



**FRIEDRICH NAUMANN
FOUNDATION** For Freedom.

POLICY PAPER

RESILIENCE AGAINST INJUSTICE

Lawyers as Human Rights Defenders

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ANALYSIS

Imprint

Publisher

Friedrich-Naumann-Stiftung für die Freiheit
Truman-Haus
Karl-Marx-Straße 2
14482 Potsdam-Babelsberg
Germany

/freiheit.org

/FriedrichNaumannStiftungFreiheit

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Date

October 2023

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1. Preface

Pitting yourself against a state apparatus that suppresses freedom and fundamental rights is an incredibly courageous thing to do – especially in states that are in the process of dismantling or are already utterly disregarding any adherence to the principles of the rule of law. All over the world, courageous lawyers are facing the choice between their own well-being, professional integrity and commitment to their clients.

Lawyers are the most important professionals for denouncing human rights violations and defending human rights. In doing so, they encounter enormous challenges. They stand up to judicial delaying tactics and harassment while representing their clients in court and demanding equal rights. They themselves become the focus of persecution and attacks. Lawyers are threatened, are forced to surrender their licences, are interrogated on flimsy grounds or even arbitrarily arrested; they can end up in prison for a long time or seek refuge in exile. Lawyers are among the most persecuted of professions.

Autocratic regimes deliberately seek to prevent lawyers from acting in accordance with the rule of law, but they also seek to destroy the trusting relationship they have with their clients, especially if the latter are themselves persecuted opposition politicians, journalists or activists. What is worrying is the trend towards initiating legal proceedings against lawyers even on account of their defence work.

For lawyers, too, the UN Declaration on Human Rights Defenders marks an achievement for the human rights protection system. Like other professional human rights defenders, lawyers have the right to lodge complaints and petitions against individuals and state bodies before national and international judicial authorities and institutions. The Declaration grants human rights lawyers the right to participate in public hearings and to form an opinion about compliance with national law and applicable obligations under international law. It is intended to grant lawyers not the privilege, but rather the right to provide professionally qualified legal assistance to their clients.

Human rights lawyers will always be at the forefront of the struggle for fundamental and human rights under the rule of law. This makes it all the more important to consider them as human rights defenders and to support them in their work against governments that are hostile to freedom and have contempt for human rights. Therefore, it is our duty to recognize that they are often the last hope for persecuted opposition activists, journalists and cultural workers. This is their purpose and will be discussed in this paper.

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2. Introduction

Lawyers and legal professionals are essential to effectively eliminate and remedy human rights violations. They provide different forms of legal protection, such as legal aid, victims' representation or meaningful access to justice. Indeed, the human rights character of their core work, when lawyers uphold the rule of law, defend journalists, human rights activists or opposition politicians, etc. marks them as human rights defenders. Not every lawyer is a human rights defender. Only those who individually or in association with others strive for the protection and realization of human rights and fundamental freedoms at the national and international levels could be considered human rights defenders. Indeed, they are described as human rights defenders by virtue of their actions in promotion of human rights (UN Declaration on Human Rights Defenders, 8 March 1999, Article 1; OHCHR, n.d.).

In repressive regimes as well as in conflict situations, the legal profession is one of the most persecuted professions worldwide for this very reason. Thus, human rights lawyers often face enormous challenges in performing their duties, i.e. they are accused of being traitors, threatened, denied access to the courtrooms, arbitrarily arrested, sent to prison and exile, or put under constant surveillance and societal isolation. This in turn leads to a social stigmatization of human rights lawyers and to them being depicted as troublemakers, both in authoritarian regimes and when there is armed conflict or severe civil unrest; but today also increasingly in emerging and long-established democracies.

This policy paper addresses the pressing issues that lawyers as human rights defenders are confronted with in their fight for the promotion of human rights and the protection of fundamental freedoms. The analyses of this paper are largely inspired by the discussions of the international conference organized by the Friedrich Naumann Foundation for Freedom and the German Bar Association (Deutscher Anwaltverein) on 8 December 2022 in Berlin. The conference focused on lawyers as human rights defenders in conflict situations, in Europe, as well as the emerging protection at the European level. Participants included among others, Dr. Marco Buschmann, Federal Justice Minister of Germany, well-known human rights lawyers, policy makers. Ms. Margaret L. Satterthwaite, the UN Special Rapporteur on the Independence of Judges and Lawyers, addressed the audience via a pre-recorded statement. Nevertheless, the analyses and conclusions in this paper exclusively belong to the authors.¹

Lawyers who are threatened in the course of their work need protection. The only step forward is to consider them as a vulnerable professional group. What are the existing and emerging international protection mechanisms? Apart from this introduction, the paper includes four sections: 1) lawyers in conflict situations;² 2) Defending Civil and Political Rights in Europe; 3) the Emerging European Convention on Legal Profession; 4) Concluding Remarks and policy recommendations.

3. Lawyers in Conflict Situations

The situation of human rights lawyers in conflict situations is particularly precarious. Lawyers are significantly dependent on the circumstances in which they work. It is not without reason that they are sometimes called seismographs of the rule of law. This is even truer, of course, when the situation in their countries of origin deteriorates dramatically – often due to the outbreak of war and civil unrests. Hence, in situations of war and civil unrests, the legal profession is one of the most persecuted professions in the world. This is mostly due to the basic constellation in such situations. The legal profession stands for the rule of law and for the effective protection of human rights. Such a commitment makes them targets for attacks of different forms that can roughly be defined within three categories: (1) attacks by state actors on lawyers themselves; (2) attacks by non-state actors, e.g. criminals, on lawyers themselves, against whom the state no longer provides effective protection; (3) attacks by state actors on lawyers' organisations and associations.

3.1. Attacks on lawyers by state actors

Attacks on the legal profession by the governments or by direct state actors include, among others, threats, intimidation, interference in the exercise of their professional activities, arbitrary arrests, prosecutions and even killings. In states where the admission to the bar is already controlled by the state, this also includes the threatened loss of admission to the bar or the actual withdrawal of admission and disbarment. Oftentimes, lawyers are equated with their clients – anyone who defends a suspected terrorist or dissident is himself a terrorist or dissident. All this occurs in particular to restrict or prevent the defence of critics of the regime, but also because the legal profession is seen as an ally of the „enemies“ and “foreign agents“ which in itself is part of the intimidating measures.

The labelling of human rights lawyers as „foreign agents“ can currently be observed in Russia, where numerous lawyers'

¹ The Authors would like to sincerely thank André Kutschmann, Dr. András Kádár and Dr. Moritz Moelle for their invaluable comments and recommendations in reviewing this paper.

² For the purpose of this paper, Russia is considered to be a conflict country, due to the fact that Russia is involved in international conflicts, such as its aggressive invasion of the Ukraine as well as the violations it commits in Abkhazia and South Ossetia.

organizations that advocate for human rights are faced with this allegation. This does not ban them; they can officially continue to work. However, the stigmatization undermines their credibility in the eyes of the public and the authorities no longer cooperate with them. In this way, it is made clear to the lawyers that they are „on the other side“ from the state’s point of view. Consequently, affected lawyers end up being threatened, arrested or they can be interrogated at any time.

There are numerous examples of conflict countries where lawyers are attacked or controlled by state actors. In Afghanistan, since the takeover of power by the Taliban, lawyers who have previously campaigned for the rule of law and human rights – especially women’s rights – are now considered enemies. Taliban members target lawyers, especially women lawyers, for representing victims in cases where the Taliban members were convicted. Lawyers are also being persecuted by the de facto authorities for their past work in upholding the rule of law by providing access to justice for their fellow citizens, especially women, and by protecting their fundamental rights and freedoms. With their lives and those of their families in great danger, many Afghan lawyers have been forced to either flee the country or go into hiding. Women lawyers are particularly targeted, making their daily survival a challenge, as result of the Taliban’s ban of women working and education. The rights of women, including female lawyers, are increasingly restricted, leaving them in an untenable situation (Lehmann, 2023). It is therefore fair to conclude that their (past and present) activities obviously imply a constant threat to their physical safety. The same applies to female judges and prosecutors.

3.2. Attacks on lawyers by non-state actors

Apart from direct attacks by the state or its institutions against lawyers, persecution, torture, and threat to the lives of lawyers by non-state actors often occur in conflict countries as well as in authoritarian states due to a lack of sufficient state control over the whole territory. In many cases, however, the state simply does not take action against attacks targeting lawyers, such as by extremist groups or criminal organizations. In other words, the state no longer provides effective protection against such violations. It is not far-fetched to assume that in certain situations, the state itself may actually be condoning the attacks.

These attacks differ in form to some extent from those by state actors – obviously, detention, disbarment or other sovereign acts are not possible here. Non-state actors often use even more brutal violence; these include, among others, disappearances of lawyers, murders, sexual violence, etc. Such attacks by non-state actors pose a major – and even greater – actual threat to human rights lawyers. Particular consideration must be given to the fact that the climate of impunity encourages the perpetrators to commit further and even more violent attacks.

Again, one example is Afghanistan, where in addition to the threat of the Taliban in power, another major risk for the legal profession is that the prisons were opened after the fall of the previous government. Dozens of Taliban fighters were in captivity until August 2021, all of whom were released by the Taliban after they took power. In addition to their own detained fighters, the Taliban released thousands more from prisons such as the central prison of Pul-e-Charkhi. It can be therefore concluded that thousands of convicted criminals are now free and threaten lawyers who, among other things, by representing victims of domestic violence and similar offences participated in their earlier proceedings.

3.3. Attacks on bar associations

Support for human rights lawyers is further weakened when not only lawyers are personally attacked, but also lawyers’ organisations are often put under immense pressure (or even banned). What is meant here, is not the above-mentioned disbarment of an individual lawyer, but attacks on the independence of the bar associations as such. Even in some autocratic or totalitarian regimes, an independent and self-organized legal profession provides an effective shield against attacks.

Here, too, a tragic example is the violent takeover of power by the Taliban in Afghanistan in 2021. The Afghanistan Independent Bar Association (AIBA) was dissolved immediately afterwards and all Afghan lawyers lost their license overnight. Later on, armed Taliban supporters stormed the AIBA main office in Kabul. The organization’s highly sensitive databases containing addresses, case records and lawyers’ involvement with international human rights organisations fell into the hands of the Taliban. Before the Taliban took power, the AIBA had more than 6,000 members, including around 1,500 women. The main tasks of the AIBA were the admission and regulation of the legal profession, the promotion of quality and equal opportunities in the legal profession, as well as education and training lawyers. AIBA also promoted the rule of law, social justice, fundamental rights, judicial independence and democratic values. In particular, it promoted the role of female criminal defence lawyers and the defence of the rights of victims of violence against women and children (Day of the Endangered Lawyer, 24 January 2023). Most lawyers now live in exile. Those who are still in the country are usually in imminent danger. In January 2023, the president of the former AIBA opened an exile office in Brussels, Belgium.

It is worthwhile mentioning that bar associations may constitute a real political influence in crisis countries, which cannot easily be overcome, even by autocrats or dictators. As such, they often represent one of the few remaining opposition voices in the country; sometimes even after a de facto ban.

For example in Afghanistan, after the dissolution of AIBA, the remaining lawyers successfully argued that the law on the registration of lawyers did not violate Sharia or its principles, so after some delays, a significant amount of (male) lawyers have now been successfully re-registered. Despite these difficult circumstances, they have arguably achieved successes (Lehmann, 2023).

The examples of the legal profession's resistance to state abuses are a source of pride and unity in many conflict driven countries, even if they work from exile. It is therefore significant to gather their stories and make them known. Because of their professional experiences, lawyers also know about the necessary changes and improvements that a system needs to find a way out of the crisis. However, to mobilize these lawyers, there is a need for resources and protection. Therefore, the support by the international community is particularly important.

4. Defending Civil and Political Rights in Europe

Human rights defenders and lawyers in Europe play a crucial role in defending civil and political rights, as well as minority rights, both inside and outside the courtrooms. They protect the rights of citizens against illiberal regimes and enforce national, European and international human rights laws, especially regarding the mechanisms provided within the framework of the European Convention of Human Rights (ECHR), such as the European Court of Human Rights (ECtHR). In other words, lawyers in Europe are an integral part of the society upholding the rule of law and democratic values, not only at national, but also international level.

Recent developments in a number of European countries nonetheless have already endangered the invaluable contribution of lawyers into the above-mentioned mechanisms. The emergence of the illiberal governments and populists super-majority within the national parliaments has given birth to a number of legal and political developments that has a significant impact on the work of these human rights defenders as well as directly impacts the rule based system as a whole. These aspects will be discussed below.

4.1. Legal reforms to rule by law

One of the challenges that human rights lawyers, and judges, in a number of European countries, such as in Poland and Hungary, face, is the reform of the existing laws and to that effect the justice system that guarantees the protection of human rights defenders in general and lawyers and judges in particular. Having a majority within the parliaments enables populist governments to introduce new laws or amend the existing ones. A majority within the parliament does not automatically lead to democratic practices and an application of the rule of law. The healthy operation of a democracy requires that the laws adopted by the parliament should guarantee human rights, taking, for example, minority rights into account too. Such an operation also limits the executive interference in the legal and judicial issues.

Prominent law reforms introduced by some illiberal countries have destructive implications not only on the system itself, but also on the work of human rights lawyers: First, on the institutional level, this affects the legal and judicial organs that enforce the laws and provide checks and balances within the whole system. This has to a larger extent hindered the implementation of the decisions of the European courts, such as the ECtHR or the European Court of Justice (ECJ). For example, in 2017, the Polish parliament introduced a reform to the judicial system that added two disciplinary chambers to the Supreme Court and started punishing judges who did not want to cooperate with the government in following its populist agenda. The government further started arbitrarily transferring lower court judges to different departments within the judicial system who did not agree with their populist policies (Duncan & Macy, 2021). Secondly, fundamental changes into the administration of justice, e.g. transferring judges from one court to another one, as well as access to their clients and information have left lawyers with less trust in the system.

Illiberal legal reforms not only affect the judicial system itself, but also the independent bar associations, which are essential to the protection of lawyers. The reform of the bar association in Turkey, which was implemented in July 2020, can be cited as an example. It was pushed through by the Turkish government against massive protests from the legal profession and had a negative impact on the progressive, government-critical bars in Istanbul, Ankara and Izmir. The aim of the reform was to further divide the legal profession through establishment of new government friendly bars to reduce the political influence of the existing independent bar associations in the long term. The law thus served the very purpose of bringing the legal profession in Turkey in line with the government, another bitter setback for the rule of law in Turkey (Human Rights Watch, 2020). Nevertheless, the example of Turkey also shows how strong the position of independent bar associations can still be even in crises – a considerable factor in supporting colleagues under threat.

It is fair to conclude that law reforms in some countries have severely interfered with the independence of judges and lawyers, e.g. in the form of arbitrary disciplinary procedures, and have led to a dysfunctional system of checks and balances that is fundamental to the implementation of the rule of law and the democratic values that constitute the foundation of the European community.

4.2. Strategic litigation and hate campaigns

According to the Law and Media Association, a Turkish non-governmental organization that defends journalists, lawyers and human rights activists in Turkey, dozens of defence lawyers, judges and prosecutors have been subject to strategic lawsuits that in turn in some cases have led to arrests, lawyers being imprisoned and even tortured (Ok, 2022).

Strategic Litigation against Public Participation (SLAPP) is another challenge against the work of human rights defenders and among them human rights lawyers. Lawsuits filed by powerful public officials against lawyers and journalists who express a critical position on an issue of political interest or social significance have gained tremendous weight in Turkey. Systematic patterns of litigation against lawyers including accusations of tax fraud, civil suits, accusations of sharing information about the government, insulting the head of the state, etc. are among the tools used against the legal profession not only in Turkey but also in other countries such as Russia, and Belarus.

As mentioned in the previous section, weakening lawyers' associations and imposing disciplinary measures against judges have also put individual lawyers at a greater risk of distrust in the system. There is obviously the need for protection for lawyers at the European level. The already emerged European best practices establish a protection system, though prone to improvement. The measures provide a two-layer protection for the judges: Firstly, any procedures should be subject to independent review. Lawyers and judges associations play a pivotal role in such reviews; and secondly, the right to appeal any decision about the legal profession (UN Basic Principle, 1985; Recommendation R. (2000)21).

In some countries, the fact that populists lead the parliamentary majority has already resulted in such developments to the detriment of the independence of lawyers' associations via the introduction of new laws, leaving lawyers without any protection against political pressure. For example in Belarus, many lawyers are struggling to safeguard the basic rights of their clients, such as providing legal aid or access to prisons. The countries bar controlled by the government cancels the licenses of human rights lawyers.

Due to the changes at the national level, such as an inclination toward authoritarianism, European principles on the protection of human rights lawyers are violated. Judges who try to uphold the common European human right norms are accused of being spies and foreign agents. It is therefore not only important to put pressure on the countries via European institutions to respect their commitment toward common European democratic values, but also raising awareness is equally important to fight the existing stigma and systematic defamation of human rights defenders.

A pattern of such stigmatization, which has devastating impact on the good work of human rights defenders and lawyers, is targeting them via hate speech. In Poland, huge billboards are placed on roads and public places, calling judges thieves (García-Sayán, 2017). This creates a negative public image of judges, which results in a lack of trust and confidence in the legal profession. Human rights lawyers have also been subject to public attacks on social media, which damages the perception of their impartiality. This has even taken the form of false accusations and smear campaign cases by the governments on social media. In Turkey, for instance, the government controls the internet and when there is a political trial, attacks and smear campaigns against lawyers and judges begin. In some instances, when an important decision is made in promotion of the human rights of political prisoners, the access to the internet will be shut down by the government to avoid this news from reaching the public. Fighting disinformation as well as new rules of criminalizing the stigmatization and smear campaigns should be on the top of the European agenda to improve.

5. The Emerging European Convention on the Protection of the Legal Profession

The situation of lawyers in conflict situations, as well as in some critical states in Europe shows that human rights defenders who are challenged or threatened in the exercise of their profession need protection themselves. Understanding them as a profession at risk is only the first step forward. A look at the international rules for the protection of the legal profession shows that they appear to be insufficient, especially since the existing principles and best practices are non-binding, such as the UN Basic Principles on the Role of Lawyers or the recommendations of the Committee of Ministers of the Council of Europe on the free exercise of the legal profession (Basic Principles on the Role Lawyers, 1990). Moreover, there is a lack of effective monitoring and evaluation mechanisms for the existing (soft law) principles.

5.1. Substantive legal requirements for a binding convention

Considering the statements above, the plans to establish a Convention on the protection of the legal profession at the Council of Europe is a promising step ahead. At the moment, a working group within the Council of Europe (Committee of experts on the protection of lawyers, CJ-AV) is drafting the text of the Convention, which will subsequently have to be adopted. There are already some promising developments: First of all, it has been agreed that the new instrument is to be drafted as a convention – thus legally binding. Furthermore, according to the current status, the Convention is to be open for signature by non-member States of the Council of Europe. Yet, the text of the convention is still to be agreed upon, within regular meetings of the CJ-AV, followed by consultations with states and other stakeholders. The final Convention is not to be expected before 2024.

There are some key issues that should be addressed by the convention. One key question is the scope of the possible protection, i.e. who should be protected by the convention? All lawyers deserve and require the same degree of protection, regardless of who their clients are, because they protect the fundamental rights of their clients and not their motives or personal actions, a simple but crucial fact that must be emphasized.

Another key element is the protection of bar associations. As outlined in previous sections, independent bar associations play a key role in protecting lawyers' integrity and independence. This is precisely why authoritarian governments often target bar associations. The independence of bar associations is therefore a very important aspect that should play a key role in this Convention, especially concerning admission procedures and disciplinary proceedings. Here the independence should be considered both institutionally of the bar association as well as that of the lawyers individually.

With regard to the verbal, physical or other kind of attacks by non-state actors on lawyers, further requirements arise for a convention binding on parties. The question is how the Convention can effectively address subtle or covert attacks on the legal profession or the state's failure to intervene against attacks by third parties. An obligation for states to take action against such attacks is therefore essential (Art. 9 para. 4, Draft Convention).

Another essential point is the confidentiality of communication between client and lawyer. Highlighting this issue in an international convention would help to raise awareness at the international level that confidentiality does not only apply in certain situations, but must apply in all situations of communication between client and lawyer. In other words, confidentiality covers the entire lawyer-client relationship.

Finally, actual access of the lawyers to the clients and the proceedings must also be protected. This seems to be self-evident in many (democratic) countries; however, what options do victims of illegal pushbacks at the EU's external borders have to consult a lawyer in this regard? Questions as such are pivotal for an effective protection of not only lawyers, but also their clients whom they represent.

5.2. Effectiveness of a binding convention

Perhaps an even more important question with regard to a binding convention is that of the effective enforcement of its provisions. The best option would of course be a court with jurisdiction over the convention. However, in view of the existing international possibilities, this is obviously difficult to achieve. The Draft Convention does not foresee an individual complaint mechanism, which further sharpens the debate for the existence of an enforcement body.

At the same time, the monitoring mechanism currently under discussion seems to be weak, but may still be useful. This mechanism actually can be effective in promoting the protection of lawyers. Very effective evaluation and monitoring mechanisms have been developed over time; for example, within the Council of Europe's Group of States against Corruption (GRECO). These mechanisms function, because even authoritarian states usually want to present themselves as law-abiding states. This means that they are afraid of causing themselves significant criticism within the reporting process. It is also for this purpose that monitoring mechanisms can actually be very effective instruments to enforce certain values without a judiciary.

6. Conclusion and Recommendations

The recent developments against human rights lawyers are not only alarming for their own security and protection, but also for the system of international rule of law generally. It is important to support and mobilize progressive forces such as civil society organizations (CSOs) to protect lawyers. In some cases, it may mean talking to the autocratic regimes or other actors in a broader sense to enable the above forces; however, it should not imply by any means legitimization of such regimes or actors. At the transnational level, constant cooperation among bar associations and human rights institutions is necessary to speak up for human rights lawyers, who fall victim to national and transnational repressive regimes.

International legal protection is another fundamental necessity. It is therefore significant to keep the Draft Convention on the Protection of legal profession open for membership to non-member states of the Council of Europe. It will not only legitimize the Convention, but also function as a legal

protection for lawyers in non-member states. The Convention should be further complimented by establishing an effective body to monitor and investigate implementation of its provisions. To strengthen applicability of the Draft Convention, an effective cooperation between the European institutions, who will be responsible for the implementation of the above-proposed treaty and the UN mechanisms as well as relevant international institutions are vital – this will also foster accountability at the international level.

On a practical level, resource allocation is significant to provide support for lawyers, e.g. financial aid for the remaining progressive legal profession as well as support in temporary (and in exceptional cases permanent) relocation of lawyers in danger. International support and protection of lawyers, including financial, humanitarian and legal support, has an enabling factor – even in crises.

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