



Country report of the German Bar Association (DAV) 52nd European Presidents Conference 8 – 10 February 2024 in Vienna

As in last year's report, there are once again numerous topics relating to the law of the legal profession and policy developments in deontology, as well as the DAV's policy engagement that could be included in the country report. In this brief four-pages-version, the report is limited to a few core topics.

1. Digitalisation of the judiciary

The DAV welcomes the further steps towards the digitalisation of the judiciary, but calls for the unconditional involvement of the legal profession in future projects, in particular the testing of an online court proceedings or a cloud system ("Justizcloud"). It also urges standardisation in the German federal states, the expansion of broadband connections and emphasises the importance of the necessary equipment in the courts.

Following the publication of the EU Commission's 2022 Rule of Law Report, the German government has adopted a Digital Pact to improve the staffing and digital equipment of the judiciary in Germany. The Digital Pact provides for the following goals by 2025:

- (1) In November 2023, the German Federal Parliament (Bundestag) passed a **law to strengthen video trials** in accordance with § 128a of the German Code of Civil Procedure (ZPO) to create a legal basis for fully digital civil proceedings. This also provides for the testing of fully virtual court hearings in which the judiciary body can participate from outside the court. The DAV sees the expansion of the use of video conferencing technology as a positive development for speeding up proceedings, but rejects fully virtual trials, as they threaten to restrict the right to be heard by a court. In December 2023, this legislative proposal failed in the German Federal Council (Bundesrat) which considered a fully virtual court hearing to be incompatible with the dignity and importance of judicial action. It also contradicted the external image of the judiciary and the reputation of the courts as an institution. The Bundesrat also noted, as did the DAV, that the courts lacked the technical and personnel resources for implementation. In addition, the DAV argues that video trials should not be ordered by the court but should remain with the parties' freedom of choice. The Mediation Committee (Vermittlungsausschuss) must now act.
- (2) In November 2023, the Bundestag also passed a **legal regulation for the audio recording of main criminal court proceedings with an automatic transcript**. The Bundesrat also rejected this legislative proposal in December 2023. The Bundesrat considered this proposal as an impairment of the establishment of the truth, as witnesses and the accused could be intimidated by the knowledge of the recording and the possibility of abusive dissemination. An at least unconscious influence on the ability and willingness to testify cannot be ruled out. From the perspective of victim protection, the testimony situation, which is already perceived as stressful, could be an additional burden for victims and could lead to re-traumatisation in case of



unauthorised disclosure of the recordings. The Mediation Committee will also deal with this issue.

- (3) Since the end of 2022, the German Federal Ministry of Justice (BMJ) has also been working with the DigitalService and the German Federal States on a nationwide **software for judicial services in a digital legal application centre**. Cooperation with nine German federal states and 17 pilot courts began in spring 2023. The application for legal aid was selected as first case of application for an online service.
- (4) There are also plans for a **standardised nationwide video portal for the judiciary for video trials and online appointments**. The video portal was to be presented at the end of 2023 and offered to the courts from 2024. This has not yet happened.
- (5) Since 1 January 2023, laws and regulations have only been promulgated electronically by **publication in the German Federal Law Gazette (Bundesgesetzblatt)**.
- (6) Also planned, but still pending, is the creation of an **interface for the controlled transfer of judicial data to enable AI-supported cloud-based judicial services**.
- (7) A **concept for a nationwide judicial cloud** has been submitted to the Budget Committee for approval.

2. AI and the rule of law

The DAV has advocated in various position papers that the fundamental rights and values of the legal profession should be fully safeguarded when dealing with artificial intelligence. Therefore, it is necessary that judicial and similarly intrusive binding decisions by the government are never fully automated. The final controlling authority must always remain a human decision. Where AI (partially) replaces the judge's decision-making legal process, the judgement threatens to become a formality and the right to be heard by a court and the right to a lawful judge and a trial under the rule of law threaten to be disregarded. It is thus crucial that even if AI only acts at the preparatory stage, the judge's autonomous, impartial, and unbiased decision is guaranteed. As a result, the DAV advocates that a judicial decision must be based on a verifiable justification that is independent of the AI-based system. It must also be ensured that the data on which the AI system bases its decision is as comprehensive as possible.

The DAV also repeatedly demanded a comprehensive ban on Biometric Remote Identification systems during the legislative process on the EU AI Act, on which a provisional agreement was reached by the European co-legislators in December 2023. However, the Council of the European Union prevailed over the European Parliament in the negotiations, so that the regulation now provides for exceptions to the ban in some narrowly defined cases of criminal prosecution, although the DAV repeatedly pointed out the associated infringement of fundamental rights.

Background:

More and more AI-based systems are being used in the judiciary. In September 2023, the JANO prototype was launched in Baden-Württemberg and Hesse, which was developed by employees of the judiciary together with an IT company and searches decisions for personal data and proposes these for anonymisation. These suggestions are checked and approved by judicial employees. In the area of mass proceedings,



some German regional courts (Landgerichte) have also agreed to test software in 2023 that has an AI-supported structuring and searching tool and prepares text passages using AI examination assistants to be configured by judges themselves. The systems OLGA and FRAUKE have also been used for mass proceedings for some time. OLGA provides support in the field of diesel proceedings and categorises similar cases to enable simultaneous processing. FRAUKE supports judges in air passenger rights proceedings by copying and adopting relevant case data from the written pleadings.

3. Protection of lawyers' fundamental values at European level

Furthermore, there are numerous aspirations at European level to make cuts to fundamental values under the pretext that lawyers are "enablers" of money laundering, sanction as well as tax evasion. These European legislative acts affect the legal profession by disregarding professional secrecy and the independence of lawyers. In this regard, the DAV has repeatedly submitted proposals for amendments to the EU co-legislators and has recently been successful in the trialogue negotiations on the money laundering package and the European Convention on the Profession of Lawyers in the Council of Europe. However, the topic will remain relevant in the future, as a proposal for a directive to regulate "enablers" of aggressive tax planning (see DAV Position Paper No. 58/22) has been postponed but is still being planned. In the context of supply chain legislation, the DAV is also campaigning in the final phase of the legislation in the trialogue negotiations for regulations that safeguard professional secrecy and the independence of lawyers (see DAV Position Paper No. 28/2022).

4. Commitment to the rule of law and human rights

a) Rule of law

(1) The DAV has submitted a position paper to the **EU Commission's consultation on the 2024 Rule of Law Report**. The DAV criticises, among other things, the politicisation of supreme court positions in Germany, which is facilitated by the election of judges enshrined in ordinary law. Especially the modalities for electing judges to the German Federal Constitutional Court (Bundesverfassungsgericht) should be secured by constitutional law and should not be modifiable by simple majorities in the Bundestag. Furthermore, independent panels of experts should be appointed to fill at least the highest judicial positions and submit corresponding election proposals.

The DAV welcomes the initiatives to progressively digitise the judiciary but continues to call on the German federal and state governments to provide sufficient resources. The DAV deplores the lack of staffing in the judiciary, particularly in the offices with regard to the guarantee of access to justice. There are also major challenges in view of the large number of upcoming retirements in many German federal states.

(2) As part of the "Weimar Triangle" initiative, the DAV co-organised a conference in Warsaw in 2023 and, as a result, issued a joint statement calling on Polish politicians, the legal profession, civil society and relevant stakeholders to uphold the independence of the legal profession and bar associations in Poland and to consider their importance for an independent judiciary and the restoration of the rule of law in Poland.

(3) **ELiL's** (European Lawyers in Lesvos) legal advice project in Poland, which was launched in August 2022, now offers pro bono legal advice at six locations in Poland. The project has also been expanded to include a hotline that operates in cooperation with local Ukrainian NGOs and community centres. ELiL is also present on the Polish-



Belarusian border, where around 1,000 refugees cross the border every month and around 200 pushbacks – mostly Syrian, Afghan, Somali and Yemeni refugees – have been documented.

(4) In September 2023, the DAV, together with the German Federal Bar (Bundesrechtsanwaltskammer, BRAK) and the German Judges Association (Deutscher Richterbund, DRB), signed an appeal against the **judicial reform in Israel**. Considering the subsequent terrible developments following the terrorist attacks by Hamas, the DAV President declared solidarity and offered support for colleagues in a non-public letter to the Israel Bar Association.

b) Human rights

(1) In cooperation with other legal organisations and associations, the DAV co-signed an appeal for intervention on behalf of Ms Nasrin Sotoudeh, an Iranian lawyer, journalist, and human rights activist. This included an appeal to the UN Special Rapporteur on the independence of judges (and lawyers), the UN Special Rapporteur on human rights defenders and other recipients to take urgent action in the case of Nasrin Sotoudeh. On 5 November 2023, after being released, she was again detained by the vice squad together with 100 other people and subjected to violence when she wanted to attend the funeral of 16-year-old Armada Garwand unveiled. On 15 November 2023, we received the news that Ms Sotoudeh had been released again.

This year's event for the Day of the Endangered Lawyer will take place in Berlin on 23 January 2024 in cooperation with the German Republican Lawyers Association (Republikanischer Anwältinnen- und Anwälteverein, RAV) and the regional bar (Rechtsanwaltskammer, RAK) with focus on **Iran**.

(2) The DAV Vice President once again wrote to the King of **Saudi Arabia** and the Ambassador in Berlin in support of the lawyer Waleed Abu al-Khair, who is imprisoned for his human rights work. In September 2018, Waleed Abu al-Khair was awarded the Alternative Nobel Prize in absentia by the Stockholm-based Right Livelihood Foundation.

(3) The DAV is continuing its involvement in the German government's **humanitarian admission programme for Afghanistan** with the aim of helping Afghan colleagues to leave Afghanistan for Germany. To this end, the DAV is in close contact with exiled lawyers from the Afghan Independent Bar Association (AIBA) and has also established contact with colleagues who have already arrived in Germany. In December 2023, a meeting between the DAV Vice President and representatives of the Afghan legal profession took place at the DAV's premises.