

# Research Report

30th Anniversary of the Basic Principles on the Role of Lawyers  
- Role played by the Basic Principles and Prospects for the Future -

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Japan Federation of Bar Associations

Working Group for the Congress 2020

Committee on International Human Rights

Board of Committees on International Affairs

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## I. Role played by the Basic Principles and Challenges

### 1. Formulation of the Basic Principles and the Role for Protection of Human Rights

#### (1) Formulation of the Basic Principles

Basic Principles on the Role of Lawyers mean international standard rules for lawyers adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba in 1990 (hereinafter the United Nations Congress on the Prevention of Crime and the Treatment of Offenders shall be referred to as “Congress”) (hereinafter referred to as “Basic Principles”).

Preparation work for the Basic Principles was made based on a resolution of the role of lawyers made at the 7th Congress (held in Milan, Italy in 1985) and the Basic Principles were adopted by a resolution made at the 8th Congress (1990).<sup>1</sup> The resolution requested the Member States to disseminate the Basic Principles in each country and incorporate the Principles into laws and policies. Further, it “invites Member States to inform the Secretary General every five years, beginning in 1992, of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into domestic legislation, practice, procedures and policies, the problems faced in their implementation at the national level and assistance that might be needed from the international community, and requests the Secretary General to report thereon to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders” (Paragraph 5) and “calls upon the Committee on Crime Prevention and Control to consider, as a matter of priority, ways and means of ensuring the effective implementation of this resolution” (Paragraph 8). In addition, the Committee on Crime Prevention and Control, the predecessor of Commission, was expected to function as a monitoring organ over all norms and guidelines of the United Nations in the field of criminal justice.<sup>2</sup>

In addition to the above Basic Principles, the “Basic Principles on the Independence of the Judiciary” were adopted by the 7th Congress and the “Guidelines on the Role of Prosecutors” were adopted by the 8th Congress.

As the background for the adoption of international standard rules for respective roles and independence with respect to the actors involved in justice, it can be

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<sup>1</sup> Basic Principles on the Role of Lawyers, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>2</sup> 8th Congress Report, “Liberty & Justice” Vol. 42, No. 2, p. 197-198

pointed out that there was an intention to clarify the position of legal professions and protect them from unjust persecution as democratization movements advanced since the 1980's in former socialist countries, mainly in East Europe and the legal professions who played leading roles in such movements suffered from persecution in one place or another.

After the 8th Congress when the Basic Principles were adopted, the function of the Congress to adopt new standards and norms was lost. That is, as a result of granting authority to participate in decisions on crime prevention and criminal justice policies of the United Nations to the Commission on Crime Prevention and Criminal Justice established in 1992 (hereinafter referred to as "Commission"), Congress was positioned as an advisory organ on crime prevention and criminal justice programs of the United Nations.<sup>3</sup>

Against this background, at the Congress after the adoption of the Basic Principles, discussions on the Basic Principles and follow-ups have not been continued. The Basic Principles are no longer mentioned in resolutions or declarations.

However, even to this day, government and nongovernmental forces have continued to hinder the functions of judges and lawyers, necessitating the need for monitoring the implementation of standards and norms for judges and lawyers and for developing such standards and norms.

## (2) Role to Protect Human Rights

On the other hand, it seems that the United Nations may have delegated the function of protecting judges and lawyers to the field of human rights protection.

The International human rights law guarantees equal rights to all persons. Protection of the functions of lawyers is guaranteed as a right so that everyone may receive assistance from a lawyer in order to realize the right to receive a fair trial and defend themselves in criminal proceedings (Universal Declaration of Human Rights, Article 10 and Article 11 and International Covenant on Civil and Political Rights (ICCPR) Article 14).

The independence of lawyers has been considered as important along with the independence of judges in order to perform their functions to protect the human rights of all persons through justice.

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<sup>3</sup> Keiichi Urata "Activities of the United Nations in the Field of Crime Prevention and Criminal Justice" *Horitsu no Hiroba*, Vol. 48, No. 9, p. 12-7

“Vienna Declaration and Programme of Action,” adopted by the World Conference on Human Rights in Vienna in 1993, declared with respect to the independence of judges and lawyers under the judicial system for protection of human rights that “Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies, and especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, is essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.”

The former United Nations Commission on Human Rights adopted in 1994 a resolution on establishing “Special Rapporteurs on the Independence of Judges and Lawyers” and a resolution was approved by the Economic and Social Council. The former United Nations Commission on Human Rights nominated five Special Rapporteurs, organizing and expanding its duties. The Special Rapporteur determines the existence of violations with reference to the principles set forth in the Basic Principles in the report on evaluation of each case for which a complaint related to the functions of lawyers was made. That is, as a system of protecting the functions of lawyers, there is a system of Special Rapporteurs on the independence of judges and lawyers of the United Nations Human Rights Council and the system depends on the Basic Principles adopted by the Congress to which tasks other than human rights are delegated.

Protection of the functions of lawyers was mentioned in the periodical State’s report review by human rights treaty bodies and individual communication cases thereto, where the Basic Principles were often referenced. As examples thereof, there were recommendations by the Human Rights Committee to Belarus, Libya, Azerbaijan, findings of violation of Nigeria by the African Commission on Human and Peoples’ Rights and recommendations to China by the Committee against Torture.

### (3) Necessity for a Monitoring System on Implementation

As stated above, the Basic Principles have been considered as international standards and norms to protect the functions of lawyers. The Basic Principles were adopted by the Congress addressing crime prevention and criminal justice of the United Nations, but follow-ups on how the Basic Principles were complied with and

implemented by respective countries around the world have not been sufficiently carried out at the Congress and Commission since the adoption thereof.

Now implementation of the Basic Principles is monitored by Special Rapporteurs on the Independence of Judges and Lawyers established under the United Nations Human Rights Council, and treaty bodies also mention the Basic Principles with respect to obstruction, etc., related to the functions of lawyers.

We should consider specifying and improving the Basic Principles corresponding to current circumstances, thirty (30) years after the adoption thereof. We sincerely desire that discussions will be activated, aiming to enhance the protection of the functions of lawyers at the Congress 2020.

## 2. Future of the Basic Principles - To Develop the Role of Bar Associations

In order to ensure the realization of the Basic Principles, it is important that activities of bar associations, comprised of lawyers as members, are protected. In the resolution adopted by the 7th Congress held prior to adoption of the Basic Principles, it is stated, “bar associations and other professional organizations of lawyers have a vital role and responsibility to strive to protect and defend their members against improper restrictions or infringement, as well as to uphold their professional ethics.”<sup>4</sup> Recently, the Special Rapporteurs on the independence of judges and lawyers of the United Nations Human Rights Council made the following recommendations in a report on bar associations (2018).<sup>5</sup>

- The protection of individual members of bar associations, particularly in situations where they may not be able to adequately defend themselves, should be at the core of the mandate of any bar associations.
- It is the duty of all State authorities to respect the role of bar associations in protecting their members, so as to ensure that they are able to carry out their professional activities without any intimidation, hindrance, harassment or improper interference.

In the Basic Principles, with respect to the role of bar associations, professional associations of lawyers are mentioned in Principle 24 and Principle 25, however, clear and adequate principles to protect members are not indicated. That is, while

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<sup>4</sup> ‘Seventh United Nations Congress on Prevention of Crime and the Treatment Offenders,’ A/CONF.121/22/Rev.1, p. 87.

<sup>5</sup> ‘Report of the Special Rapporteur on the independence of judges and lawyers’ A/73/365, 5 September 2018, paras. 105, 106.

indicating “to protect the professional integrity of members” as one of the roles of professional associations of lawyers, the Basic Principles only state that professional associations of lawyers shall “cooperate with government.” Considering that the functions of lawyers are often threatened by government, the Basic Principles must include that bar associations should have a role to protect members against government and that such authority of bar associations shall be guaranteed by laws.

### 3. Future of the Basic Principles - Road to Enactment of Hard Law

In democratic nations based on the rule of law, lawyers have an important role in that they are the core of judicial administration as intermediaries between citizens and courts and they ensure the public trust in courts. On the other hand, it is also important that clients trust the ability of individual lawyers and these principles have been confirmed by the European Court of Human Rights.

On January 24, 2018, the Parliamentary Assembly of Council of Europe (PACE) adopted a proposal for review of the convention on the role of lawyers. PACE states that the existing minimum standards for lawyers to ensure the freedom to perform legal professional functions do not have any binding force, but are expected to give practical effect on various principles arising from the obligations having binding force, including the European Convention on Human Rights. PACE considers that it is necessary to strengthen the legal status of its recommendations, including the above minimum standards and to establish regulations with legally binding force and a monitoring organ to implement these standards and regulations in order to protect the freedom to perform legal professional functions, in consideration of situations in which harassment, intimidation and attacks against lawyers have risen in some Member States. PACE requested the Committee of Ministers draft and adopt a European Convention on the Profession of Lawyers.<sup>6</sup>

On January 31, 2019, the Committee of Ministers of the Council of Europe decided to launch a feasibility study on drafting a European Convention on the Profession of Lawyers following the above recommendation of PACE that requested such a document.

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<sup>6</sup> [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/Newsletter/CCBEINFO71/EN\\_newsletter\\_71.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Newsletter/CCBEINFO71/EN_newsletter_71.pdf)

Study items are as follows.<sup>7</sup>

- a. identifying the possible added value of drafting a convention, taking account of the protection provided by other Council of Europe instruments, in particular the European Convention on Human Rights and the case-law of the European Court of Human Rights,
- b. identifying and assessing the possible alternatives to drafting a convention, including, for instance a new recommendation or guidelines,
- c. defining, if appropriate and depending on the conclusions under items a and b, a tentative outline of the personal and material scope of a convention,
- d. drawing up, if appropriate and depending on the conclusions under items a and b, a tentative outline of draft terms of reference for a committee of experts responsible for drafting the convention, and advising on appropriate working methods.

After consultations with related committees, the Committee of Ministers stressed their concerns about “the threats, in certain national contexts, to the safety and independence of lawyers as well as to their ability to perform their professional duties effectively.”<sup>8</sup> The Committee of Ministers also stated that “lawyers play a vital role in the administration of justice and that the free exercise of the profession of lawyer is indispensable to the full implementation of the fundamental right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights.”<sup>9</sup>

In April 2019, experts were appointed to investigate the above feasibility study. The study over a six (6) month period was to be completed by the end of 2019. Responding to the study, the Parliamentary Assembly of the Council of Europe adopted recommendations to the Committee of Ministers in October, 2020 ‘to proceed with the drafting and adoption of a legally-binding instrument as a priority’<sup>10</sup>

The Council of Bars and Law Societies of Europe (CCBE) actively supports the

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<sup>7</sup> “The case for drafting a European convention on the profession of lawyer” Parliamentary Assembly Recommendation 2121 (2018) (Reply adopted by the Committee of Ministers on 30 January 2019 at the 1335th meeting of the Ministers’ Deputies), 31 January 2019, para.6.

<sup>8</sup> *Ibid.*, para.3.

<sup>9</sup> *Ibid.*,

<sup>10</sup> Parliamentary Assembly, ‘The principles and guarantees of advocates,’ Recommendation 2188 (2020), 23 October 2020, para.3. <https://pace.coe.int/en/files/28820/html>

above movement.<sup>11</sup>

## II. Role and Challenges of the Basic Principles in Japan

### 1. Role that the Basic Principles Have Played in Japan

#### (1) Cases of Protection of the Functions of Lawyers in Japan

Basic Principles play the role of international standards and norms to prevent governmental interference with the functions of lawyers and prevent the government from disregarding interference by third parties.

Basic Principles provide for protection of the functions of lawyers under Paragraph 16 through Paragraph 22.<sup>12</sup>

After adoption of the resolution on the Basic Principles, the following cases, which threatened the functions of lawyers, occurred in Japan. Regarding such cases, the JFBA or each Bar Association announced statements by their respective Presidents and informal opinions of their respective Presidents.

In the statements of the respective Presidents and informal opinions of the respective Presidents, the Basic Principles were often mentioned.

[1] Unjust interference with lawyers in criminal cases involving believers of Aum Shinrikyo.<sup>13</sup>

[2] Unjust interference with a group of lawyers in the case of murder of a mother and child in Hikari-shi (sending letters of intimidation to bar associations and mass media)<sup>14</sup>

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

i) October 1997: Case of murder of wife of lawyer<sup>15</sup>

ii) September 2004: Case of assault of lawyer<sup>16</sup>

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<sup>11</sup> <https://www.ccbe.eu/news/ccbe-info-details/article/ccbe-info-79-february-2019/>

<sup>12</sup> Citing the paragraphs cited in the statements, etc., for reference.

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

<sup>13</sup> Statement of President requesting the Understanding of the Role of Lawyers - Criminal Cases involving Believers of Aum Shinrikyo (JFBA) (June 28, 1995)

<sup>14</sup> Statement of President requesting the Understanding of the Role of Lawyers and Seeking to Ensure Freedom of Defense Activities (JFBA) (July 11, 2007)

<sup>15</sup> Statement on Obstruction of Duties of Lawyers (Dai-Ichi Tokyo Bar Association) (October 18, 1997)

- iii) September 2007: Case of murder of staff of law office<sup>17</sup>
  - iv) June 2010: Case of murder of lawyer<sup>18</sup><sup>19</sup>
  - v) November 2010: Case of murder of lawyer<sup>20</sup><sup>21</sup><sup>22</sup>
  - vi) February 2011: Case of damage to a law office building<sup>23</sup>
  - vii) March 2011: Case of violation of Act on Punishment of Physical Violence and Others against staff of law office<sup>24</sup>
  - viii) May 2012: Case of attempted murder of lawyer<sup>25</sup>
  - ix) August 2013: Case of assault of lawyer<sup>26</sup>
- [4] Case of obstruction of duties of a lawyer on the Internet.<sup>27</sup>
- [5] Unjust claim for disciplinary action
- i) Claim calling for disciplinary action against a group of lawyers in the case of murder of a mother and child in Hikari-shi and the fact that a claim for damages against such an act of calling for the above-mentioned claim was not admitted by the Supreme Court.<sup>28</sup>
  - ii) Claim for disciplinary action raised by more than 800 people against all members of 21 Bar Associations<sup>29</sup>

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<sup>16</sup> Statement of President on Obstruction of Duties of Lawyers (Yokohama Bar Association (Currently Kanagawa Bar Association. The same shall apply hereinafter)) (October 13, 2004)

<sup>17</sup> Statement on Obstruction of Duties of a Member of Osaka Bar Association and Case of Murder of a Clerical Staff (Osaka Bar Association) (September 14, 2007)

<sup>18</sup> Informal Opinion of President on Obstruction of Duties of Lawyers (Yokohama Bar Association) (June 2, 2010)

<sup>19</sup> Informal Opinion of President upon the Decision of Criminal Case of Obstruction of Duties (Yokohama Bar Association) (February 28, 2011)

<sup>20</sup> Informal Opinion of President in the Case of Murder of a Member of Akita Bar Association (Akita Bar Association) (November 4, 2010)

<sup>21</sup> Statement of President to request proper and fair investigations (Akita Bar Association) (November 9, 2010)

<sup>22</sup> Statement of President 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)

<sup>23</sup> It is mentioned in the Statement of President in the case of obstruction of duties in Ehime Prefecture (JFBA) (March 4, 2011)

<sup>24</sup> Statement of President in the case of obstruction of duties in Ehime Prefecture (JFBA) (March 4, 2011)

<sup>25</sup> Statement of President in the case of attempted murder of a member of Fukuoka Bar Association (Fukuoka Bar Association) (May 28, 2012)

<sup>26</sup> Informal Opinion of President in the case of assault of a lawyer (Osaka Bar Association) (August 13, 2013)

<sup>27</sup> Statement of President on obstruction of duties of lawyers (Dai-Ichi Tokyo Bar Association) (December 2, 2015)

<sup>28</sup> Statement of President upon the judgment of the Supreme Court on the claim for damages against the act of calling for the claim for disciplinary action against a group of lawyers in the case of murder of a mother and child in Hikari-shi (JFBA) (October 17, 2011)

<sup>29</sup> Informal Opinion of President on claims for disciplinary action against a number of members of Bar Associations throughout Japan (JFBA) (December 25, 2017)

[6] Search and entry, etc., in a law office

In January 2020, public prosecutors, etc., of the Tokyo District Public Prosecutors Office conducted a search at the law office of lawyers in charge of a case of a suspected crime. Although the lawyers exercised the right to refuse confiscation pursuant to Article 105 of the Code of Criminal Procedure, prosecutors, etc., entered the law office from the back door without permission, stayed for an extended period of time, destroyed the lock of the door of the law office and video-recorded the inside of the office room of lawyers where the records of cases, etc., were stored.<sup>30</sup>

(2) Current Problems with the Basic Principles

In the Basic Principles, the independence of lawyers is not specified. In order to ensure the free exercise of functions free from interference and also with a symbolic meaning, we believe it is necessary to specify the independence of the functions of lawyers.<sup>31</sup>

While acts of interference of the counterparty of the case tend to be physical violence against lawyers and people around them (families and office staff, etc.), acts of interference of third parties other than the above tend to concentrate on obstruction of duties of a specific lawyer by an unspecified number of or anonymous individuals such as libel and slander on the Internet and a claim for disciplinary actions without justifiable reason, and in the latter cases in particular, it is difficult to respond by individual lawyers. In the Basic Principles, however, the authority and obligation of bar associations to protect lawyers from the above improper interference are not specified.<sup>32</sup> We think it is necessary to specify such point.

2. Confidentiality of Consultations between Clients and Lawyers

Basic Principles require governments to ensure, together with other rights, that all detained persons can receive visits, communication and consultation provided by a lawyer in “full confidentiality” as special protection in criminal justice (Principle

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<sup>30</sup> Informal Opinion of President protesting the search of a law office (JFBA) (January 31, 2020)

<sup>31</sup> Refer to Yasushi Higashizawa, “Basic Principles on the Role of Lawyers - Role played in Protection of Human Rights and Challenges” (Meiji Gakuin University, Graduate Law School, Law Review, No. 24, 2016, p. 53)

<sup>32</sup> Refer to “Basic Principles on the Role of Lawyers - Role played in Protection of Human Rights and Challenges” above

8). Considering that such protection of confidentiality is based on trust relationships between lawyers and their clients, it requires respective governments to recognize and respect confidentiality, which extends to “all communication and consultation between lawyers and their clients based on a professional relationship,” whether clients are detained or not or assistance of lawyers is provided in criminal or civil cases (Principle 22). Further, the Nelson Mandela Rules (revised United Nations Standard Minimum Rules for the Treatment of Prisoners: 2015) strive to protect confidentiality by providing for that detainees may consult on any legal matter with a legal adviser or legal assistance provider of their own choice under conditions where facility staff will not be able to hear (Rule 61 of the Rules).

It is still being disputed even today in many criminal and administrative trials concerning the interpretation of related domestic laws whether such protection of confidentiality is adequately ensured under the Japanese legal system and legal practices. There have been frequent disputes over the following cases: with respect to consultations between a suspect/defendant and a lawyer in criminal proceedings, cases where the administrator of detention facilities attempted to restrict bringing in and use of electronic devices by a lawyer; investigators attempted to obtain details of consultations by interrogating a suspect/defendant after consultations or by search and seizure of the records and notes of consultations; and the administrator of detention facilities conducted censorship of letters between a detained suspect/defendant and a lawyer exceeding necessity as a result of detention. Other than ordinary criminal proceedings, there are cases disputed over consultations, where the administrator of detention facilities makes a detention officer witness consultations with a lawyer when a death row inmate makes a petition for retrial or a detained person brings litigation over the treatment in the detention facilities. In addition, regarding Principle 22, which protects the confidentiality of communications with lawyers, there exists in Japan no law or system specifically protecting confidentiality.

Under such circumstances, in Japan, the legal system and practices should be continually improved in order to implement confidentiality of consultations between suspects/defendants or clients in general and lawyers, which is protected under the Basic Principles.

### III. Role and Challenges of the Basic Principles in the Asia-Pacific Region

## 1. Status on the Independence of Lawyers in the Asia-Pacific Region

The independence of lawyers is significantly threatened by interference with and attacks on the performance of their functions. Recently, a severe judgment handed down on Ms. Nasrin Sotoudeh, a famous human rights lawyer in Iran, shook the world's legal profession. According to reports, defending protesting women, including a woman who was charged for taking off her veil which she was forced to wear, resulted in imprisonment for 38 years and 148 lashes.<sup>33</sup>

Interference and attacks related to the functions of lawyers come not only from state authority. Such social groups as religious and ethnic extremists, influential politicians and opponents, including corporations and media also conduct interference and attacks related to the functions of lawyers. Accordingly, the Basic Principles specify the obligations of the state that it not only ensures its organs shall not engage in improper interference with or attacks on lawyers, but also ensures the performance of their professional functions without being subject to such interference or attacks (Principle 16).

However, interference and attacks on lawyers have continued for these last 30 years since the adoption of the Basic Principles. Special Rapporteurs on the independence of judges and lawyers of the United Nations Human Rights Council reported in their recent annual report that, out of reports made to respective states during the seven (7) months between August 2015 and February 2016, “approximately 12 reports contained arguments on the infringement of rights and the independence of lawyers, including murder, attack, threats, intimidation, harassment and detention and unjust restrictions on their business.”<sup>34</sup> CCBE indicates in its report of 2019, “CCBE has sent more than 150 letters in support of approximately 800 persecuted lawyers over the previous three (3) years” and the targeted countries include China, Turkey, Iran, the Philippines, India, Azerbaijan, Russia, Ukraine and Kazakhstan in order of the number of cases and many of these countries are from Asia.<sup>35</sup>

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<sup>33</sup> “Husband of Iranian human rights lawyer says she is sentenced to 38 years, 148 lashes” REUTERS, March 11, 2019. Refer to statement of each international organization of lawyers. International Bar Association's Human Rights Institute (IBAHRI), March 15, 2019, International Association of Lawyers (UIA), March 16, 2019 and The Law Association for Asia and the Pacific (LAWASIA), May 9, 2019.

<sup>34</sup> A/HRC/32/34(2016), paras. 10-12.

<sup>35</sup> The CCBE, “Threats to the Legal Profession,” February 18, 2019, pp. 3-4.

## 2. Responses of Bar Associations in the Asia-Pacific Region related to the Independence of Lawyers

The Law Association for Asia and the Pacific (LAWASIA), which includes member bar associations and individual lawyers in each country in the Asia-Pacific region, has issued statements of concern since 2015 about the status of lawyers in such countries as China, Turkey, Pakistan, the Philippines, Maldives and Iran.<sup>36</sup>

## VI. Conclusion

As reported above, the Basic Principles adopted at the 8<sup>th</sup> UN Congress in 1990 has played a great role in international community as fundamental principles to guarantee human rights of individuals and to ensure rule of law in the society. However, despite the Basic Principles, attacks and interferences against lawyers are being committed by governments and social groups which deem the pursuit of duties by lawyers uncomfortable, or they are left untouched by governments.

Such a situation on the Basic Principles remains as similar in Japan as found in many statements of bar associations. Particularly in Japan, it still lacks laws and systems to ensure confidentiality of consultation between clients and lawyers.

In addition, in many countries in Asia and the Pacific surrounding Japan, attacks against lawyers are being repeated on grounds of the pursuit of their duties.

What are required against such a situation are, as stated in the Opinion of the JFBA adopted April 18, 2019, firstly international mechanism to monitor implementation of the non-legally binding Basic Principles, and secondly expansion of Basic Principles to cover and guarantee roles of bar associations to protect lawyers. Those improvements would be advanced significantly by adoption of a treaty on role of lawyers with legally binding nature, which is now prepared at Council of Europe.

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<sup>36</sup> Refer below for each statement.  
<https://www.lawasia.asn.au/resources-publications/advocacy-documents>.

## Basic Principles on the Role of Lawyers

*Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990*

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safe guards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper

restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest, The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

#### Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.
4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

#### Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.
6. Any such persons 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 offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a

lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

#### Qualifications and training

9. 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.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

#### Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

(c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

#### Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad;

and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

#### Freedom of expression and association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

#### Professional associations of lawyers

24. 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.

25. 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.

#### Disciplinary proceedings

26. 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.

27. 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.

28. 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.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

Opinion on Matters to Be Included in the Kyoto Declaration at the 14<sup>th</sup>  
United Nations Congress on Crime Prevention and Criminal Justice

April 18 2019

Japan Federation of Bar Associations

The Japanese Federation of Bar Associations (the "JFBA") urges representatives of the participating countries of the 14th United Nations Congress on Crime Prevention and Criminal Justice (hereinafter referred to as the "Kyoto Congress") held in 2020 to include the following in the Kyoto Declaration to be adopted in Congress:

1 It shall be reaffirmed that the roles of lawyers, key players in criminal justice, are essential to the promotion of human rights, the rule of law and culture of lawfulness, and the maintenance and development of criminal justice in harmony with sustainable development, and the following objectives shall be addressed:

(1) Make it known once again that all States, including the judiciary, should comply with the Basic Principles on the Role of Lawyers adopted at the 8th Congress (hereinafter referred to as the "Basic Principles") as the minimum standards of criminal justice in all States.

(2) Consider international mechanisms to ensure that basic principles are observed in each State, in consultation with international professional associations of lawyers and national bar associations.

2 The Basic Principles shall be expanded to include that one of the roles of bar associations and other professional associations of lawyers in fulfilling the roles of the lawyers set forth in the preceding paragraph is to protect and defend its members against inappropriate restrictions or violations to lawyers, and that the roles of such bar associations and other professional associations of lawyers should be protected by national law.

3 In order to realize the 2030 Agenda for Sustainable Development (hereinafter referred to as the "2030 Agenda") in the field of criminal justice, the following objectives shall be addressed:

(1) It shall be the duty of the State to realize a society in which a person who commits a crime can reintegrate themselves into society.

(2) In all penal institutions, treatment of detainees will be realized in compliance with the "United Nations Standard Minimum Rules for the Treatment of Prisoners" (hereinafter referred to as "the Nelson Mandela Rules").

- (3) Forced labour in prisons should be abolished.
- 4 The death penalty system should be abolished as soon as possible in the international community. In addition, the implementation of the death penalty should be suspended until the death penalty system has been abolished.
- 5 Effective civil participation shall be promoted in education and in all sectors of society to create a society resilient to crimes, and the following shall be addressed:
  - (1) To develop awareness-raising programmes for thinking about specific challenges and issues through dialogue and discussion in light of legal values such as human rights and the rule of law, and to promote the culture of lawfulness.
  - (2) Promote educational practices for coordinating and resolving social conflicts through mechanisms of dialogue and community participation.

#### Reason for the opinion

##### 1 Reason for point 1 of the opinion

###### (1) Background for the Adoption of the Basic Principles and Its Necessity

The Basic Principles were adopted at the 8th Congress in 1990 to recognize the lawyers' vital roles in ensuring rights in a Criminal Procedure approved for all persons (Principles 1 and 4), and to support the efforts of UN Member States to promote and ensure the proper role of lawyers (preamble of the Basic Principles). Thereafter, the Basic Principles have become international standards for protecting the activities of the lawyers and have been applied as norms by the UN Human Rights Council's Special Rapporteur on the independence of judges and lawyers, as well as in human rights treaty bodies and regional human rights treaty bodies. In the Doha Declaration adopted at the 13th Congress in 2015, the objective is "to ensure that our criminal justice system is effective, fair, humane and accountable, and to provide access to justice to all" (the first sentence of the preamble), and the establishment of the roles of the judicial actors, including lawyers, continues to be one of the key objectives of the Congress.

###### (2) Present state of operation of the Basic Principles (reason for opinion 1(1) and (2))

Despite the adoption of the Basic Principles, there still exist situations in which, as a result of discharging lawyers' functions, governments interfere with lawyers improperly with intimidation, hindrance, and harassment and further impose sanctions such as arrest, prosecution or deprivation of qualification, or situations in which governments fail to safeguard lawyers adequately where their security is threatened as a result of discharging their functions.

In order to eliminate such situations, it is necessary to disseminate the Basic Principles to internal agencies of all States, and consideration should be given to establishing a monitoring mechanism for implementation not only in the human rights organs, but also in the criminal justice organs of the United Nations.

## 2 Reason for point 2 of the opinion

To protect lawyers from undue interference by governments and societies, bar associations and other professional associations of lawyers can play effective roles. In this regard, a resolution was adopted at the 7th Congress in 1985 prior to the adoption of the Basic Principles, which included "aware[ness] that bar associations and other professional associations of lawyers have a vital role and responsibility to strive to protect and defend their members against improper restrictions or infringements, as well as to uphold their professional ethics."<sup>1</sup>

However, the basic principles adopted did not include such roles that bar associations as such should play.

Thirty years after the adoption of the Basic Principles, the roles of the lawyers and bar associations for the protection of human rights of all people and expectations to them are increasing. In particular, in order to promote the culture of lawfulness approved in the Doha Declaration, and to realize the rule of law and equal access for all to justice, which is one of the goals of the 2030 Agenda (16.3), the Basic Principles need to develop further, incorporating these goals.

At present, the Council of Europe is drafting conventions to more effectively protect duties of lawyers in Europe, and international professional associations of lawyers with which the JFBA is affiliated with, such as the Council of Bars and Law Societies of Europe (CCBE), the Union Internationale Des Avocats (UIA), and the International Bar Association (IBA), are also involved in the drafting of these conventions<sup>2</sup>

Therefore, this proposal is in line with the movement of those international professional associations of lawyers.

## 3 Reason for point 3 of the opinion

(1) Reintegration into society of a person who committed a crime (reason for opinion 3(1))

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<sup>1</sup> Seventh Congress Resolution '18. Role of Lawyers'(A/CONF.121/22/Rev.1, Fourth paragraph of the preamble (pp. 87-8)

<sup>2</sup> 'CCBE contribution on the proposed European Convention on the Profession of Lawyer 15/09/2017'  
<https://rm.coe.int/ccbe-contribution-european-convention-profession-lawyer-20170915-eng/168078f2f6>  
<https://rm.coe.int/ccbe-contribution-european-convention-profession-lawyer-20170915-eng/168078f2f6>

In the introductory part, the 2030 Agenda declares: "As we embark on this great collective journey, we pledge that no one will be left behind. Recognizing that the dignity of the human person is fundamental, we wish to see the goals and targets met for all nations and peoples and for all segments of society. And we will endeavour to reach the furthest behind first" (paragraph 4). The Nelson Mandela Rules also state that "Those purposes [to protect society against crime and to reduce recidivism] can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life" (Rule 4). Therefore, the social reintegration of a person who has committed a crime is an important duty of States.

(2) Necessity of compliance with the Nelson Mandela Rules (reason for opinion 3(2))

On May 22, 2015, the Commission on Crime Prevention and Criminal Justice adopted the Nelson Mandela Rules. However, treatment in penal institutions has not been consistent with the Nelson Mandela Rules, and compliance with the rules has not been realized in many countries. Among the 17 goals of the 2030 Agenda, measures should be taken at penal institutions, which could be said to be the most cruel environments, for 1 (No Poverty), 2 (Zero Hunger), 3 (Good Health and Well-Being), 4 (Quality Education), 5 (Gender Equality), 6 (Clean Water and Sanitation), 8 (Decent Work and Economic Growth), 10 (Reduced Inequalities), and 16 (Peace, Justice and Strong Institutions).

(3) Abolition of Forced Labor in Prisons (Reason for Opinion 3(3))

Article 6 of the International Covenant on Economic, Social and Cultural Rights stipulates that "States Parties to the present Covenant recognize the right to work, and take appropriate measures to safeguard this right, including the right of everyone to the opportunity to earn a living by work which he freely chooses or accepts." The 2030 Agenda also sets out the term "to eradicate forced labour" as Target 8.7. In addition, the above-mentioned Nelson Mandela Rules warn against aggravating the suffering inherent in such a situation (Rule 3), and the Doha Declaration also looked forward to action based on Mandela Rules (Paragraph 6). The JFBA has already adopted the "Declaration Calling for Reform of the Penal System Including Abolition of the Death Penalty" at its Conventions on the Protection of Human Rights held on October 7, 2016, and has called for the abolition of forced labour. Therefore, it should be declared

with the goal of eliminating forced or compulsory labour.<sup>3</sup>

#### 4 Reason for point 4 of the opinion

The penal system should be "treated with the respect due to their inherent dignity and value as human beings" (Rule 1 of the Nelson Mandela Rules), even if it is taken into account from the viewpoint of responding to crimes and general prevention and special prevention, and should be conducive to the social inclusion and reintegration of offenders into a free society as well as to the restoration of their humanity.

However, the system of the death penalty completely excludes those who committed the crime from society, and it is against the object of the appropriate punishment as mentioned above.

In the international community as well, the number of countries abolishing the death penalty system has been increasing, and 142 countries (71% of the world total) have abolished the death penalty, including de facto abolishing countries that have not implemented the death penalty for more than 10 years.

While in the past Congress has adopted a number of instruments on the treatment of prisoners since its first meeting, many statements in support of the abolition of the death penalty and moratorium were made in the previous 13th Congress, in particular by the European Union.

The points above-mentioned, therefore, should be included in the Declaration of the Kyoto Congress in order to make it clear that the death penalty system is contrary to object and essence of the appropriate punishment, and that the abolition of the death penalty system needs to be a "standard or norm of the international community."

#### 5 Reason for point 5 of the opinion

The Kyoto Congress's overall theme is "Advancing crime prevention, criminal justice and the rule of law: towards the achievement of the 2030 Agenda," and it lists, as one item of its agenda, "Considering Social, Educational, and Other Related Measures in Accordance with the Doha Declaration" to promote the rule of law. In order to create a society resilient to crimes, it is necessary to eliminate fragmentation by encouraging effective civil participation and social inclusion in all sectors, and as a concrete measure, an approach based on education is important.

The Doha Declaration states that it "support[s] the development and implementation of consultative and participatory processes in crime prevention and criminal justice in order

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<sup>3</sup> JFBA's Declaration Calling for Reform of the Penal System Including Abolition of the Death Penalty (October 7, 2016)

to engage all members of society" (the main text of paragraph 10) and calls for the development of "awareness-raising programmes to convey key values based on the rule of law" and "to promote the management and resolution of social conflict through dialogue and mechanisms of community participation" (paragraphs (b) and (d)). "Legal-related education" encourages people to consider of specific challenges and issues through dialogue and discussion from the perspective of human rights and the rule of law, contributes to the elimination of social divides through social inclusion, and contributes to the realization and evolution of the Doha Declaration. Therefore, the Kyoto Declaration should incorporate the necessity of educational practices through the development of awareness-raising programs, dialogue, and community participation mechanisms.