



## **Rule of Law Report of the German Bar Association (Deutscher Anwaltverein, DAV)**

### **47th European Presidents' Conference 28 February - 2 March 2019 in Vienna**

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*The German Bar Association (DAV) and its local bar associations draw their strength from the voluntary cooperation of lawyers. It is the statutory duty of the DAV to represent their interests in economic, public and professional terms. At the same time, the DAV is a sought-after contact for almost every legislative project in the Federal Republic of Germany. In many cases, the DAV provides important socio-political and legal impulses through its work. This applies in particular to access to justice in its broad sense.*

The DAV is increasingly concerned that developments in judicial policy at national and international level are increasingly leading to restrictions on the rule of law. However, a functioning constitutional state cannot be equated with a "strong state" that is often demanded. Quite the contrary, the rule of law is measured precisely by the scope of the guaranteed fundamental rights and freedoms. This includes in particular the right to independent, individual and unlimited legal defence. For this reason, the DAV is organising this year's German Lawyers' Day from 15 – 17 May 2019 under the motto "Living the rule of law". The priorities of our work and our main concerns in that regard are described in this report.

#### **Work on the “Rule of Law Pact”**

There are voices who associate the rule of law with the tightening of criminal offences and the extension of administrative powers rather than the strengthening of citizens' rights. Rule-of-law procedures are often no longer perceived positively in Germany, but rather as burdensome or bureaucratic. The governing parties therefore provided for the so-called “Rule of Law Pact” in the coalition agreement.

The DAV welcomes the decision to create 2,000 new jobs for judges and public prosecutors by 2021, as adopted on 31 January 2019 in the framework of the Rule of Law Pact. However, the work will only really begin as of now. The aim is to secure access to justice for all, defend the rights of suspects and ensure that people have a

positive experience with the rule of law because their conflicts are resolved quickly, efficiently and in an appropriate manner and their personal rights are respected.

The DAV will work together with the German Federal Bar to achieve this.

### **Reform of the criminal procedure**

For years, the German Bar Association has been calling for a reform of criminal procedural law with the aim of creating more efficient and legally secure proceedings. In this context, however, the argument of efficiency must not be used to significantly restrict the essential procedural rights of victims and defendants.

However, the DAV sees such a tendency, also in demands that are part of the current coalition agreement in Germany, which strive to simplify the possibilities for rejection of allegedly abusive applications for fear of bias and taking of evidence and to introduce preliminary ruling procedures for objections to the composition of a court. These demands do not take into consideration that the formal requirements for these motions are already strict and sufficient. At the same time, important rights of defense are discredited as alleged disruptive factors in the efficient prosecution of criminal cases. Already today, abusive motions of bias can be rejected by the judge without delay in the further course of the proceedings.

Audiovisual documentation of witness and defendant hearings is a very suitable way of making criminal proceedings more efficient without restricting constitutional guarantees. It can help to avoid misjudgments and to conduct criminal proceedings more effectively. For this reason, audiovisual documentation was also proposed by the Expert Commission appointed by the Federal Ministry of Justice to make criminal proceedings more effective and practical. Unfortunately, however, it was not included in the coalition agreement. So far, pursuant to § 273 of the German Code for Criminal Procedure (StPO), only the course of the main trial is recorded in written. The exact wording of a statement is only recorded if this is particularly important. The main trial is the sole basis of the judicial conviction of guilt or innocence of the accused. The audiovisual recording of witness testimonies in the preliminary proceedings could relieve the main trial of time-consuming disputes about reconstructing what the witness actually said and whether the witness was influenced by suggestive questioning techniques.

### **Professional secrecy protection in the state police laws**

Numerous German federal states are currently introducing stricter regulations in their police laws. The DAV fears that the changes will undermine the protection of professional secrecy and demands the establishment of an absolute legal protection of professionals subject to confidentiality.

The work of a lawyer is based on confidentiality. The protection of the practice of lawyers from state control is not only in the interest of the individual lawyer or person

seeking justice<sup>1</sup>, but also in the interest of the public expecting a judicial system in accordance with the rule of law. This special need for protection is also anchored at European level. The protection of communications between lawyers and their clients ('legal professional privilege') is guaranteed as a fundamental right under the law of the European Union.<sup>2</sup> In addition, Art. 8 ECHR assigns increased protection to the exchange of information between lawyer and client.

Even if the aim of the Laws on Risk Prevention and Public Security is different from that of criminal procedure, it seriously impairs the relationship of trust if the person seeking justice has to fear that the documents of his lawyer can be searched and seized and thus information he or she (only) entrusted to his lawyer can be disclosed.

### **Strengthening of police powers of intervention**

The DAV also takes a critical view of the extent to which police powers have been extended at the cost of an ongoing restriction of civil and fundamental rights by new security laws. These include, in particular, the shifting of police investigations to a very early stage ("imminent danger" as threshold for intervention). The application of police work even to measures that go beyond mere surveillance purposes, is questionable under constitutional law.

The foreseen legal protection procedures lead to a substantial restriction of legal protection. The procedure does not provide for a provision comparable to the institution of mandatory defense by a lawyer in criminal law. As a result, a person can be taken into preventive custody without being advised by a lawyer during this time. Up to this point, the person concerned is not accused of any criminal offence. In a constitutional state, the person concerned must not have a weaker position than the suspect of a serious criminal offence for whom pre-trial detention is ordered.

### **Security of lawyers**

Far too rarely do politicians show solidarity with the legal profession. There is still no clear commitment by politicians in particular to the lawyers in Germany who have recently been threatened in particular by alleged right-wing radical groups. Here, a red line was crossed, which makes a resolute stance absolutely essential. This stance must show: Those who threaten the people living the rule of law also threaten the democratic rule of law itself.

Attacks on lawyers are unacceptable. The legal profession is the guarantor for the rule of law - and it ensures every person a fair trial, regardless of origin, sex, ideology or the accused act. The state must ensure that those who defend the liberal, democratic constitutional state do not themselves have to fear for their lives.

The DAV calls on the political authorities to protect threatened colleagues and show

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<sup>1</sup> BVerfG, Urt. v. 30.03.2004 – 2 BvR 1520/01

<sup>2</sup> Opinion of Advocate General, ECJ Case C-550/07 P

their full solidarity with them - through concrete and public measures.

### **Binding the administration to judicial decisions**

Last year in Germany – on the occasion of the deportation of Sami A. as well as of the non-implemented driving bans on diesel fuel – cases were discussed more frequently in which court decisions were intentionally not implemented by the authorities. In particular, it was questionable whether these cases were outliers of an otherwise well-functioning separation of powers or signs of a new, alarming trend. After all, the obligation of the executive to be bound by decisions of the judiciary is an essential prerequisite of the rule of law, otherwise court rulings are de facto worthless. The DAV closely monitors developments in this area and strongly condemns political statements that demand court decisions to follow a "healthy public perception".<sup>3</sup> On the other hand, a crisis of the rule of law must by no means be invoked by an exaggerated alarmism. There were always individual cases in which the executive overrode court decisions. Nevertheless, the cases mentioned have made the DAV vigilant. For some people, the purpose increasingly seems to justify the means. If judicial decisions are no longer regularly followed, the rule of law faces a difficult test.

### **Freedom of the person seeking justice to choose his lawyer to be left to the citizen**

An important element of the rule of law is to leave the freedom of decision if and by whom he or she wants to obtain legal advice to the citizen. This applies in relation to legal expenses insurance, but also in view of the legislator's tendency to strengthen "market guardians" in collective redress and in the law on unfair competition and to exclude the expertise of lawyers. The question of citizens' freedom of choice also arises in the field of artificial intelligence and legal technology, when one thinks of the ownership and programming of algorithms.

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<sup>3</sup> Vgl. <https://anwaltverein.de/de/newsroom/causa-sami-a-dav-kritisiert-verbales-nachtreten-von-innenminister-reul>