



Position Paper

of the German Bar Association by the Committees on European Affairs and Human Rights

on the Public Consultation of the 2022 Report “Attacks on Lawyers” before the Human Rights Council by the United Nations Special Rapporteur on the Independence of Judges and Lawyers

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 61.000 German lawyers and lawyer-notaries in 252 local bar associations in Germany and abroad. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession on German, European and international level.

Summary:

With reference to the scope of this report, the independence of the legal profession, in particular of lawyers authorized or licensed to practice before the courts, is widely guaranteed in Germany. Overall and for the purpose of the present survey, it therefore can be stated that there is no significant increase in attacks (physical or direct) on lawyers, or a substantial gain in legal/non-legal mechanisms in place used to systematically undermine the work and independence of lawyers.

Apart from very few singular events (as mentioned below in the answer provided to Question 6), a pattern of reported direct or physical attacks on the independence of lawyers in the past 5 years cannot be constituted.

However, some non-physical measures, in particular by several new pieces of legislation especially in the area of criminal, data protection, and security law (as outlined below in the answer provided to Question 3), which are either directly or indirectly affecting the free exercise of the legal profession, indeed display particularized obstacles to the independence of lawyers' work in Germany.

In detail:

- 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 self-regulation and self-administration of lawyers by the Bars in Germany is regulated by the Federal Lawyers Act (BRAO) and is organised according to the constitutional principle of separation of powers with independent legislative, executive and judicial bodies: Under the umbrella organisation of the BRAK the regional Bars have executive power. The Statutory Assembly drafts and adopts the Rules of Professional Practice (BORA) of the legal profession; the judiciary is exercised by special courts.

Within the scope of their area of responsibility, the bars play a decisive role in professional supervision and in combating money laundering, among other things.

According to the law, the Bar in Germany is independent from the executive or other branches of the state. The German Federal Bar is a self-regulatory body incorporated under state supervision by the Federal Ministry of Justice and Consumer Protection. Such supervision shall be limited to ensuring that the law and the by-laws are observed and, in particular, that the duties assigned to the German Federal Bar are performed. The Federal Ministry of Justice may repeal the by-laws passed by the Satzungsversammlung (Statutory Assembly), a body installed with the German Federal Bar. The regional Bars are independent from the State and self-regulatory within the statutory framework set by the federal legislator. They are public bodies which are under the supervision of the judicial authorities of the respective federal state (Land) as regards compliance with the duties transferred to them for self-regulation.

Next to the bars, there is the German Bar Association (Deutscher Anwaltverein – DAV), founded in 1871, which is a body constituted on the basis of voluntary membership. It represents the interests of the German legal profession. Its members are 252 local Bars (Anwaltvereine).

As independent agents in the administration of justice, lawyers are indispensable in order to comply with the right contained in Article 47(2) of the European Charter of Fundamental Rights that every person can be advised, defended and represented by a lawyer of their choice. Furthermore, lawyers in Germany, as in other EU countries, are subject to stringent professional practice rules. In Germany, lawyers have an ongoing obligation to their clients (i) to advise them as comprehensively and exhaustively as possible and (ii) to keep confidential all knowledge about a client gained by the lawyer

during the course of their professional activity. These obligations applicable to lawyers derive from the special role that lawyers execute as agents in the administration of justice according to § 1 of the German Federal Lawyers' Act. This interrelation therefore prescribes not only the necessity of the independent exercise of the Lawyer's profession, but also the independent administration of justice itself.

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.

Lawyers are free and independent advisors and representatives in all legal matters. They are also independent organs of the administration of justice. Individual freedom and independence are only guaranteed if the legal profession is self-governing. In Germany these essential values are secured by a system of self-administration and self-regulation of independent Bars (regrouped since 1969 under the German Federal Bar, BRAK) in addition to the German Bar Association in which membership is voluntary.

Since 1871 German lawyers have organised themselves within the German Bar Association ("Deutscher Anwaltverein", DAV) as an independent representation of interest aimed at pronouncing itself as the lawyer of lawyers in all economic, public and professional interests as well as policy related and political questions related to the rule of law and the tasks lawyers fulfil within the rule of law. In contrast to the regional Bars and the BRAK, the DAV has more freedom in choosing to comment or to proactively ask for new legislation even in fields not directly related to professional practice or policy.

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Within the scope of their area of responsibility, the bars play a decisive role in professional supervision and in combating money laundering, among other things.

It can be stated that the independence of the Bar and the self-regulation in Germany is widely recognised. The DAV considers the independence of lawyers and the freedom of choice of lawyers as important elements of the rule of law.

However, whereas the independence of lawyers is protected under constitutional law – based on the jurisprudence of the Federal Constitutional Court – the independence of Bars is protected by ordinary law only. Lawyers are independent agents in the administration of justice according to § 1 (BRAO). They are indispensable to comply with the right contained in Article 47(2) CFR according to which every person can be advised, defended and represented by a lawyer of their choice.

According to § 176(2) BRAO, The Federal Bar shall be under state supervision by the Federal Ministry of Justice. Such supervision shall be limited to ensuring that the law and the by-laws are observed and, in particular, that the duties assigned to the Federal Bar are performed. The Ministry may repeal the by-laws passed by the Statutory Assembly – a body installed with the Federal Bar. The Statutory Assembly acts in the ambit of the competences stipulated by the BRAO. The regional Bars are subject to legal supervision by the Presidents of the Higher Regional Courts.

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.

Notification ordinance for real estate transactions

A legislative project which further undermines professional secrecy is the Anti-Money-Laundering-Notification-Ordinance which entered into force in October 2020. It authorises the Federal Ministry of Finance, in agreement with the Federal Ministry of Justice and Consumer Protection, to determine by ordinance "circumstances" in real estate transactions that must always be reported pursuant to § 43(1) Money Laundering

Act (Geldwäschegesetz - GwG). It was intended to only define exceptions in the area of real estate transactions, in which the suspicious activity notification must also be submitted by members of the trusted professions in accordance with Section 43(1) no. 1- 3 GwG, even in breach of confidentiality. In fact, however, the ordinance creates, in part, new substantive notification obligations. The German Bar Association (DAV) has criticised this ordinance in a position paper: <https://anwaltverein.de/de/newsroom/sn-43-20-gwmeldv>

<https://anwaltverein.de/de/newsroom/sn-42-19-mitteilungspflicht-grenzueberschreit-steuergestaltungen>

BND Act

The ECtHR recently admitted the complaints of the organization "Reporters without Borders", as well as of Prof. Niko Härting, member of the Information Law Committee of the DAV, against the mass e-mail surveillance by the BND on the basis of the BND Act (Applications no. 81993/17 and 81996/17). Both complaints allege a violation of Article 8 ECHR, and the organization "Reporters without Borders" also alleges a violation of Article 10 ECHR. The plaintiffs argue that in light of their activities, it is likely that the excessive interception of emails by the BND in 2013 and 2012, respectively, resulted in emails sent by them also being intercepted and read. The complaints also relate to the fact that the individuals affected by the mass surveillance by the BND are not entitled to an effective legal remedy because they cannot obtain judicial review in the absence of notice. Furthermore, the surveillance itself is grossly disproportionate. A large part of the e-mails of the complainant, Niko Härting, is also subject to attorney-client privilege. The CCBE has intervened amicus curiae in this case.

The seizure of documents in law firms

Any violation of the professional secrecy of lawyers does not only violate the independent exercise of their profession, but also the independent administration of justice (see the answer to question 1 above). In this context, the DAV is particularly concerned about one development pertains to the professional secrecy of lawyers. According to § 97(5) of the German Code of Criminal Procedure (Strafprozessordnung, "StPO") the seizure of papers, audio and video media, data carriers, images or other

depictions in the custody of lawyers shall be inadmissible insofar as they are covered by the right of such persons to refuse to testify.

In particular under German criminal law the confidentiality has widely been neglected, particularly against search and seizure measures. There has never been a full attorney-client privilege a suspect and his attorney could have relied on. The intended expansion the scope of the powers to seize and confiscate attorneys' documents by the above-mentioned bill is indeed therefore worrisome. It is currently the subject of debate in case law and in legal literature whether items that are subject to the attorney's right to refuse to give evidence (attorney-client privilege) are excluded from seizure only if the attorney's client is the suspect (or is an entity with a similar status) or whether the prohibition of seizure also protects the relationship of trust between the attorney and other clients that are not suspects (e.g. witnesses or relatives of the suspect, or companies conducting an internal investigation and not suspects). While the law as it stands appears to protect these attorney-client relationships from seizures as well, the new bill intends to limit the prohibition of seizure expressly to cases where the relationship of trust between the suspect (person or entity) and the person entitled to the right to refuse to give evidence is to be protected. Attorney-client relationships with persons and companies that are not suspects are not going to be protected. Searching law firms will be permissible to the extent that the rules on the prohibition of seizure very narrowly defined in the draft do not apply. It is expressly intended that the provision set out in Sec. 160a StPO, which was recently amended in order to strengthen the protection of attorneys against government investigation measures, is not applicable in the context of search and seizure measures.

In 2017 search and seizure measures were conducted at the offices of the law firm Jones Day which represented Volkswagen in its proceedings against the US Department of Justice at that time. This was later upheld even by the Federal Constitutional Court. Since then it has been the subject of debate in case law and in legal literature whether items that are subject to the lawyer's right to refuse to give evidence (professional Secrecy/legal professional privilege) are excluded from seizure only if the lawyer's client is the suspect (or is an entity with a similar status) or whether the prohibition of seizure also protects the relationship of trust between the lawyer and other clients that are not suspects (e.g. witnesses or relatives of the suspect, or

companies conducting an internal investigation and not suspects). The case is now pending before the European Court of Human Rights, with the CCBE intervening amicus curiae.

Lack of self-administration of data protection supervision for the legal profession in Germany

The evaluation of the Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG) has shown once again the need for the establishment of an independent contact point for data protection supervision within the self-administration of the legal profession as well as the need for centralisation and sectoral orientation. In Germany, data protection supervision is currently (in addition to a few sectoral supervisory bodies) assigned to 17 different regional authorities and one federal authority. This leads to inconsistent legal interpretations and divergent supervisory practices. This complicates data protection compliance in law firms and other institutions. In addition, the geographic division of responsibilities makes it difficult to develop sectoral expertise.

Moreover, data protection supervisory authorities demanded again in the past year that lawyers disclose contents of their mandates or otherwise be sanctioned with a penalty payment, which would result in a violation of professional law and would be punishable by law. This was done even though the demands were considered disproportionate in view of the associated breach of client confidentiality and the relatively minor importance of the requested information for the protection of other legal interests. This shows the necessity for a comprehensive limitation also for cases of Article 58(1) lit. a-c of the General Data Protection Regulation, in addition to the existing limitation of the supervisory powers of the authorities in Germany in Section 29(3) of the Federal Data Protection Act (“BDSG”).

The DAV is therefore very concerned with certain developments in the area of data protection and with regard to the role of the supervisory authorities.

- 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?**

See the answer above to question 1.

- 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?**

This question can only be answered by the Federal Bar.

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

The DAV notes that lawyers are exposed to threats and attacks relating to their professional activities. In Berlin, lawyers and their families have recently been attacked for advising owners of unoccupied buildings, which included the torching of the car of a lawyer. The public took also particular note of reports on threats against lawyers in connection with the so-called NSU case. Basay-Yildiz was counsel for the ancillary claim of a victim's family in the NSU trial; she has been personally threatened by mail for 2 1/2 years now. Her data was retrieved from a police computer in police station 1 in Frankfurt am Main, to which several officers have access. Some of them could be proven to have made right-wing extremist statements and references. Even after the suspension of 5 police officers, the threats continued.

The attacks on these lawyers are an attack on the legal profession as such. It is the state's responsibility to protect the independence of lawyers fully and with all means. These events support the DAV's position that a (preferably binding) European instrument on the role of lawyers is required as it is now to be elaborated in the Council of Europe.

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.

One of the measures to foster a rule of law culture is to promote, through e. g. legal policy debates and public information campaigns on rule of law issues, in particular on the imperative impartiality of the lawyer profession.

The March of the European Robes against the Polish judicial reform, which DAV President Kindermann had called for during the February 2020 European Presidents' conference in Vienna could unfortunately not take place due to the Covid-19 pandemic. In its place, the DAV has developed the podcast "We need to talk about the Rule of Law" together with the well-known juridical Online-platform "Verfassungsblog". Over 12 weeks 12 episodes addressed the topic in its multifaceted dimension. In each episode, three to four political and legal experts from Germany and abroad devoted themselves in English to a particular aspect of the topic and spoke, among other things, about constitutional courts, the elections of judges, disciplinary proceedings and, of course, the role of the legal profession in a State based on the Rule of Law. One episode was dedicated solely to the role of (independent) attorneys. The podcast is available on all popular platforms (Spotify, Deezer) as well as on the websites of the [DAV](#) and the [Verfassungsblog](#).

Another important instrument to raise awareness for the independence of the legal profession is the Weimar Triangle initiative. For two years now, the German Bar Association, the Paris Bar Association (L'ordre du barreau de Paris) and the Warsaw Bar Association (Izba Adwokacka w Warszawie) have worked together in order to promote the Rule of Law. A special focus has been on the current situation in Poland. Various resolutions have been adopted and forwarded to policy-makers with regard to the situation in Poland, but also with regard to the situation in Belarus.

The alliance hold its annual meeting in the framework of the Conference "In Defence of the Rule of Law" in Berlin and Online on 22 October 2021, to discuss openly the existing legal possibilities of defending the Rule of Law against erosion. Members of the

three organisations and other members of the legal profession participated in active discussions to join this very practical event with experienced speakers to discuss and to learn more about the measures which could be applied by each particular lawyer to protect the Rule of Law in Europe.

Another integral mechanism in this regard is the coalition “G7 of Bars”. The G7 forum of Bars brings together Bar Associations and Law Societies from the G7 countries: Canada, France, Germany, Italy, Japan, the USA and the UK. It was established in 2019 when France held the Presidency of the G7. The G7 format is a platform for dialogue and discussions on topics, which are of high importance and relevance for the legal profession worldwide. Resolutions with regard to the rule of law and the importance of an important profession have been also adopted in the G7 of Bars. Earlier this year, the DAV also took part in a 24 hours long Rule of Law webathon which was organised by UIA and AIJA by hosting a panel.

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.

A central constitutional law issue for the DAV was and still is the demand for parliamentary control of Corona measures, even in times of crisis as recently reaffirmed in our [statement](#) of 15 November 2021. The DAV rejects a concentration of competences on the executive in these important and intervention-intensive areas. Even when quick action is required, parliament and the judiciary must exercise their rights of control.

The independence of the legal profession was particularly affected by legislation in various German Länder amounting to a general ban on leaving one’s own home. Early on in the pandemic, the DAV advocated against general applicable curfews (cf. position paper [22/20](#)). The DAV is of the opinion that citizens’ must not be forced to justify why they are exercising their fundamental rights, i. e. consulting his/her advocate. We therefore called exemptions to be made for lawyers and clients seeking legal advice (cf. position paper [22/20](#) and [statement](#) of 09 April 2020) because the access to justice

must be guaranteed without restriction even during a pandemic. The DAV has repeated this demand as the pandemic progressed (cf. press releases [39/20](#); [16/21](#)). In fact, the strict curfew regime that was implemented in some Federal States in the beginning of the pandemic was lifted relatively fast and it was generally possible for clients seeking legal advice to consult their lawyers. Furthermore, such strict curfew regimes have not been reintroduced in the course of the pandemic.

Due to the specific role of lawyers as organs in the administration of justice, we also lobbied the government on the Laender and the Federal level that lawyers were to be included in the priority group 3 of the federal Coronavirus Vaccination Ordinance. In particular for certain groups of lawyers, such as criminal defense lawyers, virtual meetings with clients were not possible. Moreover, not all court hearings could be held virtually and thus there was a general necessity to ensure that lawyers were able to receive their vaccines early on.

However, it must be noted that virtual court hearings as mandatory due to health protection measures also impaired the exercise of the legal profession indirectly. There are for instance procedural shortcomings when it comes to addressing the value of evidence or the credibility of a witness in a criminal law hearing. Moreover, many courts in Germany still lack adequate IT infrastructure which caused problems in the operation of video hearings.

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

The DAV supports the elaboration of an – in our view preferably binding – instrument on the role of lawyers in the Council of Europe as explained above.