

Re: OHCHR/UN Special Rapporteur on the independence of judges and lawyers

here: Questionnaire on the role of bar associations

Question 1:

Please provide information on the way the legal profession is organised and regulated in your country. What are the legal bases for its establishment (e.g. constitutional provisions; ordinary law or other)? Please also indicate the main legal provisions protecting the right of lawyers to freely join or create a local, national or international association, and mention the existing associations.

The rights and duties of lawyers are governed by the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung* - BRAO). The Federal Lawyers' Act is a formal act adopted by the German Bundestag (Federal Lawyers' Act of 1 August 1959 in the revised version published in the Federal Law Gazette Part III, no. 303-8, last amended by Article 3 of the Act of 30 October 2017 (Federal Law Gazette I page 3618)).

Admission to the legal profession is granted by the bar associations. Upon admission to the legal profession, lawyers also become members of one of a total of 27 regional bar associations. There is also a Bar at the Federal Court of Justice, the members of which are admitted by the Federal Ministry of Justice and Consumer Protection on the basis of a special selection process (sections 163 et seqq. of the Federal Lawyers' Act). All the bar associations together constitute the Federal Bar Association, which functions as the umbrella organisation of the bar associations.

There are also many voluntary associations of lawyers. These include the national federations, in particular the German Bar Association (*Deutscher Anwaltverein e.V.*, DAV), the largest German bar association, and the Republican Bar Association (*Republikanischer Anwältinnen- und Anwälteverein e.V.*, RAV).

The Council of Bars and Law Societies of Europe (CCBE) is an association of national bars and large national bar associations in Europe.

The right to establish or join associations has constitutional status in Germany and is guaranteed in Articles 9 (1) and 2 (1) of the Basic Law. Thus, it also applies to lawyers.

Question 2

Does a professional association of lawyers play a role in the regulation of the profession? If so, please provide information on:

- (a) the exact denomination of the body**
- (b) the legal basis for its establishment (e.g. constitutional provisions; ordinary law or other);**
- (c) whether the association has been established as an `independent` and self-governing association;**
- (d) the composition and appointment process of the executive body of the association**

The Federal Bar Association and other bar associations are regularly involved in legislative procedures on Federal Government bills when such bills concern the interests of the legal profession. Frequently, they are also called upon as experts by the German Bundestag during consultations on bills in the course of parliamentary proceedings.

The Federal Lawyers' Act also enables the legal profession to regulate details concerning certain legal rights and duties of lawyers by setting down rules of professional conduct in a statute (section 59b of the Federal Lawyers' Act). These rules of professional conduct are adopted by a Statutory Assembly (*Satzungsversammlung*) established at the Federal Bar Association, which has been described as the "Lawyers' Parliament" (section 191a of the Federal Lawyers' Act).

Question 2 a):

Federal Bar Association

Statutory Assembly at the Federal Bar Association

Question 2 b):

Both the Federal Bar Association and the Statutory Assembly at the Federal Bar Association were set up by law (Federal Bar Association: section 175 (1) of the Federal Lawyers' Act, Statutory Assembly: section 191a (1) of the Federal Lawyers' Act).

Question 2 c):

Under section 176 of the Federal Lawyers' Act, the Federal Bar Association is a corporation under public law and as such is subject to the state supervision of the Federal Ministry of Justice and Consumer Protection. However, such supervision is limited to ensuring compli-

ance with the law and relevant statutes. There is no right to subject-specific supervision. In all other respects, the Federal Bar Association is independent and self-governing.

The Statutory Assembly at the Federal Bar Association is also independent and self-governing (cf. Sections 191a et seqq.). Under section 191e of the Federal Lawyers' Act, resolutions passed by the Statutory Assembly shall be communicated to the Federal Ministry of Justice and Consumer Protection for review. However, the right to review is limited to examining whether the resolution is compatible with higher-ranking law. A more extensive right to review does not exist.

Question 2 d):

The bar associations together constitute the Federal Bar Association (section 175 (1) of the Federal Lawyers' Act). The bar associations are represented at the General Assembly of the Federal Bar Association by their presidents (section 188 of the Federal Lawyers' Act). The Federal Bar Association adopts its resolutions at its General Assemblies, and the Presiding Board of the Federal Bar Association is elected from amongst the midst of the General Assembly (sections 179 et seqq., section 187 of the Federal Lawyers' Act).

The members of the Statutory Assembly at the Federal Bar Association are as follows:

- (1) the President of the Federal Bar Association and the presidents of the bar associations, who do not have a voting right (section 191a (4) no. 1 of the Federal Lawyers Act);
- (2) members with voting rights, elected in a secret and direct ballot (section 191a (4) no. 2 of the Federal Lawyers' Act) by members of the bar associations under section 191b of the Federal Lawyers' Act. The President of the Federal Bar Association chairs the Statutory Assembly (section 191d (1) first sentence of the Federal Lawyers' Act).

Question 3:

Please provide information on the relationship between the association of Lawyers and the Executive, Legislative and Judiciary powers. In particular, please provide information on the role of the Ministry of Justice and/or the judiciary in relation to the establishment and functioning of this association.

The legislator has transferred a number of duties to the bar associations in the Federal Lawyers' Act. (For information concerning the participation of the Federal Bar Association and the Statutory Assembly in the legislative process, see question 2).

The bar associations perform on their own responsibility the duties that the legislator assigned to them in the Federal Lawyers' Act. The duties of the bar associations - except the

Bar at the Federal Court of Justice - include admission to the profession of *Rechtsanwalt* (for more detailed information, see question 4a). In addition, the bar associations have many other duties, including

1. advising and instructing lawyers in matters relating to their professional duties;
2. mediating, upon request, between lawyers or between lawyers and their clients in the event of a dispute;
3. monitoring the performance of the professional duties incumbent upon the members of the bar association;
4. rendering annual account to its members at the assembly of the bar association concerning the administration of its assets;
5. rendering expert opinions requested by a *Land* department of justice, a court or an administrative authority of a *Land*.

For further details, see in particular sections 73 to 74a of the Federal Lawyers' Act.

The bar associations' monitoring of the performance of the duties incumbent upon its members is limited to monitoring compliance with the special professional duties arising from the Federal Lawyers' Act (e.g. duty of confidentiality, advertising regulations). Answering civil-law questions as to whether a lawyer represented the interests of a client correctly in accordance with his mandate, what effects any mistakes have on remuneration, or whether the lawyer is liable to pay compensation are in principle not part of the mandate assigned by law to the bar associations. In case of dispute, the independent courts decide on such questions.

The executive board is a body of the bar associations (section 63 of the Federal Lawyers' Act). It is also the authority of the self-governing body, and in this function fulfils the rights and duties transferred to it (cf. in particular section 73 (2) nos. 1 to 4 of the Federal Lawyers' Act). It is also the authority within the context of indirect public administration and in this capacity discharges state duties in the interest of the general public (for example, the power specified in section 73 (2) no. 5 of the Federal Lawyers' Act to propose lawyers to be appointed as members of the lawyers' disciplinary court and higher lawyers' court).

The regional bar associations are subject to the supervision of the *Land* departments of justice (section 62 (2) of the Federal Lawyers' Act). The Bar at the Federal Court of Justice is subject to supervision by the Federal Ministry of Justice and Consumer Protection (section 62 (2) and section 163 third sentence of the Federal Lawyers' Act). Such supervision is lim-

ited to ensuring compliance with the law and relevant statutes. Thus, supervision does not include a specialist examination of the decisions of the bar associations.

It is incumbent upon the Federal Bar Association under the law in particular to represent the bar associations as a whole vis-à-vis authorities and organisations, to bring the opinion of the Federal Bar Association to bear vis-à-vis the competent courts and authorities in all matters which affect the bar associations as a whole, to render expert opinions requested by a federal authority or legislative body involved in the legislative process or by a federal court, and to promote the continuing professional development of lawyers. For further details and further duties, see in particular section 177 of the Federal Lawyers' Act.

The Federal Bar Association is subject to the supervision of the Federal Ministry of Justice and Consumer Protection pursuant to section 176 (2) of the Federal Lawyers' Act. Such supervision is also limited to ensuring compliance with the law and relevant statutes, however. Thus, supervision does not include a specialised examination of the decisions of the Federal Bar Association.

Bar associations and the Federal Bar Association may bring actions against decisions by the supervisory authorities through a lawyers' disciplinary court (*Anwaltsgericht*). Lawyers' disciplinary courts are ordinary courts of which all or some members are lawyers. This is intended to guarantee that lawyers' concerns are appropriately taken into account. The details of the membership of lawyers' disciplinary courts and lawyers' disciplinary proceedings are governed by sections 92 et seqq. of the Federal Lawyers' Act.

Question 4:

Please provide information on the role that professional associations of lawyers play with regard to:

- (a) the admission process to the legal profession and the licensing of lawyers;**
- (b) the conduct of disciplinary proceedings against lawyers;**
- (c) the provision of legal aid**
- (d) the protection of individual lawyers from any form of intimidation, hindrance, harassment or improper interference in the exercise of their functions;**
- (e) the development and implementation of legislation concerning the free exercise of the legal profession and the administration of justice**

Question 4 a):

Admission to the legal profession - with the exception of the Bar at the Federal Court of Justice - is granted by the bar associations (section 12 of the Federal Lawyers' Act). In Germany, there is a right to be admitted to the legal profession if the requirements specified in the law have been fulfilled (section 6 of the Federal Lawyers' Act). Under section 4 of the Federal Lawyers' Act, this includes the qualification to hold judicial office pursuant to the German Judiciary Act, or fulfilment of the requirements for integration into the profession laid down in the Act on the Activities of European Lawyers in Germany or the passing of the aptitude test under that Act. Reasons to deny or revoke admission to the legal profession are narrowly limited and conclusively governed by section 7 of the Federal Lawyers' Act. Thus, the bar associations have no discretionary powers with regard to admission.

The members of the Bar at the Federal Court of Justice are admitted by the Federal Ministry of Justice and Consumer Protection on the basis of a special selection process (sections 163 et seqq. of the Federal Lawyers' Act). The Federal Bar Association and the Bar at the Federal Court of Justice may submit lists of proposed candidates for selection under Section 166 (2) of the Federal Lawyers' Act.

Question 4 b):

The bar association has the right to advise and instruct its members in matters relating to their professional duties (section 73 (2) no. 1 of the Federal Lawyers' Act). The bar associations are also responsible for monitoring the performance of the professional duties incumbent upon their members and issuing reprimands for minor breaches (section 73 (2) no. 4 and section 74 of the Federal Lawyers' Act). In the case of major breaches of duty, the bar association must apply for a disciplinary proceeding to be initiated in which disciplinary measures can be taken against the lawyer's conduct. Possible sanctions in lawyers' disciplinary proceedings range from a warning or a fine to disbarment (section 113 et seqq. of the Federal Lawyers' Act).

Question 4 c):

In Germany, the courts decide on granting advisory assistance (free out-of-court legal assistance and/or representation) or legal aid (financial support in the context of legal proceedings). The bar associations have no competence concerning this matter.

Question 4 d):

In Germany, the principle of free and unregulated self-determination by the individual lawyer follows from the fundamental right to occupational freedom enshrined in the Basic Law. This

means that professional legal practice is characterised by the principle of the free exercise of the profession, which is opposed in principle to state control and dictation. This has been explicitly emphasised in a number of decisions by the Federal Constitutional Court (cf. decisions of the Federal Constitutional Court (cf. BVerfGE15, 226 <234>; 50, 16 <29>; 76, 171 <188>; 106; 216 <218>; 110, 226 <251 et seq.>). It is also recognised that, as agents of the administration of justice, lawyers are an important part of the judiciary in Germany (cf. section 1 of the Federal Lawyers' Act). Limitations to this occupational freedom are only possible on the basis of a law, only on account of specific and important reasons, depending on the severity of the intervention, and only while observing the principle of proportionality. Lawyers are granted privileges by law, e.g. the right to refuse to give evidence in court proceedings or exemption from confiscation in criminal investigations.

The constitutional guarantee of legal protection deriving from Article 19 (4) of the Basic Law ensures that all citizens may have recourse to the courts if their rights are violated by public authority. Thus, lawyers may also have recourse to the courts if they consider that their rights have been violated.

Thus, in this context, the bar associations have no special role concerning this matter.

Question 4 e):

Under Section 177 (2) no. 5 of the Federal Lawyers' Act, the Federal Bar Association has the duty to render expert opinions requested by a federal authority or body involved in the legislative process. The Federal Bar Association is also regularly involved in legislative processes alongside various private-law lawyers' associations insofar as they concern the legal profession (concerning this matter, see question 2).

In addition, the bar associations and the Federal Bar Association provide the legal profession with regular information on current legislative developments, thereby contributing to the acceptance and implementation of the laws affecting the legal profession.

Question 5:

Is membership in the professional association of lawyers mandatory to practice law in your country? In case membership is prerequisite to practice law, please provide detailed information on the measures the State has taken to ensure access to justice in cases where there is a shortage of lawyers in the whole country or parts of its territory.

Membership of a bar association is automatic upon admission to the legal profession (section 12 (3) of the Federal Lawyers' Act), and it is mandatory. The constellation referred to in question 5, that there could be a shortage of lawyers in a part of Germany or even throughout the whole country, is practically inconceivable. This is mainly because there are no restrictions on admission to the legal profession - anyone who fulfils the qualifications defined in law has a right to be admitted to the legal profession upon application (cf. section 12 of the Federal Lawyers' Act). Thus, 164,656 lawyers have been admitted to the bar in Germany (situation as of 1 January 2018).

Under section 78b of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO), a court can assign a lawyer to a party to exercise that party's rights insofar as representation by an attorney is mandated and a party is unable to find an attorney prepared to represent it. In principle, the assigned lawyer is then under an obligation to accept the representation (modalities of the selection of the lawyer and legal remedies against the court decision are laid down in section 78c of the Code of Civil Procedure). This serves to secure the structures for protecting citizens' access to justice.

Similarly, lawyers are assigned by the court as defence counsel in criminal proceedings in some instances determined more specifically by the law (cf. section 140 of the German Code of Criminal Procedure (*Strafprozessordnung*, StPO)).

Further information

The text of the current version of the Federal Lawyers' Act in German (*Bundesrechtsanwaltsordnung*) is available at:

<https://www.gesetze-im-internet.de/brao/index.html>

The text of the current version of the Code of Civil Procedure in German (*Zivilprozessordnung*) is available at:

<https://www.gesetze-im-internet.de/zpo/index.html>

The English translation of the Federal Lawyers' Act (last updated: 6 December 2011) is available on the Federal Bar Association website at:

https://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao-stand-6-12-2011-mit-korr-191f-2014.pdf

The English translation of the Code of Civil Procedure (last updated: 2013) is available at:

https://www.gesetze-im-internet.de/englisch_zpo/index.html

Further information on the legal profession in Germany and the duties of the bar associations and the Federal Bar Association is to be found in a booklet produced by the Federal Bar Association, available in English and German:

https://www.brak.de/w/files/02_fuer_anwaelte/Unabhaengig_u_Frei_BRAK_Brosch090908.pdf