DeutscherAnwaltVerein

Position Paper

of the German Bar Association by the Committee on European Law

on the targeted stakeholder consultation of the European Commission on the 2021 Rule of Law Report

Berlin/Brussels, March 2021

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 62.000 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.

2021 Rule of Law Report – targeted stakeholder consultation

Questions on horizontal developments

Please provide any relevant information on horizontal developments here

5000 character(s) maximum

In our view, there is a general need to increase the protection of lawyers in the European Union. First of all, the rights as enshrined in Article 47 of the Fundamental Rights Charter should be included in the definition of the Rule of Law.

Moreover, we support the drafting of a new legal instrument applicable to the legal profession within the Council of Europe as it is currently debated. We urge the European Commission to advocate in its conversations with member states for a positive decision of the Committee of Ministers of the Council of Europe on 31 March 2021 with regard to the establishment of a drafting committee.

In various EU member states Governments enacted measures against the Covid-19 pandemic in the form of executive orders rather than in the form of laws, which had been adopted in regular legislative proceedings under participation of the national parliaments.
In Germany, this has been both a development on the federal and on the Laender level. Whereas this might have been acceptable at the beginning of the pandemic the fact that also administrative courts have so far supported this modus operandi is alarming, even more so as it means that ultimately committees of the governing parties or civil servants in ministries have decided upon questions of fundamental importance for our societies. This concern is shared by the President of the German Federal Constitutional Court who publicly declared in an interview on 9 February 2021 that, although in the early

hours of a crisis the government is required to act, after a certain point the legislator has to give the executive more precise instructions for action.[1] So far, more than 880 cases relating to the Covid-19 pandemic have been filed with the German Constitutional Court.

Another worrisome topic is the question of preventive measures under national constitutional law to prevent an elected government from transforming the democratic system into a dictatorship (constitutional resilience), in particular with regard to the independence of Constitutional Courts. Poland is a cautionary example how a government can effectively abolish democratic principles including the separation of powers within a mere few years and lead the country astray. The Polish Constitutional Tribunal (Trybunał Konstytucyjny) is no longer independent. In a similar way, the German Bundestag could decide with simple majority under Art. 94 of the German Constitution (Grundgesetz, "GG") to modify the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz, "BVerfGG"). Contrary to the ECJ, the German Federal Constitutional Court (Bundesverfassungsgericht, "BVerfG") has no authority when it comes to its own set of rules.

One solution to increase the constitutional resilience in Germany would be to modify Art. 94 GG so that a qualified majority in the German Parliament would be required in order to change the Federal Constitutional Court Act. Another model would be to adopt the procedure applicable to the ECJ, where the Court itself proposes changes, which are than adopted by the Council.

There is also a certain unfortunate trend in a several EU member-states to hold lawyers responsible for the views and actions (and potential crimes) of their clients, as witnessed recently in Romania. Lawyers are essential to guarantee the access to justice for all citizens. If their independent exercise of their profession is impaired, it has a direct negative effect on the access to justice of the public. The attacks on lawyers within the European Union are however not only limited to these specific circumstances but appear in many forms and ways – by governments and other actors and entities.

[1] See for instance, https://www.rnd.de/politik/corona-oberster-verfassungsrichter-dringt-auf-beteiligung-der-parlamente-3QZCPBE5U6CW3OFJJFEB24ISO4.html (Retrieved 10 February 2021)

Justice System – Germany

Independence

Appointment and selection of judges, prosecutors and court presidents

(The reference to 'judges' concerns judges at all level and types of courts as well as judges at constitutional courts)

3000 character(s) maximum

The points addressed in our contribution to last year's report are still valid:

Article 94 of the German Constitution (Grundgesetz, "GG") (in conjunction with Section 6 et seq. of the Federal Constitutional Court Act ("BVerfGG")) stipulates that the Justices are elected upon proposal of the Justices' Election Committee half by the Bundestag and half by the Bundesrat, requiring a 2/3 majority (of votes cast in the Bundestag at or at least the majority of the votes of the Members of the Bundestag and 2/3 of the votes of the Bundesrat). Each of the 2 Senates of the Court consists of 8 justices, 3 of whom must be selected from the judges of the Federal Courts.
The Bundestag and the Bundesrat alternately nominate the President and Vice-President of the Court.

With regard to the Federal Courts, the Federal Minister responsible for the respective subject area of the Court's jurisdiction, together with a Judges' Election Committee, decides on the appointment of the judges of the federal courts in accordance with Article 95 para. 2 GG. This Judges' Election Committee consists of the 16 Ministers of the States responsible for the respective subject area and an equal number of members elected by the Bundestag.

The judiciary of the 16 States comprise the ordinary and specialised courts as well as the constitutional courts at state level. The selection procedures vary from State to State. According to Article 98 para. 4 GG, the States can – optionally – decide that the appointment of judges is to be decided by the respective Ministers of Justice together with a Judges' Election Committee in order to ensure plurality and to represent the diversity of opinions represented in society.

Except for the Chief Federal Prosecutor and the Federal Prosecutors, public prosecutors are appointed in accordance with regulations under the law of the respective Land. There is no uniform regulation for appointment/selection procedures in place, rather different procedures apply at state and at federal level, including the Federal Constitutional Court. The material criterion under Art. 33 para. 2 GG is the suitability of the candidate from a personal and professional point of view, based on assessments of the candidate that do not concern the content of his or her judicial decisions.

In summary, the system of appointment of judges is constitutionally safeguarded and in principle well-functioning. As regards the Judges' Election Committees there is a tendency for judges to be elected based on the criteria of party proportional representation. However, there is no evidence of a systemic failure in either model.

The DAV recommends that the high quorum of a 2/3 majority (of votes cast in the Bundestag) should also be provided for the selection procedures of judges for the federal courts, provided that it is guaranteed that the high quorum does not lead to a blockade by parliamentary minorities in case of new appointments.

Irremovability of judges; including transfers, dismissal and retirement regime of judges, court presidents and prosecutors

3000 character(s) maximum

The points raised in last year's consultation remain valid:

Article 97 GG guarantees the objective and personal independence of judges.
This means that they are completely exempt from any instructions or other external influence when interpreting and applying the law. All judges are entitled to, and are constitutionally required, to make their decisions independently within the framework of and subject only to the law.
The civil service status of judges is primarily regulated by the German Judges Act (DRiG). Their personal independence is guaranteed by the fundamental irremovability of judges. According to Article 97 GG, judges may be dismissed against their will and before the expiry of their term of office only by judicial decision and only for reasons and

according to the forms determined by the law. Subject to the same conditions they may be permanently or temporarily removed from office, transferred to another post or be retired.

Personal independence ultimately means freedom from certain personnel policy measures that could jeopardise the freedom of objective independence, meaning the independence to decide on the merits of the case without interference. Judges may not, either professionally or otherwise, suffer disadvantages as a result of their judicial activity which are likely to call their objective independence into question or hinder him in their judicial task. Judges are appointed for life and may be transferred or dismissed from office without their written consent only in very exceptional cases. Section 30 (1) DRiG contains an exhaustive list of possible reasons in this respect. Transfer or removal from office is only possible on the basis of a legally binding judicial decision. The Justices at the Federal Constitutional Court are irremovable and elected for one twelve-year tenure.

Measures taken in the course of disciplinary proceedings have to be proportionate in relation to the violation of the professional duties. The possibilities for dismissal are also conclusively regulated by law and such dismissal is only permissible if and when the confidence in the orderly fulfilment of the professional obligations of a judge is irrevocably destroyed and cannot be restored. In contrast to lifetime judges, judges who are within their first two years of their initial appointment may be dismissed for any material reason, Section 22 (1) DRiG. Any judge may also take legal action by appealing to specific Judges' disciplinary courts claiming that their independence has been violated by any supervisory or executive act or the judicial administration. In the view of the DAV, judicial independence is a generally respected value in the German legal system. It must be emphasized that the context of the case constellation is crucial for the exceptional decisions on the principle of the irremovability of judges, and a very strict standard must be applied in order to avert a serious impairment of the administration of justice.

Promotion of judges and prosecutors

3000 character(s) maximum

The points raised in last year's consultation remain valid:

Generally, the criteria governing the appointment of judges outlined in the answer to the previous question also apply to the promotion of judges. As outlined above, justices of the Federal Constitutional Court and judges of the Federal Courts are not promoted but elected. Their election and the appointment of federal judges involve the relevant democratically legitimised bodies. Appointments to higher or senior positions of judges, also at state level, are primarily based on objective suitability criteria, even though in the higher echelons of the judiciary a certain political dimension of the selection process is undeniable. The judiciary, in all federal states, has developed a highly differentiated system of informal and formal control as well as a system of assessment. In almost all federal states, there are tests for promotion to higher courts. Candidates are promoted after a period of 6 months followed by an assessment at the end, often related to as "third state examination". Some states organise the promotion via alternating periods between the office of a public prosecutor and a judge. A candidate who obtains a good assessment can apply for promotion with a subsequent election by a Judges' Election Committee.

Allocation of cases in courts

3000 character(s) maximum

No specific comments

Independence (including composition and nomination of its members), and powers of the body tasked with safeguarding the independence of the judiciary (e.g. Council for the Judiciary)

3000 character(s) maximum

Article 97 GG guarantees objective and personal independence of judges. According to Sec. 339 StGB and the jurisprudence of the Federal Court of Justice, it is a punishable offence to deliberately deviate from the law to render a decision that is fundamentally an abuse of the administration of justice. However, the prerequisites for establishing the

facts are very high and there is little case law on this. Undoubtedly, a judge cannot be tried for this offence if he wishes to ascertain the constitutionality of a provision.

Parties to a court case may object to a judge on the grounds of a well-founded suspicion of bias. According to the wording of the German procedural codes, the rejection can be based on reasons that are suitable to "justify mistrust in the impartiality of a judge" (Section 42 ZPO, Section 54 (1) VwGO, Section 24 (2) StPO). It is self-evident that judges have an opinion. Notwithstanding, it should be avoided to appear that a judge has a predetermined idea regarding the verdict to be reached - independently of all the legal and factual submissions of the parties.

The boundaries between academic activity and political commitment dictated by judicial restraint are especially fluid vis-à-vis the Federal Constitutional Court. It is for this reason that Section 18 (3) BVerfGG expressly declares prior participation of constitutional judges in legislative procedures as well as academic pronouncements to be irrelevant. The democratic mandate of the Parliament to influence the further development of jurisprudence precisely by electing people who have pronounced themselves on it would otherwise be severely called into question.

In general, constitutional law is political law, its "clarification and further development" not always easy to separate from prior political understandings.

The Federal Constitutional Court has therefore rightly been extremely restrictive in its treatment of the grounds for bias, for example in the case of Justice Huber in the NPD ban proceedings or in the case of then Vice President Harbarth because of his parliamentary involvement in the law against child marriages.
Courts in charge of disciplinary proceedings against judges or complaints from judges about interference with their independence are always composed exclusively of judges. The same standard applies concerning complaints against the appointment of judges from federal courts or higher courts at State level. In our view, it can reasonably be assumed that attempts to influence the independence of the judiciary in Germany would meet with widespread resistance.

Accountability of judges and prosecutors, including disciplinary regime and bodies and ethical rules, judicial immunity and criminal liability of judges

3000 character(s) maximum

No specific comments

Remuneration/bonuses for judges and prosecutors

3000 character(s) maximum

No specific comments

Independence/autonomy of the prosecution service

3000 character(s) maximum

In the CJEU Judgment in the joined cases C-508/18 and C-82/19 PPU it was held that German public prosecutors may not be considered an “issuing judicial authority” within the meaning of Art. 6(1) of Council Framework Decision 2002/584/JHA due to their being subject to potential instructions from the executive. The German Federal Ministry of Justice and Consumer Protection has since proposed an amendment to Section 147 of the Courts Constitution Act (“Gerichtsverfassungsgesetz”, GVG) according to which instructions may not be issued in the context of European arrest warrants. On the one hand he German Bar Association (DAV) welcomes that, in principle, the right to issue instructions is maintained in the proposal (DAV Position Paper 6/21).
This ensures that – other than judges – public prosecutors cannot invoke an institutional guarantee of independence. Further procedural requirements for instructions such as written form and the provision of grounds are important for the ability to challenge such instructions. However, the DAV rejects the proposed exception for European arrest warrants as the freedom of German public prosecutors to issue European arrest warrants should be subject to judicial control. As an instrument that has such a high impact on the freedom of a person, European arrest warrants must remain subject to control by a court.

Independence of the Bar (chamber/association of lawyers) and of lawyers

3000 character(s) maximum

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. According to § 176(2) BRAO, the Federal Bar shall be under state supervision by the Federal Ministry of Justice limited to ensuring that the law and the by-laws are observed. The Ministry may repeal the by-laws passed by the Statutory Assembly at the Federal Bar. 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. Lawyers are subject to stringent professional practice rules and supported by strict confidentiality requirements regarding all knowledge about a client gained by the lawyers during the course of their professional activity. Restricting lawyers' professional secrecy does therefore not only violate the independent exercise of their profession, but also the independent administration of justice. In this context, the DAV is concerned about various legislative developments on the national and European level, which interfere with and limit the concept of confidentiality of the lawyer-client relationship. Under German criminal law the confidentiality of the lawyer-client relationship has always been insufficiently protected particularly against search and seizure measures. This situation will be aggravated should the Government obtain parliamentary approval for its bill introduced last summer called ‘Act to Strengthen Integrity in the Economy’. It is intended to expand the scope of the powers to seize and confiscate lawyers’ documents. The draft would entail a completely inappropriate restriction of criminal procedural seizure prohibitions to the confidential relationship of the accused: any records and correspondence with clients during internal investigations would be seizable unless they relate to the defence of the accused. The DAV objects to this and other points of the proposal as unacceptable in terms of the Rule of Law. Another 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) 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 DAV is also very concerned with certain developments in the area of data protection.
Data protection supervisory authorities repeatedly demanded disclosure of confidential information by lawyers at the risk of otherwise being 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”).

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

3000 character(s) maximum

As raised in our contribution to last year’s report, the scope of the question should cover the justice system as such, including lawyers and bars. It is the state's responsibility to protect the independence of lawyers fully and with all means. The special role of lawyers as agents in the administration of justice is undermined through a lack of protection of their professional secrecy as well as by police laws of the Laender.
This supports a perception that lawyers are not on equal footing with the other organs in the administration of justice – judges and prosecutors.

Many Laender continue to create more restrictive police laws, including Schleswig-Holstein, Berlin and Bavaria. The DAV has always advocated an absolute protection of professional secrets. In most police laws, the protection of lawyers' professional secrecy is incomplete, including in the newly amended Bavarian and Schleswig-Holstein laws.

If there is no absolute protection, the legal profession is not protected from numerous police measures, including searches of persons, property, homes and business premises. Confidentiality of the lawyer-client relationship is however in the interest of the public with regard to a legally orderly and functioning administration of justice. Moreover, there is often a lack of regulations on individual legal protection within the police laws as required by Article 103 GG, Article 19 (4) GG and Article 6 ECHR. In some cases, police laws only stipulate that legal counsel may be consulted. These regulations are insufficient. They fall short of what is required under the constitutional institute of the necessary defence in criminal proceedings. 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 outlined briefly above.

Quality of justice

Accessibility of courts (e.g. court fees, legal aid, language)

3000 character(s) maximum

The DAV repeatedly criticised in the past 12 months that access to courts has been restricted for reasons of protection against the pandemic. Especially in proceedings in which it was particularly palpable that negotiations and decisions had to be made, e.g. in child custody cases, it must be ensured that the courts fulfil their duties, of course

with due regard to protective measures. The DAV demands that the court system will be provided with all financial means to fulfil these tasks, also by using electronic tools. The possibility to hold virtual proceedings – as allowed under § 128a ZPO in civil law proceedings (see detailed answer below) should be used accordingly.

Moreover, access to justice remains sometimes subject to a certain territorial barrier. In some German rural regions, there are fewer places of jurisdiction and courts. One can generally also observe a tendency to close small courts in the countryside, such as in Brandenburg, where the government is planning to close several labour courts (see below).[2] This has not only the effect of limiting access to justice for affected people. It also means that lawyers have to settle where the courts are located. Access to justice in those affected rural areas is thereby endangered.

The accessibility of the Courts is limited by the fact that Germany has among the highest court fees within the European Union. According to the Justice Scoreboard 2020, they were particular high for commercial lawsuits, where Germany ranked 3rd. The increase of statutory lawyers' fees in Germany (the first in 7 years) came at the price of a simultaneous increase in court fees. Another limiting issue is the question of who bears the costs for the translation of documents and interpretation in proceedings. In the oral main hearing, anyone who does not speak German has the right to an interpreter, under section 185 GVG. However, difficulties already arise with documents in a foreign language. In § 23 GKG concerning the fixing of costs, it is stipulated that a foreign party represented by a lawyer who does not speak German is entitled to reimbursement of interpreting or translation costs. This only applies to the extent that they were necessary for the proper prosecution of the case. No costs are assumed for lawyer's meetings, even within the framework of legal aid. Parties must pay for the translation of their submissions and evidence documents into the official language of the court, which can be claimed as expenses within the scope of the party compensation.
There is no entitlement to translation of the judgment. In criminal proceedings, only the interpreting costs for defence counsel discussions are covered in cases of necessary defence.

[2] For more details see i.e. https://www.maz-online.de/Brandenburg/Geplante-Schliessung-von-Arbeitsgerichten-Beamtenbund-verklagt-Landesregierung-von-Brandenburg

Resources of the judiciary (human/financial/material)

Material resources refer e.g. to court buildings and other facilities.

3000 character(s) maximum

According to the Justice Scoreboard 2020, the general government total expenditure on law courts in Germany was nearly 0.4% of its GDP in the period 2016-2018 which is the 8th highest amount of all EU countries. In terms of capita in EUR per inhabitant, Germany ranked number 2 after Luxemburg. According to our own calculations, the Laender spent in average only 3% of their budgets on the judiciary and the court systems. [3] Generally, however, the resources of the judiciary have been infamously insufficient in Germany. Lawyers tend to sit on a pile of anecdotal evidence regarding the complete lack of sufficient technical equipment and other essential resources of the courts. What is widely considered a deliberate underfunding conflicts with the notion of a state committed to safeguarding the rule of law by means of its judicial system.
At the beginning of 2019, the Federal Government and the Laender concluded the Pact for the Rule of Law. In essence, it was about financial support from the federal government for 2,000 new positions for judges and public prosecutors. The pact expires this year. At the same time, the number of posts is in question, as the Laender, which were supposed to bear the costs from now on, have had to use their funds differently due to the Covid-19 pandemic and will continue to have to do so. Hamburg is therefore demanding that the federal government extends the pact. The DAV supports this request, but in our view lawyers should be included in a future pact as agents in the administration of justice. The fact should particularly also address the deficits in the digitisation of the judiciary as outlined in the answer below.

[3] Spiegel online: https://www.spiegel.de/politik/deutschland/justiz-bundeslaender-geben-zu-wenig-fuer-richter-und-staatsanwaelte-aus-a-1153233.html

Training of justice professionals (including judges, prosecutors, lawyers, court staff)

3000 character(s) maximum

Training opportunities exist in Germany for judges and prosecutors However there are voices wanting to limit dissemination of knowledge in EU law as part of the curriculum in legal studies. In our view, EU law must be an essential part of the curriculum for legal studies in Germany.

The DAV also supports the view that all legal professionals should be trained in EU law. If there are gaps in knowledge among members of the judiciary, this may be due to the fact that members of the judiciary participate in training on other topics and expect EU law to be part of national training.

The DAV would welcome it if, for reasons of intercultural competence, knowledge of foreign languages were a prerequisite for employment in certain judicial professions (DAV position paper 16/18). The streaming of oral proceedings of the European Court of Justice could also contribute to the training of justice professionals as well as the protection of the Rule of Law in the European Union.

Digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, including resilience of justice systems in COVID-19 pandemic)

(Factual information presented in Commission Staff Working Document of 2 December 2020, SWD(2020) 540 final, does not need to be repeated)

3000 character(s) maximum

The digitalisation of the justice system is characterized by systematic deficits.

This problem is directly linked to the insufficient funding and the lacking equipment and knowledge in the justice system as mentioned above. The conduct of oral hearings by video conference (128a ZPO) still fails too often in Germany due to the lack of appropriate equipment. The DAV is of the firm opinion that even in present times an oral hearing has to take place at the request of the parties. The DAV has called for an improvement in the technical equipment of the courts in particular. At the same time, inhibiting barriers should be reduced for all parties involved. A fully digital court hearing is not yet possible even with the consent of all participants, but its introduction is foreseen in a discussion paper prepared by the presidents of the higher regional courts and welcomed by the Federal Ministry of Justice. A full review of laws and regulations

with relevance for digital activities including submissions and the conduct of hearings is required. It needs to be discussed how electronic evidence, whose importance is increasing, can be handled in court proceedings: How can e-evidence be provided in a technically safe way and how can it be inserted in the case file, which is still not electronically managed? There are also legal issues to take into account: Does the ZPO really need new rules concerning the handling of electronic evidence? And which evidential value should be attached to such evidences? In order to ensure universal access to justice, the discussion paper also aims to introduce an accelerated online procedure. In a first step, it should apply to B2C cases only, and only if the amount in dispute is less than EUR 5.000. Its application should be mandatory for the sued company, but voluntary for the consumer. Its introduction would then not oblige the consumer to be equipped with appropriate technical devices and cause problems in cases in which the consumer is domiciled in a region where appropriate internet connection is still missing. Together with the lowering of court fees for the procedure, its introduction aims to make state jurisdiction more attractive in such cases. The DAV supports this initiative, which focuses on the citizen seeking justice.

Digitalisation of the justice and court systems implies that the users including lawyers are trained in digital technology. The DAV (DAV Position Paper 89/2020) therefore supported an initiative by the FDP in the Bundestag in 2020 to adapt the legal education to the needs of the digital age.

In our view the introduction of “Digitalisation of law” into the legal curriculum with an interdisciplinary focus in the first semesters of the legal education would be highly desirable. Moreover, law faculties should be encouraged to set up Legal Tech incubators, for instance, in cooperation with law firms.

The establishment of specific LegalTech Chairs at universities might be helpful in this regard. Examinations should be held by allowing law students to consult standard legal commentaries and databases online.

Use of assessment tools and standards (e.g. ICT systems for case management, court statistics and their transparency, monitoring, evaluation, surveys among court users or legal professionals)

3000 character(s) maximum

The use of AI in courts' administrative systems can affect fundamental rights, if used in a targeted manner. Such concerns became real, when certain national Ministries in EU Member States introduced a system of algorithm-driven allegedly random allocation of cases. The digital system assigned cases to particular judges across the country on a once-per-day basis. If the system were truly random and left no discretion to its operator, this would not appear problematic at first sight; it would however if the workings of the algorithm used for the system were not made public. In Germany the Ministry of Justice recently announced that it is considering to use AI in cost assessment proceedings.

Geographical distribution and number of courts/jurisdictions ("judicial map") and their specialization

3000 character(s) maximum

The DAV has recently criticized a draft bill of the Ministry of Justice of the State of Brandenburg on the restructuring of labor court districts (DAV Position Paper 15/2021). The Ministry of Justice intends to close the labor courts of Eberswalde and Potsdam as well as the existing external chambers of the Cottbus labor court in Senftenberg.
The remaining judicial districts would have sizes of up to 11300 km² which is bigger than Cyprus. A court structure that is close to citizens is of elementary importance for the citizens' trust in the rule of law and the judiciary. Large distances between courts and those seeking justice give rise to fears that citizens might increasingly lose confidence in the judiciary and the rule of law. Smaller courts should therefore continue their work in the countryside as part of public services. In view of current sociopolitical trends court closures are the wrong signal. Lawyers ensure that citizens have access to justice. A closure of courts will also have a negative impact on the local presence of lawyers. People seeking justice will find it increasingly difficult to find a lawyer they can trust.
While the population remains stable in Brandenburg, the number of cases has dropped.

Against this background, the DAV and the Brandenburg Bar Association advocate first investigating the causes of the decline in the number of incoming cases before access to justice is made even more difficult by closing courts.

The Bavarian Association of Administrative Judges as well as the President of the Federal Administrative Court criticised in February 2020 the plans of the Bavarian government to relocate the Bavarian Administrative Court from Munich to Ansbach.[4] In their view, this would not only hamper the dialogue and exchange between the judges as most of them would only commute to Ansbach for hearing, but also impede the access to justice as the majority of plaintiffs would live in the Greater Munich area.

Efficiency of the justice system

Length of proceedings

3000 character(s) maximum

The points and problems identified in last year's contribution remain generally valid (Please refer to DAV Position Paper 71/20)

Other - please specify

3000 character(s) maximum

Despite repeated demands on the part of the DAV, there is still no or only inadequate documentation of the main hearing in German criminal proceedings. It is still left to the judges to base a judgement on the content of witness and expert testimony by relying on their own transcripts, which are not accessible to anyone and the accuracy of which is not subject to appeal review.

The legal requirements for the minutes of the main hearing in German criminal proceedings do not meet the requirement based on Art. 8 ECHR that procedural guarantees must be designed in such a way that any risk of arbitrariness is reduced to a minimum. An expert commission for the documentation of the main hearing has been established at the Federal Ministry of Justice and Consumer Protection. The DAV

[4] https://www.sueddeutsche.de/bayern/ansbach-muenchen-verwaltungsgerichtshof-markus-soeder-richter-1.4787179 (Retrieved 12 February 2021).

hopes that this commission will come to the conclusion that Germany - as one of the last states within the EU - will introduce a system of recording the main hearings before the Regional Courts and Higher Regional Court.

Other institutional issues related to checks and balances – Germany

The process for preparing and enacting laws

Framework, policy and use of impact assessments, stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms), and transparency and quality of the legislative process

3000 character(s) maximum

In the last years the German legislator has been allocating interested parties less and less opportunities to participate in the legislative process for contributions on their practical experience and expressing their needs. This negative development has been spurred on by the Covid-19 pandemic to which the federal government has responded by developing new procedures that shorten the legislative process. In many cases, the deadlines for reviewing and commenting on draft bills were only a few days and even hours. A serious examination of any given complex subject matter is no longer possible under such conditions. At the same time, however, a tendency can be observed for amendments to be introduced subsequently by certain lobby groups in the legislative process, for example during the readings in parliament. In the long run, these developments could undermine the legislative process as such and compromise the legitimacy of German legislation. The democratic participation of associations according to Section 47 of the Joint Rules of Procedure of the Federal Ministries is an instrument that can make an important contribution to good legislation and the Federal Government must use it properly. But in order for the involvement of associations to fulfil this task of "good legislation", associations need one thing above all: time. Accordingly, we would welcome a mandatory consultation of associations with appropriate deadlines. It must be emphasised, however, that this unfortunate trend by the Federal Ministries that deadlines for reviewing and commenting on draft bills are increasingly short is not limited to laws being adopted in the context of the Covid-19 pandemic.

One cannot avoid the impression that the development is not only triggered by the pressure on law makers to address deficiencies. It might also be motivated by the desire to limit the influence of stakeholders like professional associations on codifications. As one negative example, one must mention the foreseen supply chain regulation by the Federal Government. Only handpicked associations were allowed to comment upon the draft bill within a deadline of a few hours only. Despite pleas with the competent Federal Ministry of Labour, the DAV was not allowed to participate. [5]

The EU Commission should lead by example. In this regard, we are deeply concerned by the fact that the analysis of contributions to public consultation is often done by using quantitative analysis which does not take into account the (legal) arguments and the quality of submissions, but simply the number of contributions in favour or against a given proposal.

Rules and use of fast-track procedures and emergency procedures (for example, the percentage of decisions adopted through emergency/urgent procedure compared to the total number of adopted decisions)

3000 character(s) maximum

The decision-making in response to the Covid-19 pandemic has been rightly criticized (see also above). The resort to decrees and strong executive action in response to an unclassifiable threat might have been understandable and effective at the outset. However, after more than a year since the outbreak of the pandemic, the DAV believes that the Bundestag is still too weak. Most regulatory reactions to the pandemic are developed and implemented by the Laender governments. Since its beginning, the Minister Presidents of the federal states have met with the Chancellor at regular intervals in order to coordinate their responses within the so-called Minister Presidents' Conference.

Neither the conference nor its decisions are provided for by constitutional law or ordinary law. Nonetheless, the conference in itself does not pose a constitutional

[5] https://zeitung.faz.net/faz/wirtschaft/2021-03-03/6a4f4df3a37d12a3fe1572f1c6fcecb8/?GEPC=s5 (Retrieved 3 March 2021)

problem as long as it serves the coordination of law-making. The manner in which the policy decisions are taken, however, namely without public participation and sufficient legislative parliamentary involvement, does.

Just as the Laender participate in federal legislation through the Bundesrat, they coordinate among themselves and with the federal government in areas falling within the scope of their own exclusive (e.g. school policy) or shared competences. If one Land for example unilaterally allows the opening of retail stores, this might trigger undesirable border traffic.

The problem is rather that neither the Bundestag nor the parliaments of the Laender have decided on essential matters but rather the government acted mostly by ordinance, even with regard to far-reaching restrictions of fundamental rights, for example based on the broadly drafted Infection Protection Act (IfSG) or with regard to the determination of the vaccination priorities. By determining an epidemic situation of national scope, the Bundestag gave far reaching powers to the Federal Ministry of Health (BMG). Since then, however, the Bundestag, has not claimed its own powers as guaranteed by the constitution. One possible improvement would be to introduce an obligation for the government to present its own position to the Bundestag even before a Minister Presidents' Conference so that the Members of Parliament would get the opportunity to criticize it and point out their own alternatives.

Furthermore, it is mostly for the administrative courts to decide on the basis of the broadly drafted IfSG and executive orders. Instead of creating a clear legislation at the federal level, currently the many individual-case related court decisions rather lead to a fragmentation and a lack of legal certainty. Unfortunately, it should be mentioned that a number of administrative courts have not looked critically at the executive decisions which have been taken with regard to the pandemic situation in the last year. Mostly they restricted themselves to justifying the measures on the ground of the wide room for discretion appreciation of the legislator/executive body.

Regime for constitutional review of laws.

3000 character(s) maximum

The points addressed in our contribution to last year's report are still valid:
There are, in particular, three possible avenues to launch a constitutional review of (federal and state) laws. The first is the "abstract review of statutes" ("Abstrakte Normenkontrolle"): According to Art. 93 (1) Nr. 2 GG and sections13 Nr. 6, 76 et seq. BVerfGG a request for the abstract review of a law, be it federal or state, can be launched by either the federal government, a state government or by a quarter of the members of the federal parliament (Bundestag). The second is the '"concrete review of statutes" ("Konkrete Normenkontrolle"): According to Art. 100 (1) GG and sections 13 Nr. 11, 80 et seq. BVerfGG any court that (1) has a pending case before it and (2) is convinced that the statute on which its decision in that case decisively hinges on is unconstitutional, can launch a review of constitutionality of this statute before either the Federal Constitutional Court (in case of a federal statute) or the relevant State Constitutional Court (for state statutes). The third is a "constitutionality review" through an individual constitutional complaint ("Verfassungbeschwerde") before the Federal Constitutional Court according to Art. 93 (1) Nr. 4a GG and sections 13 Nr. 8a, 90, 92 et seq. BVerfGG. A review via this avenue presupposes, inter alia, that the statute in question directly and immediately affects the individual, i.e. that the statute is self-executing.
While the general regime in place for the constitutional review of laws has proven largely effective, certain aspects regarding the mechanisms in place for monitoring the satisfactory implementation of judgments of the Federal Constitutional Court could be improved. Specifically two aspects are of interest here: First, no effective mechanism exists to ensure that judgements are implemented within a (set) reasonable period of time, i.e. that the legislative does not delay the enactment of new legislation that is meant to remedy the unconstitutional legal situation that the Court has rebuked in its judgment (see e.g. implementation of judgment to inheritance tax law). Second, no effective mechanism exists to fast-track a constitutional review of such new laws, where their constitutionality is in doubt, i.e. when it is doubtful that they sufficiently address the issues that Court has raised in its judgment (see e.g. federal electoral act; compensation due to nuclear phase out act) The only explicit possibility to review such new legislation that has been enacted following a Court's judgment is to launch a new

complaint, which involves considerable temporal and financial costs for the complaining party.

COVID-19: provide update on significant developments with regard to emergency regimes in the context of the COVID-19 pandemic

- judicial review (including constitutional review) of emergency regimes and measures in the context of COVID-19 pandemic
- oversight by Parliament of emergency regimes and measures in the context of COVID-19 pandemic
- measures taken to ensure the continued activity of Parliament (including possible best practices)

3000 character(s) maximum

The DAV has commented on various modifications of laws and ordinances as adopted in the past year on the federal level. The DAV was particularly concerned by the modifications being carried out in Spring 2020 to the Infection Protection Act ("IfSG"). On the basis of the modifications to the IfSG the Bundestag was authorised to declare a situation as an epidemiological situation of national scope. The law grants the Federal Government the authority to enact regulations of considerable scope (e.g. expropriations, service obligations, compulsory treatment) that deeply interfere with the fundamental rights of citizens by means of a statutory order. A further participation of the Parliament is not foreseen in the IfSG as long as such a situation was declared.
In our view, regulations that deeply interfere with the fundamental rights of citizens must be passed by parliament in any democratic state. They cannot be handed over to the executive through far-reaching powers to issue ordinances. In order to guarantee political debate and decision-making in the elected bodies even in times of crisis, the federal government must be instructed regarding the legal ordinances, it is authorised to issue due to the established epidemiological situation. The ordinances need to be, confirmed by the Bundestag without delay, i.e. within a period of 7 days at the latest. The admissibility of such a reservation of consent has already been recognised under constitutional law in another context (cf. BVerfGE 8, 274 (321)). If parliament does not give its consent, the statutory instrument is invalid. In particular, the opposition parties in the Bundestag and in the Laender have been calling regularly upon the Federal government as well as the Laender governments to involve the parliaments when it comes to measures against the Covid-19 pandemic. This concern is shared by the

President of the Federal Constitutional Court as explained above. However, the Parliament should also use all tools at its disposal, including motions to request information by the government or to present a legislative proposal with regard to the Covid-19 measures taken. A general ban on leaving one's own home is not compatible with guiding principles of the German Constitution. This also applies if some exceptional circumstances (shopping, work, doctor's appointments, access to a lawyer etc.) are permitted. Citizens must not be forced to justify to the police why they are making use of fundamental freedoms. It is unacceptable when, e.g., the Berlin regulation stipulated that one has to justify to the state authorities why one needs to see a doctor or a lawyer. Access to a lawyer and thereby access to justice must be ensured even in times of crisis.

Otherwise fundamental aspects pertaining to the Rule of Law such as the right to have a fair hearing cannot be guaranteed. The DAV has therefore called upon the Federal Government to clarify that the access to a lawyer is not to be restricted

Independent authorities

Independence, capacity and powers of national human rights institutions ('NHRIs'), of ombudsman institutions if different from NHRIs, of equality bodies if different from NHRIs and of supreme audit institutions

Cf. the website of the European Court of Auditors:https://www.eca.europa.eu/en/Pages/SupremeAuditInstitutions.aspx#

3000 character(s) maximum

In Germany, various institutions are charged with the supervision and monitoring of the respect of human rights by the governments. The German Institute for Human Rights is the independent national human rights institution. It was established by the law on the legal status and tasks of the German Institute for Human Rights (Gesetz über die Rechtsstellung und Aufgaben des Deutschen Instituts für Menschenrechte, "DIMRG"). It works to ensure that Germany respects and promotes human rights at home and abroad. The German Institute for Human Rights also accompanies and monitors the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established corresponding monitoring bodies for this purpose. The National Agency for the Prevention of Torture serves as the national agency responsible to monitor the fulfilment of Germany's

obligations under the Convention Against Torture (CAT). Its independence is guaranteed in its constitutive document.[6]

Accessibility and judicial review of administrative decisions

Transparency of administrative decisions and sanctions (incl. their publication and rules on collection of related data) and judicial review (incl. scope, suspensive effect)

3000 character(s) maximum

Access to and judicial review of administrative decisions by concerned parties can be generally considered efficient in Germany. Decisions are generally published or publicly accessible. In general, however, transparency requires specialist knowledge.
Decisions of the administrative authorities are made public in proceedings in which this is provided for by specialised legislation. This includes in particular decisions with far-reaching effects, such as in planning approval law, emission control law or procedures relevant to regional planning law. Other administrative decisions (such as building permits or administrative orders) are not usually published.
Some Laender provide for the possibility of making such administrative acts public as well, in order to ensure the issuing of decisions and that deadlines for appeals can be met. Persons affected by administrative decisions can assert legal remedies (objection) and legal remedies (complaint, review of norms), against acts of state authority. The admissibility of such legal remedies requires that the persons affected are restricted in their own subjective rights. However, this does not impede effective means of access to justice as the courts allow it to be sufficient that there is a mere possibility of a violation of rights by the challenged state act. With the implementation of European law requirements, in particular in the UmwRG (Act on the Implementation of Directive 2003/35/EC), effective judicial control is generally guaranteed. Within the context of the judicial review of state acts, there is usually a comprehensive objective legal control in the review of “review of norms” (Normenkontrolle), whereas in the case of actions for annulment the violation of subjective rights is decisive (§ 113 Paragraph 1 Sentence 1 Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, ‘VwGO’)),

[6] https://www.nationale-stelle.de/en/rechtsgrundlagen0.html
(Retrieved 15 February 2021)

unless it is a matter of the violation of environment-related regulations within the meaning of the UmwRG. The current trend in the case law of the European Court of Justice will lead to an increasing repression of the German theory of protective norms (Section 113 (1) VwGO), i.e. the dependence of the admissibility and justification of challenges of administrative decisions on violations of subjective rights of the plaintiff , at least in questions determined by European law (environmental protection); in this respect, German case law practice still "lags behind" European law standards in some cases. Increasingly, the courts of instance are ruling in a very EU-friendly manner (e.g. OVG Münster with regard to the Hafencenter Münster and OVG Hamburg with regard to the Hafencity Hamburg), in part probably still contrary to the Federal Administrative Court; in this respect, it remains to be seen whether the Federal Administrative Court will follow the line or not.

Implementation by the public administration and State institutions of final court decisions

3000 character(s) maximum

As commented in last year’s consultation, in the past few years, there have been cases in which executive bodes and State institutions have deliberately not implemented court decisions. This concerns, among others, the case of the deportation of Sami A., which has attracted media attention, as well as the non-implemented diesel driving bans following a ruling by the BayVGH (Az.: 22 C 18.1718) or the case of Stadt Wetzlar (Az.: 8 L 9187/18.GI),

Initially considered to be an outlier in an otherwise well-functioning separation of powers, there are increasing signs of a new, worrying trend.

The case before the ECJ C-752/18 regarding a request for a preliminary ruling from the Higher Administrative Court of Bavaria, Germany concerned the Land of Bavaria’s refusal to comply with the injunction to implement traffic bans in respect of certain diesel vehicles in various urban zones of the city of Munich.
The Deutsche Umwelthilfe applied for that injunction to be enforced by ordering the coercive detention of the Minister for the Environment and Consumer Protection of the Land of Bavaria or, failing that, of its Minister-President.

In case of “Stadt Wetzlar”, the NPD intended to use the city hall in March 2018, the municipality denied it access. The NPD brought a case to the court and wins in all instances, first before the Giessen Administrative Court (Az.: 8 L 9187/18.GI), then before the Hessian Administrative Court, then before the Constitutional Court. Nevertheless, the mayor of the city maintained his ban on access to the hall.

The enabling framework for civil society

Measures regarding the framework for civil society organisations (e.g. access to funding, registration rules, measures capable of affecting the public perception of civil society organisations, etc.)

3000 character(s) maximum

Teaching legal awareness and legal topics to high school students is important beyond the teaching of law itself. Political disenchantment and the erosion of legal awareness are increasingly the subject of public debate. Intolerance finds its place where people are unaware of the rights of others and often do not accept them for that reason alone. The DAV’s project "Lawyers in Schools" is committed to combating this. In this project, lawyers go into schools on a voluntary basis to inform students about various legal topics and also to provide life support. The aim of the project is to arouse interest in the law, to create legal awareness and thus to strengthen adherence to the law. But the project also aims to provide concrete help for life. For example, information is provided about stalking and cyberbullying, the ban on cell phones at school, cell phone contracts, the illegal downloading of music and films, the teacher-student relationship, and much more. Through concrete life lessons, students learn about their own rights and the rules of the game in society. They also learn about the role of lawyers and their position in the constitutional state. Unfortunately, however, the DAV had great difficulties in approaching the Laender to implement this program.

Initiatives to foster a rule of law culture

Measures to foster a rule of law culture (e.g. debates in national parliaments on the rule of law, public information campaigns on rule of law issues, etc.)

3000 character(s) maximum

As an organ of the administration of justice, the legal profession has a special role and also an obligation to stand up for and fight for the upholding of the principles of the Rule of Law. The March of the European Robes, which DAV President Kindermann had called for during last year's 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 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. The podcast is available on all popular platforms (Spotify, Deezer) as well as on the websites of the DAV and the Verfassungsblog

Other – please specify

3000 character(s) maximum

A comment we would like to make at the very end of this contribution is the wish for the Commission to include numbering in its stakeholder consultations for the next Rule of Law Report Consultation 2022. This would facilitate readability and also comparison of individual contributions at the utmost.