

JFBA/42/21
December 6, 2021

**Submission to the report on protection of lawyers
by Japan Federation of Bar Associations**

December 6th, 2021

Japan Federation of Bar Associations

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 favour of their clients in a free and independent manner.

The Japanese Constitution guarantees fundamental human rights and stipulates that the arrested and the detained shall have the right to seek defense counsel and such causes must be disclosed in open court in the presence of their counsel (Article 34). It also stipulates the right of defendants to seek defense counsels in all criminal cases, and that the State shall appoint defense counsels in cases where defendants do not have sufficient financial resources (Article 37, para.3).

In criminal procedure, the law guarantees suspects and defendants the right to appoint defense counsels and to communicate confidentially with their defense counsels, as well as the right of defense counsels to refuse testimony or seizure, which further embodies the guarantee of fundamental rights under the Constitution.

In 2020, in relation to the Carlos Ghosn case, despite the fact that the defense attorneys explicitly exercised their right to refuse seizure, the prosecutors raided the law office. They stayed in the law office, ignoring the attorneys' repeated requests to leave. They broke the locks on the door in the law office and filmed the attorneys' office rooms where the case files were kept. The Japan Federation of Bar Associations (JFBA) issued a Statement protesting that such conduct from the public prosecutor's was an illegal act that infringed the right of defense (January 31, 2020).

The human rights treaty bodies have pointed out several issues including that attorneys are not allowed to attend interrogations, that audio/video recording is limited to some criminal cases, and that the discovery system was inadequate. It should also be noted that there was no court-appointed defense counsel system for the arrested before pre-trial detention, and that only small legal fees were paid to court-appointed defense counsels for their representation.

In order for defense counsels to assist suspects and defendants independently of the investigative authorities, the right of confidential communication is stipulated in the law, which is also guaranteed by the Constitution.

However, the investigative authorities still infringe on such rights. They sometimes violate the right to independent and fully confidential communication, and obstruct the exchange of documents or confidential communications between death row inmates and their retrial counsels. The use of electronic equipment during interviews between suspects/defendants and their counsels is prohibited in principle.

In civil and administrative cases, there are also issues including the following:

- when clients are represented by attorneys in some administrative cases, the government agencies in charge require a notice to or permission by the agencies before consulting with their attorneys;
- the discovery system is not sufficiently institutionalized;
- the protection of confidentiality of communications between clients and their lawyers is insufficient; and
- the lack of the right of attorneys to be present in administrative investigation procedures such as deportation procedures for foreign nationals or hearings for investigations of violations of the Antimonopoly Act.

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.

The Attorney Act stipulates that all attorneys shall register with a local bar association and the national bar association (JFBA).

Bar associations are autonomous bodies and independent from the government.

As part of their activities, bar associations seek actions, including criminal proceedings, by government authorities, in the case of obstruction of professional activities, violence, and intimidation by government agencies or private individuals against lawyers, and support the relief measures for attorneys who have been targeted.

In addition, the right to discipline attorneys shall be vested exclusively in the local bar associations and the JFBA, and they conduct the disciplinary proceedings independently.

Other than the bar associations, there are no institutions who have public authorities to protect lawyers, such as independent state human rights institutions.

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.

As mentioned in the answer to question No. 1, several institutional problems exist, including but not limited to;

- the absence of the right of defense counsels to attend interrogations in criminal proceedings;
- the limited audio/video recording of criminal interrogations;
- the insufficient discovery system;
- the lack of a state-appointed defense counsel system for the arrested; and
- the inadequacy of the protection of confidentiality of communications between clients and the lawyers in civil, administrative, and criminal cases.

In addition, obstruction of professional activities, violence, and intimidation towards attorneys by government agencies or private persons can only be addressed through general criminal complaint or civil litigation, but it is often time consuming and the police and courts do not respond effectively.

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?

As mentioned in the answer to question No. 2, attorneys are obliged to register with the JFBA, which is the national bar association in Japan. The JFBA is legally and practically independent of the state.

The JFBA has established special committees which conduct research, publish policy recommendations, and advocate to protect the activities and legal practice of attorneys.

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?

The local bar associations and JFBA have disciplinary committees respectively that consists of attorneys as well as outside experts, which investigates and examines the misconduct and violations of professional regulations by attorneys upon receiving a request for disciplinary action from any person, including the bar association to which the said attorney belongs, and disciplinary action is taken where necessary.

Disciplinary proceedings shall be initiated by a local bar association, and any person subject to a disciplinary action may file an objection with the JFBA.

Following the results of the JFBA's review, an appeal may be filed with the court for its

revocation.

In disciplinary actions by the bar associations in 2020, three "disbarment" decisions were issued, which effectively disqualify the attorneys from conducting professional activities.

The JFBA does not have statistics on the number of lawyers who were subject to criminal proceedings.

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.

Please refer to the Attachment for cases of attacks on lawyers.

In addition to the cases outlined in the attachment, there have been numerous cases of interference in defense activities by investigative authorities in criminal cases and interference in visits and communications between detainees and lawyers in penal detention facilities and administrative detention facilities. There have been repeated judicial decisions that this interference by the investigative authorities and penal detention facilities was illegal.

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.

- (1) There are committees on the obstruction of attorneys' professional duties, criminal defense, establishment of the right of confidential communication, protection of confidentiality of communications between clients and the lawyers, and the protection of human rights that conduct research to protect the independence and duties of legal professionals in their respective fields, and are working with all bar associations/JFBA to lobby the state agencies and general public.
- (2) In response to some serious cases of attacks on attorneys, presidents of bar associations and/or the JFBA publicize statements and/or the associations publicize resolutions.

(3) The JFBA is a member of numerous international legal organizations, such as the International Bar Association (IBA), the Law Association for Asia and the Pacific (LAWASIA), and the Union Internationale des Avocats (UIA). The JFBA proposes recommendations to them, participates in joint initiatives, and promotes their activities to the JFBA members.

(4) On the occasion of the 14th United Nations Conference on Crime Prevention and Criminal Justice (Kyoto Congress) that was held in 2021, the JFBA adopted an opinion paper which was addressed to the governments of foreign countries, and conducted advocacies based on the paper. The JFBA also organized a joint event together with international legal organizations and the Delegation of the European Union to Japan. In addition, the JFBA adopted and jointly published a statement on the independence of attorneys with the international legal organizations and bar associations of foreign countries.

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.

The COVID-19 pandemic has had a significant impact on the practice of attorneys, including difficulties in visiting detainees, postponement of trial dates, and difficulties in providing legal counseling services. This has also made it difficult for the great number of people, who were affected by the COVID-19 and faced legal issues in their life, employment or healthcare, to receive appropriate support from attorneys.

The bar associations/JFBA requested and corrected the COVID-19 measures taken by the state institutions including the prisons, detention centers, and courts that were deemed unjust.

However, these measures did not directly threaten the independence of the legal profession or the safety of attorneys.

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

(1) The State must approve and strengthen the establishment and activities of independent bar associations authorized to protect attorneys under national law.

(2) The State must implement legal education in school as well as public awareness campaigns on the human rights and the role of attorneys protecting those rights.

(3) The adoption of a legally binding international convention requiring the State to protect the role and duties of attorneys and to establish an international implementation monitoring body.

(4) Measures Required in Japan

i) The establishment of an independent state human rights institution with public authority.

ii) The introduction of individual communication procedures stipulated in the United Nations Conventions on Human Rights.

iii) The addition of "violation of the treaty" as a ground for the Supreme Court to accept a final appeal in the Code of Civil and Criminal Procedure.

iv) The clear establishment by law, in all criminal, administrative and civil procedures, the protection of confidentiality of communications between clients and the lawyers.

Attachment “Cases of Protection of the Functions of Lawyers in Japan”

The following cases, which threatened the functions of lawyers, occurred in Japan. Regarding such cases, the JFBA or each bar association publicized statements by their respective Presidents.

In the statements, the UN Basic Principles on the Role of Lawyers were often referred.

(1) Unjust interference with lawyers representing criminal cases involving the believers of the Aum Shinrikyo cult¹

(2) Unjust interference with the defense counsels representing the accused in a case of a murder of a mother and child in Hikari-shi city (sending letters of intimidation to bar associations and mass media)²

(3) Cases of assault, intimidation or murder targeting lawyers by the counterparty, etc. of the cases

- i. October 1997: Case of a murder of a wife of lawyer³
- ii. September 2004: Case of injury of a lawyer⁴
- iii. September 2007: Case of murder of a staff of a law office⁵
- iv. June 2010: Case of a murder of a lawyer⁶⁷
- v. November 2010: Case of murder of a lawyer⁸⁹¹⁰
- vi. February 2011: Case of damage to a law office building¹¹

¹ Statement Requesting the Understanding of the Role of Lawyers - Criminal Cases involving Believers of the Aum Shinrikyo (JFBA) (June 28, 1995)

https://www.nichibenren.or.jp/document/statement/year/1995/1995_5.html

² Statement Requesting the Understanding of the Role of Lawyers and Seeking to Ensure Freedom of Defense Activities (JFBA) (July 11, 2007)

<https://www.nichibenren.or.jp/document/statement/year/2007/070711.html>

³ Statement on Obstruction of Duties of Lawyers (Dai-Ichi Tokyo Bar Association) (October 18, 1997)

⁴ Statement on Obstruction of Duties of Lawyers (Yokohama Bar Association (Currently Kanagawa Bar Association. The same shall apply hereinafter)) (October 13, 2004)

<https://www.kanaben.or.jp/profile/gaiyou/statement/2004/post-38.html>

⁵ Statement on Obstruction of Duties of a Member of the Osaka Bar Association and the Case of Murder of a Clerical Staff (Osaka Bar Association) (September 14, 2007)

https://www.osakaben.or.jp/web/03_speak/seimei/seimei070914.pdf

⁶ Statement on Obstruction of Duties of Lawyers (Yokohama Bar Association) (June 2, 2010)

<https://www.kanaben.or.jp/profile/gaiyou/statement/pdf/20100602kaityodanwa.pdf>

⁷ Statement upon the Decision of Criminal Case of Obstruction of Duties (Yokohama Bar Association) (February 28, 2011) <https://www.kanaben.or.jp/profile/gaiyou/statement/2010/post-112.html>

⁸ Statement on the Case of Murder of a Member of Akita Bar Association (Akita Bar Association) (November 4, 2010) <https://akiben.jp/statement/2010/11/post-10.html>

⁹ Statement Requesting Proper and Fair Investigations (Akita Bar Association) (November 9, 2010) <https://akiben.jp/statement/2010/11/post-24.html>

¹⁰ Statement Requesting Reexamination of the Response of Akita Prefectural Police to the Case of Murder of the Late Lawyer, Hirotaka Tsuya (Akita Bar Association) (February 22, 2019) <https://akiben.jp/statement/2019/02/post-133.html>

¹¹ It is mentioned in the Statement on the Case of Obstruction of Duties of Lawyers in Ehime Prefecture (JFBA) (March 4, 2011) <https://www.nichibenren.or.jp/document/statement/year/2011/110304.html>

- vii. March 2011: Case of violation of Act on Punishment of Physical Violence and Others against an employee of a law office¹²
- viii. May 2012: Case of attempted murder of a lawyer¹³
- ix. August 2013: Case of injury of a lawyer¹⁴

(4) Case of obstruction of duties of a lawyer on the Internet

(5) Unjust filing for disciplinary action

- i. Calling for filing of disciplinary action against the defense counsels representing the case of murder of a mother and child in Hikari-shi city and the fact that a claim for damages against such act of calling was not approved by the Supreme Court. ¹⁵
- ii. Filing for disciplinary action raised by more than 800 people against all members of 21 Bar Associations. ¹⁶

(6) In relation to the case that the defendant on bail escaped abroad, despite the fact that the defense attorneys explicitly exercised their right to refuse seizure, the prosecutors raided the law office. They stayed in the law office, ignoring the attorneys' repeated requests to leave. They broke the locks on the door in the law office and filmed the attorneys' office rooms where the case files were kept. ¹⁷

¹² Statement on the Case of Obstruction of Duties of Lawyers in Ehime Prefecture (JFBA) (March 4, 2011)
<https://www.nichibenren.or.jp/document/statement/year/2011/110304.html>

¹³ Statement on the Case of Attempted Murder of a Member of the Fukuoka Bar Association (Fukuoka Bar Association) (May 28, 2012) https://www.fben.jp/suggest/archives/2012/05/post_243.html

¹⁴ Statement on Obstruction of Duties of Lawyers (Dai-Ichi Tokyo Bar Association) (December 2, 2015)
https://www.ichiben.or.jp/opinion/opinion2015/post_308.html

¹⁵ Statement upon the Judgment of the Supreme Court on the Claim for Damages against the Act of Calling for Filing for Disciplinary Action against the Defense Counsels Representing the Case of Murder of a Mother and Child in Hikari-shi city (JFBA) (October 17, 2011)
<https://www.nichibenren.or.jp/document/statement/year/2011/111017.html>

¹⁶ Statement on Filings for Disciplinary Action against a Number of Members of Bar Associations throughout Japan (JFBA) (December 25, 2017)
<https://www.nichibenren.or.jp/document/statement/year/2017/171225.html>

¹⁷ Comment in Protest of the Search Conducted at a Law Office (JFBA) (January 31, 2020)
<https://www.nichibenren.or.jp/document/statement/year/2020/200131.html>
<https://www.nichibenren.or.jp/en/document/statements/20200131.html>