prerogatives of the legal profession, whose right to defense is central to the figure of the legal profession, expanding the social grammar through which new rights are created. By advocating for the prerogatives of the class, the merely corporatist dimension is overcome. Democracy, as a form of social and economic inclusion, does not exist without access to justice, with the lawyer playing a crucial role in bridging that gap.

The civil society, in claiming the importance of the client's right to confidentiality, such as the inviolability of law offices and communications, functional independence, and the dignified treatment of the legal profession within the justice system, among other aspects, safeguards its own citizenship and limits possible state abuses. The creation of new human rights, as part of a struggle for human dignity and the acknowledgment of human suffering in official documents, intersects with the work of lawyers and the foundational mission of the OAB.